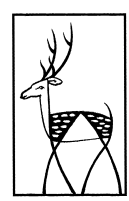
THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INTERNATIONAL LAW

The African Commission on Human and Peoples' Rights and International Law

DR. RACHEL MURRAY



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Preface

The African Commission on Human and Peoples' Rights has been in existence since November 1987 when the first session of the Commission was held in Addis Ababa, Ethiopia. The Commission thus became the third regional instrument for the promotion and protection of human rights, coming as it did after the European and American systems. The new Commission was immediately handicapped on many fronts. The OAU never provided it with sufficient resources to be able to discharge its functions. The statute of the Commission made it over-reliant on the OAU Assembly of Heads of State and Government AHSG). The election of members was by that forum, reports were submitted to that body and, until then, confidentiality had to be maintained. The Charter was not geared towards ready and easy application either. Every clause is littered with claw-back exceptions and, while innovative in many respects, unfortunately left the impression that it fostered ambiguity rather than clarity. Given that the early commissioners were accused of being over-inclined to defer to the AHSG, the Commission was not aggressive or pro-active in its advocacy of human rights in the Continent. That is not surprising, given that many states which voted for members of the Commission were unrepentant violators of human rights; they were unelected, undemocratic military dictators. Others were from one-party states and Presidents-for-Life, a system of governance then in vogue in the Continent.

And yet, Africa had a vital instrument for the advocacy of human rights. It behoves those who were committed to human rights to make every effort to make the Commission work effectively and efficiently. Victory never countenances those besotted with cynicism. Mobilisation was undertaken from all fronts. Donor agencies, non-governmental organisations (NGOs) and researchers all combined efforts to support and assist the African Commission. The result is that the Commission is probably the one most open to and appreciative of NGO participation. Efforts to enhance the credibility of the Commission are still under way. Questions remain about the independence of members of the Commission. Ironically, the African Charter does not require members of the Commission to be "independent", whatever that means. It only requires them to be "African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights . . ." (Article 31). An element of this is to strive to have the Commission as representative of all the peoples of Africa as is possible, that is, regional, linguistic and gender representation must be taken into account. With the elections of Algiers in July 1999, the Commission has drawn closest to being representative.

Arguably, the greatest challenge facing the Commission at the end of the millennium and into the second decade of its life, is to advance human rights jurisprudence as reflected in Article 45(1)(b) and (3) of the Charter. To do this, the Commission will have to improve its consideration of communications. The more this is done, the more the people of Africa will entrust to the Commission their complaints about human rights violations. The more effective the Commission is in its consideration of communications, the more states will take serious note of the work of the Commission. The more this happens, the decisions and recommendations of the Commission will take on a more authoritative force to be obeyed especially by the states. At the moment nobody does. Only a handful of states parties to the Charter have submitted their initial country reports, a key instrument of monitoring the observance of human rights in the states, and only one has submitted all three reports that the Charter required of it. The Commission is severely hampered by its dependence on the diplomatic niceties that mean that states have to approve missions and invite the Commission to their countries. That means that the Commission is unable to take proactive steps to deal with human rights violations or to act as an early warning barometer.

There is hope that much of this will now change. There is a new mood sweeping across the portals of the OAU. The mother body appears to be delivering on its commitment to improve the provision of resources to the Commission. This should assist with field missions and inter-sessional activity. Democratisation seems to be taking root in Africa as evidenced by the first-ever OAU Ministerial Summit on Human Rights in Africa held in Mauritius in April 1999. The OAU has adopted the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights. The Protocol is now being considered for ratification by states parties to the Charter. The Algiers Summit of the OAU was emphatic in its rejection of leaders who assume government by supplanting the Constitution and coming to power by force of arms.

This process is considerably assisted by the work of scholarship of the calibre of Dr Rachel Murray's book. This is the work not just of a spectator, but a witness over a while, of the work of the Commission at all levels. Dr Murray shows a depth of knowledge, a sensitivity in understanding and a passion for the advancement of human rights in Africa. Her efforts are to be commended. The book makes a contribution to scholarship on the work of the African Commission which has not been widely acknowledged. Because of the prevailing veil of secrecy, not much has been known about the Commission. Excessive confidentiality has meant that the Commission was conspiring in the ignorance about its work and contributing little to the advancement of human rights jurisprudence in Africa. Publicity and public relations are as much an element of promotion and protection of human rights as the carefully crafted legal argumentation of its decisions and recommendations. This book will advance the work of the Commission and extend knowledge of its work to the farthest vistas. Dr Murray is to be heartily commended for her endeavours.

Besides contributing to knowledge about the Commission, the book will also serve as a manual and a textbook on the Commission. As a member of a national human rights commission and as I am involved in the development and support for national institutions throughout Africa, I believe that this book will be an invaluable tool for hard-pressed practitioners. It will enhance the work of human rights advocates in Africa and, hopefully, improve their participation in and contributions to the sessions of the Commission. Maybe, more communications will emerge, states may also be encouraged to bring matters to the Commission, advisory opinions will be sought and the African Court will be better able to make the decisions that will clarify rights and enforce them. Granted, this is only one of a handful of books on the work of the Commission; I know only two or three others. This publication may stimulate other offerings and is a timely study.

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Member, African Commission on Human & Peoples' Rights
Johannesburg, South Africa
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Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
AFPRC	Armed Forces Provisional Ruling Council—The Gambia
AHSG	Assembly of Heads of State and Government, the OAU
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
The Charter	The African Charter on Human and Peoples' Rights
The Commission	The African Commission on Human and Peoples' Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
INGO	International non-governmental organisation
NGO	Non-governmental organisation
NIEO	New International Economic Order
OAS	Organization of American States
OAU	Organization of African Unity
PRI	Penal Reform International—an NGO
RADDHO	Rencontre Africaine pour la Défense des Droits de l'Homme
SPLA	Sudan People's Liberation Army
SSIA	South Sudan Independence Army
TNC	Transnational corporation
UDHR	Universal Declaration of Human Rights
UIDH	Union Interafricaine des Droits de l'Homme
UN	United Nations
UNESCO	United Nations Economic and Social Council

UNFPA	United Nations Family Planning Association
UNICEF	United Nations Children's Fund

JOURNALS AND REPORTS

AJIL	*American Journal of International Law*
AJICL	*African Journal of International and Comparative Law*
ASIL	*American Society of International Law*
BYIL	*British Yearbook of International Law*
DR	Decisions and Reports (in relation to the European Convention on Human Rights)
ETS	European Treaty Series
EHRR	European Human Rights Reports
HRLJ	*Human Rights Law Journa*l
HRQ	*Human Rights Quarterly*
ICLQ	*International and Comparative Law Quarterly*
ILM	International Legal Materials
ILR	International Law Reports
MLR	*Modern Law Review*
NQHR	*Netherlands Quarterly on Human Rights*
UKTS	United Kingdom Treaty Series
UNTS	United Nations Treaty Series
Yearbook	Yearbook of the European Convention on Human Rights
YBILC	Yearbook of the International Law Commission

Table of Cases

CASES OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Reported in Seventh Annual Activity Report, Annex IX:

Eighth Annual Activity Report, Annex VI:

Ninth Annual Activity Report, Annex VIII:

Reported in Tenth Annual Activity Report, Annex X:

Reported in the Eleventh Activity Report, Annex II:

EUROPEAN CONVENTION ON HUMAN RIGHTS ORGANS

INTER-AMERICAN SYSTEM

INTERNATIONAL COURT OF JUSTICE

UN HUMAN RIGHTS COMMITTEE

1

Theoretical Issues

A. INTRODUCTION

Jurists have noted the inadequacies of principles of international law in relation to an understanding of the position and protection of some individuals. Prominent among these are feminist writers.[1] Similar challenges to the concepts of international law were adopted by this book to consider, through the work of the African Commission on Human and Peoples' Rights, whether international law at present takes into account the African situation and that of non-Western States. These "feminine and African world views name what is absent in the thinking and social activities of [men and] Europeans, what is relegated to 'others' to think, feel and do".[2]

These views criticise the dominant discourse as failing to account for the position of marginalised groups[3] and they identify areas of neglect by the mainstream, it being:

> based on individualist and particular moral philosophies which serve to exclude the perspectives of "others" [and] founded on liberal notions of the self and on liberal prioritization of civil and political rights. Both critiques are looking at the centre from different places on the margin.[4]

[1] See H. Charlesworth, C. Chinkin and S. Wright, "Feminist Approaches to International Law" (1991) 85 *AJIL* 613–45; also, C. Chinkin and H. Charlesworth, *Feminist Analysis of International* Law (Manchester University Press, Manchester, 1998); H. Barnett, *Sourcebook on Feminist Jurisprudence* (Cavendish, London, 1997); A. Bottomley and J. Conaghan, *Feminist Theory and Legal Strategy* (Blackwell, Oxford, 1993); S. Harding, *The Science Question in Feminism* (Open University Press, Milton Keynes, 1986); R. Keohane *et al*., *Feminist Theory—A Critique of Ideology* (Harvester, Sussex, 1982); C. MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, Cambridge Mass., 1989); J. Peters and A. Wolper, *Women's Rights. Human Rights. International Feminist Perspectives* (Routledge, New York, 1995); J. Pettman, *Worlding Women—A Feminist International Politics* (Routledge, London, 1996); A. Bottomley, "What is Happening to Family Law? A Feminist Critique of Conciliation" in J. Brophy and C. Smart (eds.), *Women in Law. Explorations in Law, Family and Sexuality* (Routledge, London, 1985); C. Bunch, "Transforming Human Rights from a Feminist Perspective" in J. Peters and A. Wolper, above, at 11–17.

[2] *Ibid*. 186. C. Chinkin, "A Gendered Perspective to the International Use of Force" (1992) 12 *Australian Yearbook of International Law* 279–93, at 281 notes that "the role of women under colonialism is in many respects symbolic of the domination of the colonised within a colonial society".

[3] Charlesworth *et al*., above n. 1 at 616. See in general Harding, above n. 1.

[4] A. Bunting, "Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies" in A. Bottomley and J. Conaghan, above n. 1, at 10; and at 17: "[i]n the above cases where African Muslim and other Third World feminist and human rights scholars assert culturally based arguments, they do so to critique the dominant discourses in question. In addition, these perspectives may be a retrieval of formerly 'subjugated knowledges', marginalized through the historical production of legitimate truth claims".

B. RESTRAINTS OF THE PRESENT DISCOURSE

These critiques provide us with "categories of challenge"[5] which advocate that the principles of international law are not objective and universally applicable, but biased in favour of the dominant group,[6] who thus command the discourse on human rights and international law.[7] In fact, "despite the inadequacy of the existing discourse to define or describe many . . . needs, it is extremely difficult to talk about these needs in any other language. The discourse of human rights can become a trap out of which communication becomes extremely difficult".[8] It then ensures that the views of the marginalised group, in our case non-Western States[9] do not succeed, and that their subordinate position is maintained.[10]

C. OPPOSING DICHOTOMIES

The principles of international law appear to be based on opposing dichotomies: for example, subject/object, state/individual, public/private, amicable/judicial, war/peace, etc. Feminist theory has illustrated the existence and inadequacies of the opposing dichotomy approach[11] which is central to liberal

[5] Harding, above n. 1 at p. 186; see Charlesworth et al, above n. 1 at p. 617.

[6] Thus, "the contemporary international human rights rhetoric is characterised by political, philosophical and historical universality, gender neutrality and cross-cultural applicability. This dominant discourse has been criticised from a number of different perspectives which have revealed that the universal pretensions hide the fact that it is a predominantly male, Western, liberal human rights discourse which has evolved in a particular historical and philosophical context": Bunting, above n. 4, 7.

[7] "The dominant position of first World States is not just their control of international legal institutions, but follows from the fact that they created the modes of thought, figures of speech by which these institutions are understood and . . . by which international law is operated and developed": K. Ginther, "Redefining International Law from the Point of View of Decolonisation and Development of African Regionalism" (1982) 26 *Journal of African Law* 49–67, at 59.

[8] S. Wright, "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions" (1992) 12 *Australian Yearbook of International Law* 242–64, at 241.

[9] This may be a way of ensuring the West maintains control over the non-Western countries and their situations of human rights, and prevents the latter from fully questioning the role the former have played or should play in protecting human rights worldwide. Harding, above n. 1 at 166–7, thus identifies aspects of the "African" view of international human rights law which are usually cited, and often criticised, namely, a community rather than a individual focus; connection of the self with nature and the impact of it upon nature rather than a separation; responsibility of the individual to his society or his community; voting in the group rather than unanimous consensus; etc. In relation to the position of women, see E. Schneider, "The Violence of Privacy" (1992) 23 *Conneticut Law Review* 973–99, at 977 has argued that privacy is used "as a rationale for immunity in order to protect male domination".

[10] E.g., in domestic violence incidents, the police do not intervene to protect the woman from abuse: see *ibid*.

[11] N. Lacey, "Theory into Practice? Pornography and the Public/Private Dichotomy" in A. Bottomley and J. Conaghan, above n. 1 at 93–113; S. Whitworth, *Feminism and International Relations* (MacMillan, Basingstoke, 1997).

thinking.[12] This book draws upon these dichotomies and criticisms of them in order to address the inadequacies of the application of international law to the situation in non-Western countries.[13]

By considering the jurisprudence and practice of the African Commission, an attempt is made to challenge the dichotomies and fundamental concepts of the discipline of international human rights law itself. The dichotomous method adopted by present international law to consider issues in terms of either/or[14] tends to neglect the benefits of one of the two extremes.[15] The position of non-Western states in this respect parallels the position of women. They are excluded and deemed secondary to analysis.[16] This approach will fail to account for the middle ground.[17]

In this respect, such a disparate and opposing approach does not permit adequate examination of the African system, which portrays a mixture of both "extremes", the European and pre-colonial stances.[18] An examination of issues

[12] E.g. J. Locke, *Two Treatises of Government* (ed.) P. Laslett, (CUP, Cambridge, 1965). It has been said, e.g., in relation to the public/private dichotomy, that this "is deeply embedded in Western legal structures and the vocabulary of the distinction is built into the language of the law itself": C. Charlesworth, "The Public/Private Distinction and the Right to Development in International Law" (1992) 12 *Australian Yearbook of International Law* 190–204, at 192.

[13] Harding, above n. 1; D. Otto, "Subalternity and International Law—Problems of Global Community and Incommensurability of Difference" (1996) *5*(3) *Social and Legal Studies* 37–64; Schneider, above n. 9 at 976.

[14] Bottomley in Brophy and Smart, above n. 1 at 182, argues, "the point is that in counterposing conciliation to adversarial justice the relationship between conciliation and court control will be missed".

[15] Lacey, above n. 11 at 99, notes the focus at present is on dichotomies and divides, "structured around pairs of ideas which are opposed in the sense that the attribution of one excludes the other". Furthermore, "concentrating too much on the public/private distinction excludes important parts of women's experiences. Not only does such a focus often omit those parts of women's lives that figure into the 'public', however that gets defined, it also assumes that 'private' is bad for women. It fails to recognise that the 'private' is a place where many have tired to be (such as those involved in the market) and that it might ultimately afford protection to (at least some) women": K. Engle, "After the Collapse of the Public/Private Distinction: Strategising Women's Rights" in D. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (American Society of International Law, Washington, D.C., 1993), 143, at 143.

[16] Harding, above n. 1 at 165, identifies a number of aspects which are usually associated with the feminine, and thus viewed as less preferable to their opposing matter: emotion as opposed to reason; body as opposed to mind; being as opposed to knowing; nature as opposed to culture; others as opposed to self; subjectivity as opposed to objectivity. At 171 she notes the similarities between the African and feminist approaches: "[e]thics that emphasize responsibilities to incorporating the welfare of social complexes through contextual, inductive and tentative decision processes". In addition, "these States challenged both substantive norms of international law and the traditional law-making processes as either disadvantageous to them or inadequate to their needs. The impact of this challenge to assumptions about the objective neutrality of norms by showing them to support western values and interests has been substantial. Developing States have also emphasized decision making through negotiation and consensus, and through the use of nontraditional methods of lawmaking such as the 'soft law' of General Assembly resolutions. These techniques find some parallel in the types of dispute resolution sometimes associated with the 'different voice' of women": Charlesworth *et al*., above n. 1 at 616.

[17] Schneider, above n. 9 at 977.

[18] For example, even the background of the individual Commissioners indicates that, although all African, they were often trained in the West and thus in Western legal techniques.

in terms other than opposing dichotomies will enable links between what are often seen as mutually exclusive concepts to be analysed. By examining the African Commission and its approaches and jurisprudence in this way, a method is offered in which non-Western countries' challenges to international law could enlighten and refocus the principles of international law as they now stand. Analysed in this way, the supposed universal applicability of present international human rights law may indeed be questioned.[19]

D. THE SCOPE OF THIS STUDY

After an introduction to the recent developments that have taken place in the African system, the data obtained from its practice and jurisprudence are used to identify and challenge several of those dichotomies assumed to exist in international law. These include: first, the dichotomy between the individual and the state. An attempt is made, in Chapter 3, to show that the concept of the state, in the view of the African Commission, is different from that of the Western notion of statehood. This has an impact on the applicability of human rights norms in an African context and on the public/private divide.[20] This is relevant to a discussion of the African system, given that the historical background to the establishment of states in Africa is radically different from that in Western Europe.[21] As a result, African states derive from a mixture of European liberal state structures imposed by colonialism on pre-existing community structures. Given that human rights law is traditionally concerned with the actions of a state towards an individual, a "public" approach, it does not refer adequately at present to the

[19] In parallel, as has been stated by feminist writers in relation to the exclusion of women from traditional international law, "[u]nless the experiences of women contribute directly to the mainstream international legal order, beginning with women's equal representation in law-making forums, international human rights law loses its claim to universal applicability: it should be more accurately characterized as international *men*'s rights law": H. Charlesworth, "Human Rights as Women's Rights" in J. Peters and A. Wolper, above n. 1 at 103–13, at 105.

[20] "The public/private split is central to law within a liberal capitalist political economy, to feminist theory, and to political rhetoric. But how and where the distinction is drawn depends upon the theoretical perspective employed, the function it is designed to serve and the contradictions which emerge when a seemingly straightforward conceptual apparatus is employed to make sense of complicated and interrelated social phenomena". The design is also "shifting over time and in relation to specific areas under consideration", so it is not possible to define areas which fall within either: J. Fudge, "The Public/Private Distinction: Possibilities of and Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 *Osgoode Hall Law Journal* 485, at 549.

[21] Although not in relation to the idea of individuals owing duties towards each other: "one problem therefore is whether human rights, which like the rest of international law, is aimed at public or government action can be used to alter the behaviour of private parties. Feminists have argued persuasively that the public–private distinction is a false one and that the real question is not whether law, in their case human rights law, should apply to the private as well as the public, but rather 'what types of private acts are and are not protected'. If one can decide that a particular act is a violation, even if performed by private citizens, one can hold governments responsible": S. Gunning, "Arrogant Perception, World Travelling and Multicultural Feminist: the Case of Female Genital Surgeries" (1991–2) 23 *Columbia Human Rights Law Review* 189, at 238.

actions of the individual to other individuals in the "private" sphere,[22] noting that "the State is not all there is to power".[23] The relationship between the state and the individual, and also the idea that human rights may govern relations between individuals, is questioned. This involved taking into account aspects of individual duties for which the African Charter is renowned.

Chapter 4 deals with the personalities in international law and the traditional subject/object divide. The applicability of such a strict delineation to the African system is debated and the roles of different entities in the system and in its development considered. The dichotomy of state/individual is challenged, as are the ideas that the state is the central, sometimes the only, focus of international law[24] and its sovereignty something from which all rules are derived.[25] This highlights the important roles played in the African mechanism, not just by states, but by individuals, NGOs, peoples, as well as responsibilities being owed by non-state parties to the Charter and the global community. The focus is not so much on the extent of the rights and responsibilities of each entity, but rather on the co-operation and interdependence between them all to enable the functioning of the system.

[22] "A reason often given or implicit in considering atrocities to women not human rights violations, politically or legally, is that they do not involve acts by States. They happen by non-State actors, in civil society. . . . They do not happen by virtue of State policy. International instruments (and national constitutions) control only State action": C. MacKinnon, "On Torture: A Feminist Perspective on Human Rights" in K. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-first Century* (Kluwer Academic Publishers, Dordrecht, 1993), at 60. Furthermore, A. Byrnes, "Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation? Some Current Issues" (1992) 12 *Australian Yearbook of International Law* 205–41, at 596 says: "while the traditional liberal conception of human rights guarantees was protection against the direct exercise of State power against a private individual, it has become increasingly accepted at the international level that the instruments protected by human rights guarantees may in many cases be encroached on by private individuals as well as government, and that this has implications for the responsibility of the State under international law. As a result, there has been an expansion of the traditional content of States' obligations in the area of protection of human rights with parallels being drawn from the more traditional doctrines of State responsibility."

[23] In this respect, feminist writers have argued, "[i]f 'the political' is to be defined in terms of men's experiences of being subject to power, it makes some sense to centre its definition on the State. But if one is including the unjust power involved in the subjection of half of the human race by the other half-male dominance—it makes no sense whatsoever to define power exclusively in terms of what the State does", MacKinnon in Mahoney and Mahoney, above n. 22 at 61.

[24] Approaches of feminist writers are relevant here as parallels to non-Western countries' challenges: "[t]he centrality of the State in international law means that many of the structures of international law reflect its patriarchal forms. Paradoxically, however, international law may be more open to feminists analysis than other areas of law. The distinction between law and politics, so central to the preservation of the neutrality and objectivity of law in the domestic sphere does not have quite the same force in international law. So, too, the Western domestic model of legal process as ultimately coercive is not echoed in the international sphere: the process of international law is consensual and peaceful coexistence is its goal. Finally, the sustained Third World critique of international law and insistence on diversity may well have prepared the philosophical ground for feminist critiques", Charlesworth *et al.*, above n. 1 at 644.

[25] Feminist theories have questioned the notion of the state: "[t]raditionally of course, international law was regarded as operating only in the most public or public spheres: the relations between nation-States. We argue, however, that the definition of certain principles of international

A third dichotomy that is considered is that of war/peace.[26] The traditional assumption that humanitarian laws apply in times of war, and human rights in times of peace, with states being permitted derogations from the latter in times of public emergency or war, is questioned given that it is contrary to the position taken by the African Commission.

Finally, the dichotomy of amicable and judicial settlement of disputes is considered.[27] The features of amicable and judicial procedures are identified and the criticisms directed against the former, in particular, are considered and critically analysed in the light of the experience of the African Commission. This is particularly relevant in relation to the recent establishment of an African Court. The presumed conflict between judicial and amicable procedures is well illustrated by the African Commission, it being neither totally amicably focused, nor totally judicial. In fact, the Commission does not necessarily perceive a conflict between them.[28]

E. CONCLUSION

It is submitted that the concepts, presented as opposing dichotomies, on which human rights law, and international law specifically, is based, need to be considered. The African system provides a very useful framework in which to examine the opposing dichotomies and to explore the relationship between them. Thus, this book aims to question the applicability of the opposing dichotomies to non-Western systems.

F. BRIEF NOTE ON MATERIAL

To gain access to these data, consent was sought from the Commission to work as an intern at the Secretariat and to attend the sessions.[29] Members of the Commission and staff of the Secretariat were aware that research was being conducted. Transcripts of the proceedings were taken at the sessions, given that the Commission does not provide such material. These were taken verbatim, with the assistance of Julia Harrington, as the participants spoke. Words were noted as spoken by any simultaneous translation from French, Portuguese or Arabic into English. The transcripts are thus not official documents of the Commission but are my notes for which I take any responsibility for errors.

law rests on and reproduces the public/private distinction. It thus privileges the male world view and supports male dominance in the international legal order": Charlesworth *et al.*, above n. 1 at 627.

[26] In Chap. 5.

[27] In Chap. 6. See Charlesworth *et al.*, above n. 1 at 616 and 634.

[28] "The presentation of conciliation and litigation as opposites proves to be a false distinction. There remains a tension . . .": Bottomley in Brophy and Smart, above n. 1 at 183.

[29] Sessions of the Inter-American Commission on Human Rights were also attended in order to gain a comparative perspective and obtain documents. Commissioners from this organ, as well as staff at the Secretariat and other individuals involved in the Inter-American system, were met.

Information that was internal to the Commission was made available as a result of my internship at the Secretariat. The Commission has in the past taken a highly confidential stance in respect of much of its work. Although it has been criticised for doing so,[30] it was not the intention of this book to expose its work. Any material or documents that were confidential[31] were excluded from the data that were included. The problem was compounded further since it is not always clear which documents were confidential. In the case of doubt, the material was not used.[32]

Due to the problems with recording information in the African Commission, including problems with translation and filing, among others,[33] inaccuracies and inconsistencies that may appear in the information used need to be borne in mind. In some situations information provided in official documents was not complete, differences were noted between the texts of various official versions distributed, and material produced in one language on occasions did not tally with that produced in the other.[34]

Attempts were made to identify any inaccuracies with the Secretariat or the Commissioners, and to obtain the correct version. Any further inaccuracies have been noted.

[30] See Chap. 2.
[31] Marked confidential by the Secretariat of the Commission.
[32] A list of the documents and data used is attached.
[33] See Chap. 2.
[34] Documents are produced in French and English and access was gained to both.

2

Evolution of the African Charter and Status of Ratification

A. INTRODUCTION

International human rights law in its present format of international treaties was created largely in the aftermath of the Second World War, in response to the atrocities committed by the defeated powers. The Universal Declaration of Human Rights was adopted and subsequently given legal force in two international covenants which came into force in 1976.[1] In addition, activities were taking place at the regional level with the adoption of the European Convention on Human Rights (ECHR) in 1950.[2] The Inter-American mechanism under the auspices of the Organization of American States established a Commission in 1959 to promote respect for human rights,[3] as set out in the American Declaration on the Rights and Duties of Man of 1948,[4] and a binding document came into existence with the American Convention on Human Rights (ACHR) in 1969.[5] Both the European and American mechanisms provided for an independent Commission and a Court.[6] The African system is the youngest of the regional mechanisms and follows its counterparts with the provision of similar procedures such as the inter-state and individual communication mechanism and the state reporting procedure.[7]

The African Charter on Human and Peoples' Rights is the regional mechanism for the continent. It was adopted, under the auspices of the Organization

[1] International Covenant on Civil and Political Rights (ICCPR), adopted 16 Dec. 1966, entered into force 23 Mar. 1976, 999 UNTS 171, reprinted in (1967) 6 ILM 368; International Covenant on Economic, Social and Cultural Rights (ICESR), adopted 16 Dec. 1966, entered into force 3 Jan. 1976, 993 UNTS 3, reprinted in (1967) 6 ILM 360.

[2] European Convention for the Protection of Rights and Fundamental Freedoms, signed 4 Nov. 1950, entered into force 3 Sept. 1953, 213 UNTS 221.

[3] Resolution VII, Fifth Meeting of Consultation of Ministers of Foreign Affairs, 12–18 Aug. 1959, Final Act, OAS Doc. OEA/Ser.C/II.5.

[4] Signed 2 May 1948, OEA/Ser.L/V/II.71 at 17 (1988).

[5] American Convention on Human Rights (Pact of San José), signed 22 Nov. 1969, entered into force 18 July 1978, reprinted in (1970) 9 ILM 673.

[6] ECHR, Art. 19; ACHR Art. 33. The European Organs have now been combined into one single Court after the coming into force of Protocol 11 in 1998 to the European Convention for the Protection of Rights and Fundamental Freedoms, adopted 11 May 1994, ETS 155, reprinted in (1994) 33 ILM 960; (1994) 15 HRLJ 86. As a result, the new Articles will be referred to, where relevant, in this book.

[7] Communication procedures are provided under the Optional Protocol to the ICCPR and its Art. 41; ECHR, Arts. 33 and 34; ACHR, Arts. 44 and 45. A state reporting mechanism is available under Art. 40 of the ICCPR.

of African Unity, in 1981 and came into force in 1986,[8] after a number of conferences and meetings prompted initially by non-governmental organisations (NGOs)[9] and then taken up by the UN[10] and the OAU[11] aimed at creating a regional mechanism for Africa. All states of the OAU have now ratified the African Charter.[12] Two states have made reservations to the Charter.[13]

B. CONTENTS OF THE AFRICAN CHARTER

The African Charter is seen as a "unique" document among the instruments that exist on human rights because it represented the "African" concept of rights.[14] The aim of the drafters was to create an instrument that was based on African philosophy and responsive to African needs.[15] This uniqueness is illustrated by, for example, the inclusion of civil and political rights, economic, social and cultural rights and peoples' rights in one document treating them as indivisi-

[8] (1987) 21 ILM 59.

[9] E.g. African Conference on the Rule of Law, Lagos, International Commission of Jurists, 3–7 Jan. 1961.

[10] E.g. Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Cairo, 2–15 Sept. 1969, UN Doc.ST/TAO/HR/38 and 39; Seminar on Studying New Ways and Means for Promoting Human Rights With Special Attention to Problems and Needs of Africa, Dar-es-Salaam, 23 Oct.–5 Nov. 1973, UN Doc.ST/TAO/HR/49 (1973); Seminar on the Establishment of Regional Commissions, Monrovia, 10–21 Sept. 1979, UN Doc.ST/HR/Ser.A/4 (1979).

[11] Meeting of Experts, Dakar, Nov., Dec. 1979, OAU Doc.CAB/LEG/67/3 Rev.1 (1979); Ministerial Meeting of African Ministers of Justice and Other Legal Experts, Banjul, 8–15 June 1980; Second Ministerial Meeting, 7–19 Jan. 1981, OAU Doc.CM/Res.792 (XXV) 1980.

[12] Eleventh *Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–7, CM/2084(LXVIII), Annex I. Eritrea and Ethiopia were the last to ratify in 1999.

[13] Egypt and Zambia. See App. III for text of reservation. See Chap. 5.G for discussion of these reservations. South Africa made a statement, requesting information from the OAU on the meaning of "zionism" in the preamble to the African Charter, when ratifying the Charter, which is not considered to be a reservation.

[14] O. Gye-Wado, "A Comparative Analysis of the Institutional framework for the Enforcement of Human Rights in Africa and Western Europe" (1990) 2(2) *AJICL*, 187–200, at p. 191; C. Welch, "The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment" (1992) 14 *HRQ* 43–61, at 45; S. K. C. Mumba, "Prospects for Regional Protection of Human Rights in Africa" [1982] *Holdsworth Law Review* 101, at 104; E. Bondzie-Simpson, "A Critique of the African Charter on Human and Peoples' Rights", 31 *Howard Law Journal* (1988) 643–65 at 645.

[15] R. Gittleman, "The African Charter on Human and Peoples; Rights: A Legal Analysis" (1981–2) 22 *Virginia Journal of International Law* 667–714, at 668; M. L. Balanda, "African Charter on Human and Peoples' Rights" in K. Ginther and W. Benedek, *New Perspectives and Conceptions of International Law. An Afro-European Dialogue* (Österreichische Zeitschrift für Offentliches Recht und Volkerrecht, Vienna, 1984), 134, at 138; B. O. Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6(2) *HRQ* 141–59, at 145; R. M. D'Sa, "The African Charter on Human and People's Rights: Problems and Prospects for Regional Actions" [1987] *Australian Yearbook of International Law* 101–30, at 106; E. Bello, "The African Charter on Human and Peoples' Rights" (1985/6) 194 *Hague Recueil* 13–268, at 147. The African nature of the Charter is reflected in the preamble: "the preamble to the Charter was conceived as the signpost to the specificity of African problems with regard to human rights", at 140.

ble[16]; and the drafting of provisions relating to the latter and to duties of the individual in considerable detail.[17] This led some to claim that it is the most interesting of the regional instruments.[18] The African system thus offers ripe ground for challenging the universality of international law principles.

C. THE ROLE OF THE AFRICAN COMMISSION

The Charter established an African Commission, a body of 11 independent experts[19] to promote, protect and interpret the rights in the Charter.[20] The Commission was inaugurated in 1987.[21] Commissioners are elected by the OAU[22] and, although the requirement for geographical balance is not explicitly written in the Charter, it was a source of complaint that most of the Commissioners were from the north or the west of Africa.[23] After the most recent elections by the OAU their locations are now more widespread.[24] It is an important requirement of the Charter and of "paramount consideration" that Commissioners should act in their personal capacity and be impartial,[25] as required by Article 31 of the Charter. This is supported by the fact that Commissioners are given privileges and immunities and that the headquarters of the Commission were placed away from those of the OAU.[26] A number of members, however, have close connections with their home states, for example,

[16] H. Scoble, "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter" in C. Welch and R. Meltzer (eds.), *Human Rights and Development in Africa* (State University of New York Press, Albany, NY, 1984), at 197; W. Benedek, "Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights" in P. Kunig, W. Benedek and C. R. Mahalu, *Regional Protection of Human Rights in International Law: The Emerging African System* (Nomos Veragsgesellschaft, Baden-Baden, 1985), 89, at 62; S. K. C. Mumba, above n. 14 at 104; M. W. Mutua, "The Banjul Charter and African Cultural Fingerprint: An Evaluation of the Language of Duties", 35 *Virginia Journal of International Law* 339–80, at 340; E. Ankumah, *The African Commission on Human and Peoples' Rights. Practices and Procedures* (Nijhoff Publishers, The Hague, 1996), at 159.

[17] Arts. 27–29. See M. Nowak, "The African Charter on Human and Peoples' Rights", [1986] *HRLJ* 399–410, at 399; Ankumah, above n. 16 at 159. This uniqueness derives from the political and socio-economic context in which the Charter was formed and which it aims to reflect.

[18] E.g. Benedek, above n. 16 at 61.

[19] Art. 30. See App. IV for members of the Commission.

[20] Art. 45.

[21] 2 Nov. 1987, *First Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1987–8, ACHPR/RPT/1st, para. 4.

[22] Arts. 33–38.

[23] E.g. A. Danielson, *The State Reporting Procedure under the African Charter* (Danish Centre for Human Rights, Copenhagen, 1994), at 27; P. V. Ramaga, "The 10th Session of the African Commission on Human and Peoples' Rights" (1992) 10 *NQHR* at 360; P. Amoah, "The African Charter on Human and Peoples' Rights. An Effective Weapon for Human Rights?" (1992) 4(1) *AJICL* 226–40, at 232.

[24] OAU AHSG Summit, Algiers, July 1999.

[25] Bello, above n. 15 at 42; Balanda, above n. 15 at 142. See issue on independence discussed in Chap. 6.C.4.

[26] Balanda, above n. 15 at 142; Okere, above n. 15 at 150; Danielson, above n. 23 at 32; Ankumah, above n. 16 at 18.

having held ministerial posts or ambassadorial positions.[27] Whilst the Charter is a legal document[28] and most of the Commissioners have been lawyers, some of them have also been members of their home governments. This detracts from the status of the Commission as a judicial organ.[29]

Commissioners elect their Chairman and Vice Chairman from among their members.[30] The Commission is served by a full-time Secretary based in The Gambia.

The Commission adopted its own Rules of Procedure[31] which were amended at the eighteenth session.[32] Although the original Rules gave a significant role to the OAU Secretary General in the work of the Commission, the amendments reflected the reality of the situation and assigned many of these powers to the Secretary of the Commission.[33]

Although the OAU is required under the Charter to finance the Commission and, through the Secretary General, provide the staff and material resources to enable it to function,[34] this has been lacking. As a result there were, for many years, few, or only temporary, staff[35] and the facilities in the secretariat in Banjul were minimal, a fact which, when added to poor telecommunications and electricity supply, rendered work conditions difficult.[36] The African

[27] E.g. Dr Badawi El-Sheikh is ambassador for Egypt to the Netherlands; Dr Hatem Ben Salem is ambassador for Tunisia to Senegal.

[28] Gye-Wado, above n. 14 at 191.

[29] It is worth noting that the Draft Charter contained a provision expressly preventing Commissioners from holding government positions: *Monrovia Proposal for the Setting-Up of an African Commission on Human Rights*, Art. 5, see B. G. Ramcharan, "The Travaux Preparatoires of the African Commission on Human and Peoples' Rights" (1992) 13 *HRLJ* 307–14, at 309; Okere, above n. 15 at 150. See Chap. 6 for further discussion.

[30] Art. 42.

[31] Art. 42(2), Rules of Procedure of the African Commission on Human and Peoples' Rights, *First Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1987–1988, ACHPR/RPT/1st, Annex V.

[32] Rules of Procedure of the African Commission on Human and Peoples' Rights (Amended), adopted 6 Oct. 1995, ACHPR/RP/XIX. The Rules referred to throughout the thesis relate to the amended Rules, unless otherwise stated. The text of the Amended Rules is provided in App. II.

[33] *Ibid*. For example, notifying members of the African Commission of the dates of the session, Rule 5; drawing up the provisional agenda, Rule 6; issuing press releases on activities that took place in private sittings, Rule 96; and initial sorting of communications, Rules 102–112, became tasks of the Secretary to the Commission.

[34] Art. 41.

[35] *Tenth Anniversary Celebration, One Decade of Challenge. 2 Nov 1987–2*, Nov. 1997, 22nd session (no reference), 7, lists them at that time as: one full-time lawyer who is the Secretary to the Commission; a legal advisor; an accountant, a bilingual secretary; a filing clerk, a receptionist, two drivers, two security guards and one cleaner.

[36] "Since the entry into force of the African Charter [it] has been suffering from a chronic lack of staff, resources and services necessary for the effective discharge of its functions. No funds are allocated in the Commission's budget for promotional activities. . . . In spite of serious administrative and financial shortcomings and the repeated requests of the Commission no substantial measure has been taken to resolve this situation": *Sixth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1992–3, ACHPR/RPT/6th, paras. 20 and 23. At the 23rd session Commissioners agreed with suggestions made by NGOs that the Secretariat could improve its functioning with e-mail and access to the Internet, and the Secretary informed the meeting that approval had been obtained from the OAU and such facilities were in the process of being acquired: 23rd Session Transcripts, 5. See also *Eleventh Activity Report*, above n. 12 at para. 35.

Commission has thus felt the need to utilise the financial assistance and other support of both NGOs and Western governments and organisations.[37] Many of the staff have thus been temporary, Western legal interns who spend only months at the Commission.[38]

There is the hope of some improvement with the recent moves by the OAU to increase the budget of the Commission. This is reflected in the decision to hold the twice yearly sessions, as from October 1999, for 15 days rather than the usual ten.[39] Originally all were to be held in Banjul, The Gambia, where the Secretariat is situated, but this was especially felt to be not possible after a coup *d'état* in 1994, and sessions have been held in various African states.[40] Two extraordinary sessions have been held, permitted under Rule 3 of the Rules of Procedure, one for the drafting of the Rules of Procedure and the other to discuss the situation in Nigeria and Burundi.[41]

The sessions are usually attended by members of governments, representatives of international and national NGOs, observers and the media.[42] Seven Commissioners are required to attend in order to ensure a quorum[43] and although there has been no occasion on which this has not been reached, it has been rare for all Commissioners to attend every session.[44]

The sessions are usually divided into public sittings, taking the first few days of the sessions, and private sittings, into which only the Commissioners and members of the Secretariat are permitted.[45] During the latter, administrative and financial issues are discussed and communications heard, for which a

[37] E.g., "the Commission notes with gratitude the voluntary contributions which it had received from the United Nations Centre for Human Rights, the European Community, the Swedish, Danish and Austrian Governments", *Sixth Annual Activity Report*, above n. 36 at para. 25. The Commission has also received assistance from the Raoul Wallenberg Institute and the African Society for International and Comparative Law, see *One Decade of Challenge*, above n. 35 at 13. See also, *Eleventh Activity Report*, above n. 12 at para. 36.

[38] E.g. Funded by the Danish Centre for Human Rights and the African Society for International and Comparative law. This has been criticised as adding to the problems of the Commission. See *ibid*. at para. 35(2).

[39] Rule 1 of the Rules of Procedure states that the number of sessions should enable the Commission to carry out its functions. Rule 2 states that this will "normally be about two" per year, "for about 2 weeks". This was for many years, however, reduced to ten days given the lack of funding from the OAU, see *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–5, ACHPR/RPT/8th, para. 30.

[40] See list of sessions, App. V.

[41] *Ibid*. The Commission has said recently that it may consider holding such a session to discuss the relationship between the Commission and the newly formed Court; see below at section E, 25th Session Transcripts, 68.

[42] E.g. Final Communiqué of the 23rd Ordinary Session of the African Commission on Human and Peoples' Rights, DOC/OS/45(XXIII). The participation of various entities in the sessions and the work of the Commission is relevant to an understanding of the notion of personality, discussed in Chap. 4.

[43] Art. 42(3).

[44] F. Viljoen, *The Realisation of Human Rights in Africa through Intergovernmental Institutions* (University of Pretoria, Thesis, 1997), table E, 3.3.1.

[45] Rule 32.

number of government representatives and individuals have attended to present their cases.[46]

D. FUNCTIONS OF THE AFRICAN COMMISSION

A consideration of the functions of the Commission is essential to put its work in a wider context and to enable a comparison with the practice and procedures adopted by other regional and international organs. The African Commission is required, by Article 45, to promote, protect and interpret the rights in the Charter and to carry out any other tasks assigned to it by the OAU.

1. Promotional

In general, there is a lack of available information on the operation and activities of the Commission[47] and this is partly felt to be a result of excessive confidentiality.[48]

The importance of the promotional mandate[49] is also reflected in a number of resolutions adopted by the Commission[50] and the fact that it has adopted 21 October each year as African Human Rights Day.[51] At its second session it adopted a *Programme of Action* which was renewed at the twentieth session.[52]

[46] E.g. see Agenda of the 22nd session of the African Commission on Human and Peoples' Rights, DOC/OS/REV.1 (XXII), para. 11.

[47] W. Benedek, "The African Charter on Human and Peoples' Rights: How to Make it More Effective" (1993) 11(1) *Netherlands Quarterly on Human Rights* 26, at 29; C. Odinkalu and A. An-Na'im, *Enhancing Procedures of the African Commission with Respect to Individual Communications* (1995), at 4.

[48] This is a major issue raised in respect of the ineffectiveness of the Charter to protect human rights and is said to be a "general feature in the work of the Commission": Danielson, above n. 23 at 29. See further discussion at Chap. 6.C.5.

[49] Art. 45(1)a. It is argued that Art. 45 represents a hierarchy of importance in terms of the tasks of the Commission, with promotion being the most significant, see Ankumah, above n. 16 at 21. This is certainly recognised by the Commission itself, noting the "particular importance of this essential mission": see *First Annual Activity Report*, above n. 21 at para. 23.

[50] Recommendation on Some Modalities for Promoting Human and Peoples' Rights, *Second Annual Activity Report of the African Commission on Human and Peoples' Rights* (1988–9), ACHPR/RPT/2nd, Annex IX; Resolution on Human and Peoples' Rights Education, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights* (1993–4), ACHPR/RPT/7th; AHG/198/(XXX) REV.2, Annex X.

[51] Resolution on the Celebration of an African Day of Human Rights, *Second Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1988–1989, ACHPR/RPT/2nd, above n. 50 at Annex VII.

[52] *Programme of Action of the African Commission on Human and Peoples' Rights*, *First Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1987–1988, ACHPR/RPT/1st, above n. 21 at Annex VIII. A further plan was drawn up for the period up to 1996: *African Commission on Human and Peoples' Rights. Programme of Activities 1992–1996*, *Sixth Annual Activity Report*, above n. 36 at Annex VII. This was then reaffirmed in greater detail by the Mauritius Plan of Action 1996–2001 (not referenced). At the 23rd session the Commission called on NGOs and states to consider ways in which the 50th Anniversary of the Universal Declaration of

The Documentation Centre at the Secretariat, which for many years remained closed,[53] has recently been opened and staffed.

(a) Role of Commissioners

Commissioners themselves also have a duty to promote the Charter. They are assigned particular African states to visit[54] and are required, by the Rules of Procedure, to produce a report on their intersessional activities at each session.[55] Many Commissioners take this opportunity to visit Western European countries as well.[56]

(b) Seminars

The Commission has organised a number of seminars[57] in collaboration with NGOs or other institutions such as the United Nations Centre for Human Rights.[58] Reports on such events are not always produced by the Commission, although they may be provided by NGOs.[59] The Commission's practice of holding its sessions in different states also raises its profile.[60]

Human Rights could be celebrated, *Celebration of the 50th Anniversary of the Universal Declaration of Human Rights*, DOC/OS/29 (XXIII).

[53] See *Eighth Annual Activity Report*, above n. 39 at para. 27.

[54] Even if the state has not ratified the Charter, see *Distribution of Countries for Commissioners of the African Commission of Human and Peoples' Rights for Promotional Activities as at January 1996*, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights* (1995–16), ACHPR/RPT/9th; AHG/207 (XXXII), Annex VI; ACHPR/DIST/COUN/XIX; *One Decade of Challenge*, above n. 35 at 20. The Commission explained that it allocates countries to Commissioners on the basis of nationality, language and distance from their country of residence: *Geographical Distribution of Countries Among Commissioners for Promotional Activities*, DOC/OS/36e(XXIII).

[55] Rule 87(3). This provision was not contained in the previous Rules of Procedure.

[56] E.g. *Intersession Activity Report of the Chairman of the African Commission, November 1989–April 1990*, *Third Annual Activity Report of the African Commission on Human and Peoples' Rights* (1989–90), ACHPR/RPT/3rd, Annex VI.

[57] Some of these have been listed for years but have never taken place. This issue was discussed at the 22nd session; see also Viljoen, above n. 44 at para. 3.3.5.

[58] The collaborating partner is often required to find the financial support. Seminars that have been held include: Workshop on Impunity in Africa, Ouagadougou, Burkina Faso, 22–23 Mar. 1996, with International Centre for Human Rights and Democratic Development; Prison Conditions in Africa, Kampala, Uganda, 19–21 Sept. 1996, with Penal Reform International; Mechanism for Early Warning in Emergency Situations under Article 58 of the African Charter, Nairobi, Kenya, 23–25 July 1996, with Interights.

[59] The Commission has produced some reports on seminars held: *Conclusions and Recommendations of the Seminar on National Implementation of ACHPR into the Internal Legal Systems in Africa*, 26–30 Oct. 1992, Banjul, *Sixth Annual Activity Report*, above n. 36 at Annex VIII; *Final Report on the African Conference on Journalists and Human Rights in Africa*, Tunis, 31 Oct.–1 Nov. 1992, *ibid*., Annex IX; *Conclusions of the Seminar on Protection of African Refugees and Internally Displaced Persons*, Harare, 16–18 Feb. 1994, *Seventh Annual Activity Report*, above n. 50 at Annex VII.

[60] See App. V for list of sessions.

2. State Reporting

Under Article 62 of the Charter states parties are required to send a report to the Commission every two years on the legislative and other measures that they have taken to implement the Charter.[61] This procedure has been described as the "backbone of the mission of the Commission"[62] in its monitoring of the implementation of the Charter by states. It is similar to reporting requirements found in other international instruments[63] and, like them, states have a poor record of submission, with only 23 states having submitted their initial reports under the African Charter.[64] Those reports sent have been of varying quality,[65] which has been attributed, in part, to the lengthy guidelines produced by the Commission,[66] which are thus in the process of being amended. The Commission has now produced a two-page document which summarises outcomes of seminars held a number of years ago on the issue. It sets out a list of 11 points of which states should take account in compiling their reports.[67]

The Commission mandated itself[68] to examine the reports under Article 62.

[61] Sometimes this is viewed as part of the promotional function of the Commission and sometimes as part of its protective function. This discussion is relevant to an understanding of the amicable/judicial dichotomy discussed in Chap. 6.

[62] I. Badawi El-Sheikh, "The African Commission on Human and Peoples Rights: Prospects and Problems" (1989) 7 NQHR 272–3, at 281.

[63] E.g. ICCPR, Art. 40; ICESCR, Art. 16; ICERD, Art. 9.

[64] See List of Documents of the Commission, attached. Initial Reports have been submitted by: Libya, Rwanda, Tunisia, Egypt, Tanzania, The Gambia, Zimbabwe, Senegal, Nigeria, Togo, Ghana, Benin, Cape Verde, Mozambique, Mauritius, Seychelles, Algeria, Sudan, Chad, Guinea and Namibia, South Africa and Burkina Faso: *Status of Submission of State Periodic Reports to the African Commission on Human and Peoples' Rights as at 31 January 1990*, DOC/OS/INF.10(XXV). Mali submitted its report, although it was not examined, at the 25th session, Final Communiqué of the 25th Ordinary Session of the African Commission on Human and Peoples' Rights, DOC/OS(XXV)/111/Rev.1, para. 7. Most reports were submitted late. Only 3 second reports have been sent, by The Gambia, Tunisia and only one 3rd report, Zimbabwe submitted a joint second and third periodic report. The *Eleventh Activity Report*, above n. 12 at para. 16 and Annex I is confusing in listing which reports have been submitted and examined. The Commission has adopted a resolution on the issue, Draft Resolution on Overdue Reports for Adoption, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights* (1991–2), ACHPR/RPT/5th, Annex IX. Letters have also been sent from the Chairman encouraging states to comply with their reporting requirements, e.g. Letter of reminder by the Chairman of the Commission sent to States Parties, *Second Annual Activity Report*, above n. 50 at Annex XIV. In relation to other international organs, see J. Hatchard, "Reporting under International Human Rights Intruments by African Countries" (1994) 38(1) *Journal of African Law* 61–3.

[65] E.g., from a few pages with no accompanying constitution or other documents, to the Zimbabwe report which was considered by the Commission to be the model report, a bulky document sent with supporting materials. See in general Danielson, above n. 23.

[66] *Guidelines for National Periodic Reports*, *Second Annual Activity Report*, above n. 50, Annex XII.

[67] Amendment of the General Guidelines for the Preparation of Periodic Reports by States Parties, DOC/OS/27(XXIII). See discussion at various sessions: Agenda of the Twenty-First Ordinary Session (15–24 April 1997), *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights* (1996–7), ACHPR/RPT/10th, Annex III; Doc.OS/1(XXI) Rev.IV, item 7e; 23rd Session Transcripts.

[68] Recommendation on Periodic Reports, *First Annual Activity Report*, above n. 21, Annex IX.

Questions are sent to the state and it is invited to send a representative to present the report to the Commission at its next session. In practice the questions may not be sent in time and representatives may not appear, thus postponing examination for up to several years.[69] As a result, at the twenty-third session the Commission decided that those reports of states which failed to send representatives would be examined *in absentia*.[70] The aim of the procedure is to create a "constructive dialogue" between the Commission and the state.[71]

There is little, if any, follow-up to these procedures. The Commission does request that states provide answers to the questions posed in writing and send these to the Commission, and has even on one occasion said that these would then be published.[72] The Commission has, however, never made any public comments about the reports, their contents or the responses to the questions.[73]

3. Protective

(a) Procedures under the African Charter

The inter-state communication procedure is set out in Articles 47 to 54 of the Charter. This enables states to petition the Commission in the event of violations of the Charter. There is no indication from the Commission that this procedure has been used to its full extent, although there are a number of suggestions that it could be.[74]

In respect of communications from entities other than States, the only reference in the Charter is in Articles 55–59 which are merely entitled "other communications". There is no consensus over whether the Commission has judicial powers and, if so, what these are, and this confusion undermines its

[69] See further Chap. 6.C.3.

[70] At the 23rd session at which representatives of Chad and Seychelles failed to attend, a decision was taken to examine their reports at the following session: see Final Communiqué of the 23rd session, above n. 42 at para. 13. In its *State Reporting Procedure*, Information Sheet No. 4, at 11, the Commission affirmed that reports would be examined after the state had been sent two notifications and failed to attend. The same decision was taken at the 24th and 25th sessions but the reports were not examined. However, in relation to Seychelles, in its Final Communiqué of the 25th Session, above n. 64, at para. 7, the Commission "deplored" this lack of representation and it passed a Resolution Concerning the Republic of Seychelles Refusal to Present its Initial Report (no reference) where it held that "such persistent behaviour represents a deliberate violation of the Charter" and "firmly condemned this unspeakable behaviour". It invited the OAU AHSG to "express their disapproval of such a persistent refusal that amounts to a deliberate violation" and to consider "appropriate measures" to be taken against it.

[71] Guidelines for National Periodic Reports, above n. 66 at para. 1. See further discussion in Chap. 6.C.3.

[72] See 22nd Session Transcripts, 6.

[73] The issue was discussed at the 23rd session but no conclusions reached, see 23rd Session Transcripts. This is in contrast to the UN Human Rights Committee which now adopts concluding observations on reports, see UN Doc.A/47/40 (1994) at 18, para. 45.

[74] See further, Chap. 6.B.5b.

effectiveness.[75] An interpretation of the Charter which does not authorise the Commission to deal with communications on an individual basis, but requires it to submit cases to the Assembly of Heads of State and Government (AHSG), would appear to deprive the Commission of the ability to make binding decisions. The Commission thus would have only investigative powers before referring the matter to a political organ,[76] whose ability to protect human rights is questionable,[77] particularly in the case of emergencies.[78]

In contrast, because the provisions of the Charter are not clearly defined, it is argued that this gives the Commission very wide powers:

> the nature of influence and power wielded at this level by the Commission is unlimited and there is no express provision in the Charter to the contrary.[79]

The Commission has developed a practice since its third session when it established a procedure for dealing with individual communications[80] and has now considered over 200 communications and taken decisions on the merits on a number of them.[81]

It is of relevance to an understanding of personality in international law, discussed fully in Chapter 6, that individuals and NGOs can petition the Commission alleging violations of rights in the Charter on their own or on another's behalf. The communication will be registered under a number[82] and the state against which it is directed informed and sent a copy of the allegations for its comments on admissibility. The comments should be received by the Commission within a maximum of three months[83] but the Commission often allows more time.[84] The Commission

[75] The provisions are said to be "grossly inadequate": O. Ojo and A. Sesay, "The OAU and Human Rights: Prospects for the 1980s and Beyond" (1989) 8(1) *HRQ* 89–103, at 97.

[76] S. Mumba, above n. 14 at 109; H. Scoble, above n. 16 at 195, E. Ankumah, above n. 16 at 25.

[77] P. Amoah, above n. 23 at 237. Exactly what the Assembly does afterwards is not clear in either case: U. O. Umozurike, "The African Commission on Human and Peoples' Rights" (1991) 1 *Review of the African Commission* 5, at 11.

[78] The procedure of referring to a higher body is seen as time consuming and insufficiently prompt: E. Ankumah, "The Emergency Provision of the African Charter on Human and Peoples' Rights" (1994) 4 *Review of the African Commission on Human and Peoples' Rights* 47–55, at 48; P. Amoah, above n. 23 at 232.

[79] E. Bello, above n. 15 at 98. This is in relation to inter-state communications. See R. Gittleman, "The Banjul Charter on Human and Peoples' Rights: A Legal Analysis" in C. Welch and R. Meltzer (eds.), above n. 16 at 688. S. Ropke, *The African Commission on Human and Peoples' Rights—A Case Study* (Danish Centre for Human Rights, Copenhagen, 1995), at 12, notes that Art. 59 suggests the Commission's decisions are not legally binding. However, the Commission has taken decisions which are, arguably now, no different from the non-legally binding decisions of the European or American Commissions: Bello at 127, argues that the production of an *Annual Activity Report* permits the Commission to record what it chooses, including problems and complaints.

[80] *First Annual Activity Report*, above n. 21 at para. 26.

[81] Published in the *Annual Activity Reports*, from the seventh onwards.

[82] Some communications recorded were later found not to be communications at all, e.g. No. 63/92, *Congress for the Second Republic of Malawi* v. *Malawi*, about a "general situation".

[83] Rule 117(4). This explicit time limit was added to the previous Rules which merely stated the Commission should decide the time available.

[84] E.g. see Nos. 25/89, 47/90, 56/91, 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah* v. *Zaire*.

considers the question of admissibility in light of the information received by the parties.

The admissibility requirements are set out in Article 56 of the Charter and include requirements that the authors are not anonymous, the communication is compatible with the African Charter and the Charter of the OAU and is not submitted in disparaging language, it is not based exclusively on news from the media, should have exhausted local remedies and should be submitted within a reasonable time from this occurring, and without having been settled by other international organs.[85]

(b) Serious or Massive Violations

The requirement to meet some of the admissibility requirements will be waived if there is "*prima facie* evidence" of a series of serious or massive violations[86] in relation to Article 58 of the Charter.[87]

The Commission has stated that the justification given for this waiver by the Commission is that "the requirement of exhaustion of local remedies is founded on, amongst others, the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international tribunal".[88] As a result, "in view of the vast and varied scope of the violations alleged and the large number of individuals involved, the Commission holds that remedies need not be exhausted and, as such, declares the communications admissible".[89]

There have been a number of cases where serious or massive violations have been found and where the Commission has held there to have been violations of a number of Articles of the Charter.[90] In Communication No. 47/90[91] the Commission held that allegations of torture, detention and arbitrary arrests "admits evidence of the existence of a series of serious or massive violations of human and peoples' rights".

[85] The previous Rules of Procedure used to have slightly different requirements in Rule 104, but these have now been amended to refer to just Art. 56.

[86] See R. Murray, "Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms" (1999) 17(2) *NQHR* 109–33.

[87] In relation to the ECHR, the applicant can complain of an administrative practice if he finds *prima facie* evidence of such and of being affected by it: *Kurt* v. *Turkey*, Judgment of 25 May 1998, [1998] Reports of Judgements and Decisions Vol. III; *Mentes and Others* v. *Turkey*, Judgement of 28 Nov. 1997, [1997] Reports of Judgements and Decisions, Vol. III; *Donnelly* v. *UK* Nos. 5577–83/72 (1975) 43 CD 122, at 145–6; *Norris* v. *Ireland*, No. 10581/83 (1985) 44 DR 132, see D. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995), at 634–5.

[88] Communication Nos. 25/89, 47/90, 56/91, 100/93 (joined), above n. 84.

[89] *Ibid*.

[90] E.g., Nos. 16/88, 17/88, 18/88 (joined), *Comité Culturel pour la démocratie au Bénin, Badjogoume Hilaire, El Hadj Boubacar Diawara* v. *Benin*, and Nos. 64/92, 68/92 and 78/92 (joined), *Krischna Achuthan, Amnesty International, Amnesty International* v. *Malawi*.

[91] No. 47/90, *Lawyers Committee for Human Rights* v. *Zaire*.

In these communications the Commission referred the cases to the AHSG under Article 58(1) for their consideration. There is no evidence available publicly to suggest that the AHSG has required the Commission to take a subsequent action in response and the Commission has not felt that it can take the initiative. In those cases, however, it thus takes a decision on the merits of the communication and publishes the decisions in its *Activity Reports*.[92]

(c) Procedure

The procedure for dealing with individual communications and those which reveal serious or massive violations is thus the same. If the case is declared inadmissible the parties will be informed accordingly and the case closed.[93] If it is declared admissible the parties will be informed and asked to submit their comments on the merits[94] before the next session which they are invited to attend, where such issues will be considered. The state party is given three months to submit its responses to the communication[95] and any comments received will be sent to the author of the communication for their response within a time limit fixed by the Commission.[96]

The Commission will then proceed to consider the case on its merits. A number of parties do attend the sessions to present their case, although this is not obligatory and the hearing will take place even if only one party is present. The Commission has held that it will also take a decision even if the state has adduced no comment.[97]

These decisions are then sent to the parties and published in the following *Annual Activity Report*.[98]

The Commission has, on a number of occasions, used its ability to take interim measures to protect a victim in accordance with Rule 111[99] and has called on states to ensure a remedy for the victim of the violation.[100]

[92] See *Seventh Annual Activity Report*, above n. 59; *Eighth Annual Activity Report*, above n. 39.

[93] Rule 118. The case can be opened again later by the Commission.

[94] Rule 119(1).

[95] This was set at four months in the previous Rules of Procedure, Rule 117(2).

[96] Rule 119(3).

[97] See Chap. 6.B.

[98] The Rules of Procedure require only that the decision be communicated to the Secretary General of the OAU and the state concerned: Rule 120(2). In practice, the Commission has informed both parties.

[99] "Before making its final views known to the AHSG on the communication, the Commission may inform the State party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation . . . the expression of its views on the adoption of those provisional measures does not imply decision on the substance of the communication". E.g., in communication Nos. 83/92, 88/93 and 91/93 (joined), *Jean Y. Degli (on behalf of N. Bikagni), Union Interafricaine des Droits de l'Homme, Commission Internationale de Juristes* v. *Togo*, the Commission took such measures "towards ensuring the security of Corporal . . . Bikangi to avoid any irreparable prejudice inflicted on the victim of the alleged violations". It is not entirely clear what these provisional measures entail, but it has sent letters to Nigeria requesting that it not execute individuals until the Commission had the opportunity to consider the case which was pending before it, *Human Rights Report on the Situation in Nigeria*, letter of 1 Nov. 1995, ACHPR/COMMU/AO44 (6).

[100] See Chap. 6.B.2(a).

There is no policy for follow-up of the decisions, although there have been a number of missions sent.[101] The publicity that the *Activity Report*s receive is minimal, the Commission often not having sufficient resources to disseminate them widely and relying on NGOs and others to do this for it. It is not clear to what extent governments have implemented the Commission's decisions, although the Commission has stated that, with the exception of one, "the attitude of State Parties . . . has been to generally ignore its recommendations".[102] It has made a series of recommendations to overcome this including interpreting the confidentiality provision of Article 59(1) more dynamically; sending its members to gain information from states on whether they had complied with any recommendations made; incorporating any violations found into the agenda of the OAU Committee of Ambassadors and Council of Ministers; issuing press releases; and setting a time limit of 90 days in which the state has to comply with the decision.[103]

(d) Missions

The Commission has also undertaken a number of missions to states for protective reasons, including to Togo,[104] Nigeria,[105] Senegal,[106] Mauritania[107] and Sudan.[108] The reports of only two are publicly available at present,[109] although they do not include any decision on the violations alleged by the communications which prompted the visit. The manner in which the Commission has undertaken the missions has been criticised by NGOs which claim that the

[101] See (d) below. In its *Eleventh Activity Report*, above n. 12, the Commission also noted the need to follow up its decisions and in its *Communication Procedure*, Information Sheet No. 3, at 17, it noted that a series of letters were sent out to states calling on them to implement the decisions. It has said that it would be considering decisions taken on some communications in its mission to Nigeria, No. 87/93, *Constitutional Rights Project (in respect of Zamani Lakwot and 6 others)* v. *Nigeria*. No report of this mission has been produced.

[102] *Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach*, DOC/OS/50b(XXIV), 1.

[103] *Ibid*.

[104] No report has been produced on this mission. During the 17th session in Togo members of the Commission met with the President and discussed issues of human rights in the country with him as well as a document that had been given to the Commission by an organisation alleging violations of rights by the administration: *Eighth Annual Activity Report*, above n. 39 at para. 13. In its Draft Agenda, 24th Ordinary Session (no reference), para. 12, the Commission said it would be considering "follow-up of mission reports to Senegal, Mauritania and Togo".

[105] 7–14 Mar. 1997, *One Decade of Challenge*, above n. 35 at 21; *Tenth Annual Activity Report*, above n. 67 at 4.

[106] 1–7 June 1996, *ibid*.

[107] 19–27 June 1996, *ibid*.

[108] 1–7 Dec. 1996, *ibid*. It has stated that it has also taken missions to Lesotho, Zimbabwe, Malawi and Botswana, but it is not clear when these were taken and for what purpose: *One Decade of Challenge*, above n. 35 at 21.

[109] *Report on Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights (1–7 June 1996)*, *Tenth Annual Activity Report*, above n. 67, Annex VIII; *Report of the Mission to Mauritania of the African Commission on Human and Peoples' Rights, Nouakchott, 19–27 June 1996*, *Tenth Annual Activity Report*, above n. 67, Annex IX.

missions spent too much time with government officials, wrongly used government transport and facilities and did not have a clear mandate.[110]

(e) Enforcement of Decisions

The initial absence of a court and of other clear enforcement powers or decision-making procedures was considered to be one of the major shortcomings of the Charter, preventing states from being compelled, jurisprudence from being developed, remedies from being given and the necessary publicity from being made.[111] A court was seen as the required solution to these problems by depoliticising the Commission and providing final binding judgments.[112] There are some suggestions, however, that the Commission could avoid the problems caused by the present deficiency through the use of Article 46.[113] This is a generous provision giving great powers of investigation, more so than exist in other international bodies, and can be used to allow oral representation by victims of violations, on-site missions and the presentation of evidence.[114] It is questionable, however, whether the Commission can act on its own initiative without the requirement for submission of complaints from other entities.[115]

The Commission has adopted a number of resolutions against particular countries[116] and three thematic *rapporteurs* have been appointed by the Commission.

(f) Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

Commissioner Hatem Ben Salem was appointed to this position at the fifteenth session.[117] He was mandated to set up a reporting system of extrajudicial exe-

[110] Interights, Constitutional Rights Project, RADDHO, *Missions for Protective Activities*, submitted to the 21st session, 1997.

[111] P. Amoah, above n. 23 at 237; E. Ankumah, above n. 16 at 75.

[112] K. Ebert, "Progressive Features of the Actual Human Rights Development in Africa, with Particular Reference to the Banjul Charter", Public Lecture, University of Bophuthatswana, Institute of African Studies, 10 April 1993, at 25; E. Ankumah, above n. 16 at 194; R. Sock, "The Case of an African Court on Human and Peoples' Rights: From Concept to Draft Protocol over 33 Years" [1994] *African Topics*, March/April, at 10; B. Weston *et al*., "Regional Human Rights Regimes: Comparison and Appraisal" (1987) 20 *Vanderbilt Journal of Transnational Law* 585–637, at 636. The moves in this direction will be considered below at E. See in general Chap. 6.

[113] E. Ankumah, above n. 16 at 48.

[114] Bello, above n. 15 at 79; Ropke, above n. 79 at 41; Odinkalu and An-Na'im, above n. 48 at 7; Ramaga, above n. 23 at 358. The fact that the Commission has taken missions and permitted parties to the individual communications to attend the sessions gives some indication that it has been creative and used this provision.

[115] E. Ankumah, above n. 78 at 54.

[116] E.g. Resolution on Zaire, *Tenth Annual Activity Report*, above n. 67, Annex XI; Resolution on Burundi, *Ninth Annual Activity Report*, above n. 54, Annex VII; Resolution on Liberia, *Ninth Annual Activity Report*, above n. 54, Annex VII; and in general, *Eighth Annual Activity Report*, above n. 39, Annexes VII and VIII.

[117] Final Communiqué of the 15th Ordinary Session, Banjul, The Gambia, 18–27 April 1994, reprinted in International Commission of Jurists, *Participation of Non-Governmental Organizations in the Work of the African Commission on Human and Peoples' Rights. A*

cutions; collaborate with the authorities and NGOs to find those responsible; make recommendations to the Commission on how it should intervene; liaise with states for the punishment of the authors and for rehabilitation of victims; and to consider the creation of a fund for compensation.[118] In his oral report to the twenty-first session he stated that he had contact with NGOs and was initially concentrating on the situation in Rwanda and Burundi.[119] There was considerable concern that not enough was being done by the Commissioner in his role as *rapporteur*.[120] He submitted a written report which is published in the *Tenth Annual Activity Report*[121] and at the twenty-third session presented a report to the public sitting.[122] His latest report was available in French only.[123]

(g) Special Rapporteur on Prisons and Conditions of Detention

Commissioner Dankwa was appointed to this position at the twentieth session[124] and has presented reports to the twenty-first and twenty-second sessions.[125] He has visited places of detention in Zimbabwe, Mali and Mozambique as part of his mission and made recommendations in that respect.[126] It has been affirmed that a visit had also been made to Madagascar.[127]

Compilation of Basic Documents, October 1991–March 1996 (International Commission of Jurists, Geneva, 1996), 133–38, para. 20.

[118] *Rapport présenté par M. Hatem Ben Salem, Rapporteur Special* (to 25th Session), (no reference).

[119] 21st Session Transcripts.

[120] See Amnesty International, *African Commission on Human and Peoples' Rights. The Role of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, AI Index, IOR 63/05/97.

[121] *Progress of the Report on Extrajudicial, Summary or Arbitrary Executions, Rwanda, Burundi*, *Tenth Annual Activity Report*, above n. 67, Annex VI.

[122] This was not available in writing and, although mentioned in the *Eleventh Activity Report*, was not reproduced in it. It was noted, however, that problems had been encountered by the Special *Rapporteur* in the carrying out of his mandate, including the absence of sufficient information from states and the lack of co-operation by particular governments.

[123] Above n. 118.

[124] Final Communiqué of the 20th Ordinary Session of the African Commission on Human and Peoples' Rights, Grand Bay, Mauritius, 21–31 Oct. 1996, ACHPR/FIN/COMM/XX, para. 18.

[125] The Special *Rapporteur* on Prisons has also produced a written report: see *Report of Special Rapporteur on Prisons and Conditions of Detention to the 21st session of the African Commission*, *Tenth Annual Activity Report*, above n. 67, Annex VII.

[126] See, in relation to the former, *Report on Visit to Prisons in Zimbabwe by Professor EVO Dankwa, Special Rapporteur on Prisons and Conditions of Detention*, *Tenth Annual Activity Report*, above n. 67, Annex VII. A report on his visit to prisons in Zimbabwe has been published with the assistance of NGOs: *Prisons in Zimbabwe. Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa*, Series IV, No. 1. See also *Prisons in Mali. Report of the Special Rapporteur on Prisons and Conditions of Detention to the 22nd Session of the African Commission on Human and Peoples' Rights*, Series IV, No. 2; *Prisons in Mozambique. Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa*, Series IV, No. 3.

[127] 23rd Session Transcripts, 16–17.

(h) Special Rapporteur on Women's Rights

The third thematic rapporteur on women's rights[128] was mandated to study the situation of the rights of women in Africa; draft guidelines for state reports on women's rights; monitor the implementation of the Charter by states, noting violations of women's rights and preparing a report on the subject; assist African governments in implementing protection of such rights; encourage NGOs and act as a link between interested bodies and the Commission, in this respect, and collaborate with other Special *Rapporteurs*.[129] In a report given to the twenty-fourth session the Special *Rapporteur* indicated logistical problems prevented her from carrying out her work.[130] The appointment is being considered in conjunction with the adoption of an Additional Protocol on the same issue and various drafts have been produced and are in the process of debate.[131]

(i) Early Warning Mechanism

The Commission is in the process of considering a mechanism for dealing with emergency situations under Article 58(3). A draft document was produced by one Commissioner at the twenty-first session[132] which required that the Commission "act promptly in cases of massive violations of human rights or emergency situations".[133] At the twenty-third session, after an intervention by the representative of Amnesty International, the Commission sent a fax on the same day to the authorities of Rwanda requesting that they postpone the execution of a number of individuals until the Commission had had the opportunity to consider whether their trials were in accordance with Article 7 of the Charter.[134] It refused to respond in a similar manner to a subsequent request for

[128] Commissioner Ondziel-Gnelenga was appointed to this position at the 23rd session: see Final Communiqué of the 23rd Session, above n. 42 at para. 11. See also *Ninth Annual Activity Report*, above n. 54 at para. 19, which shows that the appointment could have taken place as early as the 20th session. A Resolution adopted at the 25th session confirmed that she will continue in her position until Apr. 2000, Resolution on the Extension of the Mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa (no reference).

[129] Draft Terms of Reference for the Special Rapporteur on the Rights of Women in Africa, DOC/OS/34c(XMII), Annex II. The mandate was for the period until the year 2002.

[130] *Report of the Special Rapporteur on Women's Rights*, DOC/OS/57(XXIV).

[131] Discussions have taken place at a meeting of NGOs and Commissioners in Jan. 1998: see *Report of the First Meeting of the Working Group on the Additional Protocol to the African Charter on Women's Rights*, DOC/OS/34c (XXIII). Documents produced include: Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, DOC/OS/34c (XXIII), Annex. This has been amended by the Dakar Draft Protocol on Women's Rights, June 1999 (no reference).

[132] After a seminar held by Interights. *Mechanism for Urgent Response to Human Rights Emergencies under Article 58 of the African Charter on Human and Peoples' Rights* (no reference).

[133] *Ibid*., para. 1.

[134] See 23rd Session Transcripts. The executions took place. See also *Eleventh Activity Report*, above n. 12 at para. 16.

action from an NGO in Sierra Leone highlighting demonstrations and killings in that country.[135]

4. Interpretative

The Commission also has a broad interpretative function, similar to an advisory opinion jurisdiction. The requirement in Articles 60 and 61 that it take account of other international and African laws and customs is said to provide the Charter with an African touch and is unusual in its inclusion of non-binding concepts and the jurisprudence of other bodies.[136]

The Commission has adopted a number of recommendations and resolutions where it has interpreted various rights in the Charter, including on the right to fair trial and freedom of association[137]. Other documents such as the Draft Additional Protocol on Rights of Women[138] and Guidelines for National Periodic Reports[139] also develop the Charter further. In the case of the latter, it is apparent that much of the elaboration regarding Articles 15–18 of the Charter is a direct reference to provisions of the International Covenant on Economic, Social and Cultural Rights, and those of the Universal Declaration of Human Rights.[140] In relation to other provisions on peoples' rights, discrimination against women and on apartheid, the Commission states clearly that it takes its interpretation directly from the Conventions adopted by the United Nations on those particular topics.[141] This is to the extent that it almost copied verbatim from the provisions on these particular instruments.[142]

[135] The *Eleventh Activity Report*, above n. 12 at para. 12 notes that the Chairman intervened in respect of emergency situations with the governments of Mauritania and Djibouti, but no further information is given.

[136] Bello, above n. 15 at p. 82; U. O. Umozurike, "The African Charter on Human and Peoples' Rights" (1983) 77 *AJIL* 902–12, at 910; Gye-Wado, above n. 14 at 194; Okere, above n. 15 at 149; Bondzie-Simpson, above n. 14 at 653.

[137] Resolution on the Right to Freedom of Association, *Fifth Annual Activity Report*, above n. 64, Annex VII; Resolution on the Right to Recourse Procedure and Fair Trial, *ibid*., Annex VI; Resolution on the Integration of the Provisions of the Charter into National Laws of States, *Second Annual Activity Report*, above n. 50, Annex XI; Resolution on Electoral Process and Participatory Governance, *Ninth Annual Activity Report*, above n. 54, Annex VII.

[138] Above n. 131.

[139] Above n. 66.

[140] E.g. paras II.10–16 of the *Guidelines for National Periodic Reports*, above n. 66, clearly mimic Art. 8 of the ICESCR. In addition, the order in which the rights are dealt with in the *Guidelines* follows the sequence of the Arts. in the Covenant.

[141] See *Guidelines for National Periodic Reports*, above n. 66, Parts V, VI, VII. International Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 Dec. 1979, into force 3 Sept. 1981, (1980) 19 ILM 33, 24 UN GAOR Supp (No. 49); ICESCR, above n. 1; International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 Dec. 1965, in force 4 Jan. 1969, 660 UNTS 195, reprinted (1966) 5 ILM 352; International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 Nov. 1973, in force 18 July 1976, GA Res. 3068 (XXVIII), reprinted (1974) 13 ILM 50.

[142] E.g. *Guidelines for National Periodic Reports*, above n. 66, in relation to ICERD, the *Guidelines*, at para. V.B.7, states should "provide specific information in relation to Articles 2 to 7,

As noted above, provisions of the Charter were seen to be unique in their inclusion of many types of rights and duties in one document. This is relevant in the context of this book to a discussion of the supposed Western notion of human rights. There was much speculation about the nature of such rights[143] prior to the Commission providing jurisprudence on their content. The Charter sees a balance between economic, social and cultural rights, on the one hand, and civil and political rights, on the other, the former giving the latter meaning.[144] It is argued, however, that there should be a focus on economic, social and cultural rights, reflecting the need to eliminate poverty and the socio-economic problems in many African states.[145] However, the jurisprudence of the Commission has concentrated on civil and political rights, with most cases involving violations of Articles 6 and 7,[146] although some decisions have been adopted on economic, social and cultural rights as well as peoples' rights.[147] Individual duties have also received some attention.[148]

"Clawback clauses"[149] that exist in relation to some rights will be examined below.[150]

5. Other Tasks Assigned to the Commission

Article 45(4) enables the AHSG to request the Commission to undertake other tasks for it. It is not entirely clear what these may entail, but it is notable that the Commissioners have been requested on a regular basis to observe elections in various African countries as part of OAU missions.[151]

in accordance with the sequence of those articles and their respective provisions"; in relation to apartheid, "that apartheid is a crime against humanity and that inhuman acts resulting from policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in Article II of the Convention . . .": *ibid*., para. VI.2, Art. 1(1) of the Convention.

[143] E.g. see in general Bello, above n. 15.

[144] Gittleman, above n. 79 at 687; Welch, above n. 14 at 46; S. Dayal, "Developing Countries and Universal and Regional Approaches to Human Rights in the light of Changing Context and Perspectives" in K. Ginther and W. Benedek, above n. 15 at 108. Ankumah, above n. 16 at 143 states, albeit too optimistically, that this is as though their equal importance is already an "accepted principle" of international law.

[145] D'Sa, above n. 15 at 121; Gittleman, above n. 79 at 677.

[146] This may be due to the fact that NGOs have not been submitting cases on these particular rights.

[147] Chap. 4.E.

[148] See Chap. 4.C.3.

[149] A clawback clause has been defined as "one that permits, in normal circumstances, breach of an obligation for a specified number of published reasons": R. Higgins, "Derogations under Human Rights Treaties" (1976–7) 48 *BYIL* 281–320, at 281.

[150] See Chap. 5.A.2.

[151] See, e.g. *Ninth Annual Activity Report*, above n. 54 at para. 15: "[t]wo Commissioners who were part of the OAU observer teams presented reports on elections in Tanzania and the Comoro Islands".

E. AN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Amendments to the Charter are permitted by Article 68[152] and most importantly, in this respect, there have been recent attempts to set up an African Court on Human and Peoples' Rights.[153] This is essential to a discussion of the features of amicable and judicial approaches. This was initiated by a resolution of the OAU[154] and was followed by the creation of three draft protocols: firstly in Cape Town in 1995, at a meeting attended by both governments and NGOs, the proposals of which were amended in Mauritania at the second meeting, of legal experts, in April.[155] The matter received the attention of the twenty-second session of the African Commission, following which a third legal experts' meeting was held in December 1997[156] which produced a final draft protocol.[157] This Protocol was presented to the OAU summit in June 1998 where it was adopted, with the signature of 30 States.[158] Two States, Burkina Faso and Senegal, have now ratified the Protocol with a number of others promising to do so shortly.[159]

The adopted (Addis) Protocol states that the Court will be composed of 11 judges, nationals of OAU member states,[160] nominated by the states party to the Protocol[161], taking into account a gender and a geographical balance.[162] They

[152] This is possible once requested by a party to the Charter and approved by a simple majority of states. As noted previously, an Additional Protocol on the Rights of Women is in the process of being developed: see D.3(h) above.

[153] I. Osterdahl, "The Jurisdiction Rationae Materiae of the African Court on Human and Peoples' Rights: A Comparative Critique" (1998) 7 *Revue Africaine des Droits de l'Homme* 132–50. See also G. Naldi and C. Magliveras, "The Proposed African Court on Human and Peoples' Rights—Evaluation and Comparison" (1996) 8(4) *AJICL* 944–69, on earlier drafts of the Protocol.

[154] AHG/Res.230 (XXX) adopted by the AHSG in 1994.

[155] Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Draft (Cape Town) Protocol), Cape Town, 1995, OAU/LEG/EXP/AFC/HPR (I); Draft (Nouakchott) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Nouakchott, 1997, OAU/LEG/EXP/AFCHPR/PROT (2).

[156] *Report of the Experts' Meeting, Third Government Legal Experts' Meeting (Enlarged to include Diplomats) on the Establishment of the African Court on Human and Peoples' Rights*, 8–11 Dec. 1997, Addis Ababa, Ethiopia, OAU/LEG/EXP/AFCHPR/RPT.(III) Rev.1.

[157] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Addis) Protocol), Addis Ababa, Dec.r 1997, OAU/LEG/MIN/AFCHPR/PROT (I) Rev.2. See also *Report of the Secretary General on the Conference of Ministers of Justice/Attorneys General on the Draft Protocol on the Establishment of the African Court on Human and Peoples' Rights*, 23–27 Feb. 1998, CM/2051 (LXVII). A copy of the Protocol is provided in App. VI.

[158] It will require the ratification of 15 states before it can come into force: Art. 34(3), (Addis) Protocol, above n. 157, "Nigeria reminded the meeting of its position in Nouakchott, namely that is preference for a higher number of ratifications to make the Court more credible": *Report on December Experts' Meeting*, above n. 156 at para. 35.

[159] The 25th session discussed ways in which the Commission could expedite the process of ratification. The Commission decided that it would write to states and request each of its Commissioners to make personal contacts with those governments to which they were assigned: 25th Session Transcripts, 65–7.

[160] Art. 11.

[161] Arts. 12(1) and 13.

[162] Arts. 14(2) and 12(2) and 14(3), respectively.

will be part-time, in general elected for six years[163] and their independence is to be ensured.[164] The Court has the ability to give advisory opinions on the request of OAU states, and the OAU or African organs.[165] It will also have a contentious jurisdiction where there is a presumption that proceedings will be heard in public although there will be a possibility for hearings to be held in private[166] and hear witnesses if necessary.[167] Those appearing before the Court may have free legal representation, but it does not say who should provide this.[168] The Court also has the ability to order the payment of compensation, and it may take provisional measures.[169] A judgment will be given by the Court within 90 days of completion of its deliberations[170] and judges may deliver dissenting opinions.[171] The decisions of the Court will be binding[172] and the Council of Ministers of the OAU is to monitor the implementation of the decision, thus injecting a political element into enforcement.[173]

There were several concerns expressed with the Draft (Nouakchott) Protocol which have not been altered by the final (Addis) Protocol.[174] First, the relationship with the Commission was not settled; the Protocol merely states that the Court will complement the protective role of the Commission.[175] It may be assumed that the Commission would thus first try to reach an amicable settlement and, if this failed, then the Court would take the case. However, there was also a provision in the (Addis) Protocol for the Court to reach amicable settle-

[163] Art. 15(1).

[164] Arts. 17 and 18. Art. 18 states that "the position of judge of the Court is incompatible with any activity which might interfere with the independence or impartiality of such a judge or the demands of the office" but leaves it to the Rules of the Procedure of the Court to determine. Art. 22 prevents a judge who is a national of any state which is a party to the case from hearing that case.

[165] Art. 4, at the request of a member state of the OAU, the OAU or any of its organs or any African organisation recognised by the OAU.

[166] Arts. 3 and 10.

[167] Art. 10(3).

[168] Art. 10(2), states that free representation may be possible if the "interests of justice so require".

[169] Art. 27(1) and (2), respectively.

[170] Art. 28(1).

[171] Art. 28(7), if "the finding of the Court does not represent, in whole or in part, the decisions of the judges".

[172] Art. 30.

[173] Art. 29(2). This is the same approach as that of the ECHR, which requires the Committee of Ministers to monitor execution of the judgment. See also H. J. Bartsch, "The Supervisory Functions of the Committee of Ministers under Article 54—a Postscript to Luedicke–Belkacem–Koç", in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension. Studies in Honour of Gerald J. Wiarda* (Heymanns Verlag KG, Koln, 1990), 47–54.

[174] These concerns were raised in discussion on the Court at the 22nd session: 22nd Session Transcripts.

[175] The preamble to the Protocol states that "attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights". Art. 2 states that the Court will "complement the protective mandate of the African Commission".

ment.[176] The only other indication was in Article 6 of the (Addis) Protocol which stated that the Court shall rule on admissibility of cases but it "may request the opinion of the Commission" and "may consider cases or transfer them to the Commission".[177]

There was also no agreement reached, at the time the (Addis) Protocol was adopted, concerning where the Court would sit. The *coup d'état* in The Gambia had raised the issue whether the Commission should remain there. After civilian elections this matter remained on the agenda, but several sessions have been held there.[178] It would doubtless be a controversial political decision to move the Commission elsewhere. However, if the Court were placed apart from the Commission, this would cause considerable communication difficulties. There were problems with placing the Court close to the headquarters of the OAU for fear of jeopardising its independence.[179] The (Addis) Protocol states that the seat would be determined by the Assembly from among states party to the Protocol.[180] There is concern that, given that the OAU has failed to finance the Commission effectively,[181] its ability to undertake its obligations in this respect towards the Court is doubted.

There have been ongoing concerns throughout the drafting process of the extent to which NGOs and individuals will have access to the Court.[182] The Draft (Cape Town) Protocol permitted such entities to petition the Court only on "exceptional grounds".[183] The Draft (Nouakchott) Protocol permitted their standing only in urgent cases or those with serious, systematic or massive

[176] Art. 9. See Chap. 6. Egypt noted at the Dec. experts' meeting that "the relationship between the Commission and the Court be set out in the Rules of the Procedure of the Court and approved by the Assembly", para. 17, *Report of the Meeting*, above n. 156. Note that the Eleventh Protocol to the ECHR also provides for the new Court to attempt a friendly settlement: Arts. 38–39. Harris, O'Boyle and Warbrick, above n. 87 at 711, state that the "friendly settlement procedure has not been compromised by the fact that cases are decided by a Court. There is every reason to suppose that the wide experience of the Commission in this area, as well as the attachment of contracting parties to the possibility of settlement, will exercise an important influence in this respect."

[177] Art. 6(1) and (3) respectively.

[178] E.g. the 22nd, 23rd and 24th sessions, Nov. 1997, Apr. 1998 and Oct. 1998 respectively. See Agenda of the 22nd Session, above n. 46 at para. 14.

[179] This was one of the reasons given for not having the Commission there in the first place: see Recommendation on the Headquarters of the African Commission Human and Peoples' Rights, *First Annual Activity Report*, above n. 21, Annex VI, "bearing in mind the quasi-legislative nature of the Commission . . . it is not desirable to have the Headquarters of the Commission where the political and administrative organs of the OAU are located".

[180] Art. 25. It does state that "it may convene in the territory of any member State of the OAU when the majority of the Court considers it desirable and with the prior consent of the State concerned", enabling the Court to rotate between states.

[181] *Sixth Annual Activity Report*, above n. 36.

[182] E.g. 22nd Session Transcripts. See *Report of Experts' Meeting* in Addis Ababa, above n. 156 at para. 17 which indicated the controversial discussions that it posed.

[183] Art. 6 of the Draft (Cape Town) Protocol, above n. 155: "the Court may, on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the Court, without first proceeding under Article 55 of the Charter". It could thus be argued that, provided the case had been through the Commission procedures, NGOs and individuals could then petition the Court.

violations[184] and only states or the Commission were to have standing before the Court in all cases.[185] In addition, the state would have to make a declaration saying they accepted the competence of the court in cases brought by individuals or NGOs[186] before access could be gained.[187] It was argued that this would substantially limit the protection accorded to individuals and, given that NGOs have submitted most of the communications, could inhibit the ability of the Court to be effective. At the December 1997 meeting a prolonged debate illustrated the lack of consensus over the status of individuals and NGOs.[188] The final decision, reflected in Article 5 of the (Addis) Protocol, held that the Commission, a state which had lodged a complaint at the Commission, one against which a complaint had been lodged and one whose citizen was a victim of a violation, would be permitted to submit cases to the Court.[189] In addition it also permitted African intergovernmental organisations to submit cases.[190] Article 5(3) also stated that "the Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it",[191] however States must still have made a declaration accepting the jurisdiction of the Court.[192]

When it came to suspending or removing judges, the final decision would not rest with the court, but with the AHSG.[193] There were also discrepancies noted by NGOs between the French and English versions of the Drafts.[194] The concerns raised and lack of clarity on several issues could be evidenced by the fact that there was no real consensus on the provisions of the draft Protocols of the Court during the three meetings.[195]

Several of these concerns are also pertinent in light of the recent changes to the European system as introduced by Protocol No. 11 which merged the

[184] Art. 6 of the Draft (Nouakchott) Protocol, above n. 155: "[t]he Court may entitle NGOs with observer status before the Commission, and individuals to institute directly before it, urgent cases or serious, systematic or massive violations of human rights".

[185] Art. 5, *ibid*.

[186] Art. 6, *ibid*.

[187] This used to be the position before the European Court of Human Rights under the ECHR, Art. 46 prior to the adoption of Protocol 11.

[188] *Report of Experts' Meeting*, Addis, above n. 156 at para. 7.

[189] Art. 5, above n. 157.

[190] Art. 5(1)e, above n. 157.

[191] Note the use of the word "may" in relation to NGOs and individuals alone, and not in relation to the states or the Commission. It would thus appear to be in the Court's discretion whether these entities can submit a case to it.

[192] Art. 34(6) reads, "[a]t the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State party which has not made such a declaration": (Addis) Protocol, above n. 157.

[193] Art. 19(2). It was apparent that this was subject to debate at the meetings and that there was no consensus on this issue. The report of the Experts' Meeting, above n. 156 at para. 25, notes that "Nigeria was of the view that the removal of judges should be done solely by the Assembly".

[194] This was pointed out by NGOs during the 22nd session, 22nd Session Transcripts.

[195] E.g. see *Report of Meeting, Cape Town*, above n. 156, para. 23; *Report on Second Governmental Experts Meeting, Nouakchott*, above n. 157, paras 21–25, 36–37; *Report of Experts Meeting, Addis Ababa*, above n. 157, paras 17, 19 and 25.

European Commission and its Court into a single judicial body, sitting in committees, chambers or plenary session.[196] It is believed that the changes will improve the previous procedures and provide for more efficiency, given the increasing workload of the existing organs and number of states to the ECHR. The new system, amongst other things, operates on a full-time basis, makes individual petitions mandatory[197] and abolishes the decision-making role, although not the supervisory function, of the political Committee of Ministers.[198]

[196] Above n. 6. See, in general, Harris, O'Boyle and Warbrick, above n. 87 at chap. 26.
[197] Art. 34, Protocol No. 11, above n. 6.
[198] Art. 46(2), above n. 6.

3

The Notion of the State

A. INTRODUCTION

The conflicting ideas of cultural relativism and universality are noted by writers on the African system[1] in considering whether human rights have relevance in Africa, or whether this is merely another form of imperialism and attempt by the West to influence and control African countries.[2] It was argued that human rights instruments were based in the Western liberal tradition and that this did not take account of the poverty and political instability that faced many African countries and to which a narrow concept would not be applicable.[3]

It is submitted that the concepts on which international law is based themselves may make it difficult to apply the present system for the protection of rights in Africa.

B. RELEVANCE OF NOTION OF THE STATE

The notion of the state is central in any discussion of rights, given that international human rights law derives from public international law where, traditionally, the state is the central actor. International human rights law concerns, primarily, the relationship between the state and the individual.[4]

In this respect it is necessary to question which organs or individuals can be viewed as being state entities, and thus owing duties under international law.[5] It thus depends "on the ideological conception of the African State concerned

[1] E.g. A. Danielson, *The State Reporting Procedure under the African Charter* (Danish Centre for Human Rights, Copenhagen, 1994), at 102.

[2] S. Ropke, *The African Commission on Human and Peoples' Rights: A Case Study* (Danish Centre for Human Rights, Copenhagen, 1995), at 3.

[3] M. W. Mutua, "The Banjul Charter and African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 *Virginia Journal of International Law* 339–80, at 344; R. M. D'Sa, "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Actions" [1987] *Australian Yearbook of International Law* 101–30, at 121.

[4] A. Clapham, *Human Rights in the Private Sphere* (Clarendon, Oxford, 1993), at 89–93.

[5] "It was important to express what was meant by 'State'. Rights and duties corresponded to certain observed behaviour, certain ways of doing things within organized States. In talking about the rights of individuals one should bear in mind the context of the nation State": P. Kunig, "The Role of Peoples' Rights in the African Charter on Human and Peoples' Rights" in K. Ginther and W. Benedek, *New Perspectives and New Conceptions in International Law: An Afro-European Dialogue* (Österreiche Zeitschrift für Offentliches Recht und Volkerrecht, Vienna, 1984), at 172.

which role the concept of duties in the African Charter may play in practice".[6] This in turn raises issues about whether human rights law should and does provide protection in the private sphere.[7] A deeper understanding of this area could help dispel fears raised respecting some of the provisions of the African Charter, for example, that the individual just owes duties to the state.[8]

C. THE DIFFERENCES BETWEEN TRADITIONAL AND WESTERN STRUCTURES

The African pre-colonial structure was said to focus on the community: "few African nations were also States in the modern European sense, although they certainly were political societies".[9] The African Commission itself has noted differences between the traditional African arrangement and the Western state. The Chairman of the Commission has argued that a Western state is "all powerful . . . centralised, authoritative and equipped with absolute power with little interest in the separation of powers or administrative decentralisation";[10] and is "omnipotent . . . formed of experts, from outside the society of those to which they bring the needs and desires and which they govern in an objective, abstract, neutral and impersonal manner, by law and decree"[11]. He has noted that the Western state is "a sovereign State, of an absolute sovereignty and impartiality".[12]

[6] W. Benedek, "Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights" in P. Kunig, W. Benedek and C. R. Mahalu, *Regional Protection of Human Rights in International Law: The Emerging African System* (Nomos Verlagsgesellschaft, 1985), at 89; M. Scoble, "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter" in C. Welch and R. Meltzer (eds.), *Human Rights and the Development of Africa* (State University of New York Press, Albany, 1984), at 187: "Moreover citizenship and the specification of all rights and duties attaching thereto, is defined wholly in terms of membership in the ethnic community not yet the nation-State".

[7] See below at section E.

[8] See below E.3.

[9] Mutua, above n. 3 at 365. See also, above Scoble, above n. 6 at 187; E.-I. A. Daes, *Freedom of the Individual under Law. A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights* (United Nations, New York, 1990), 38–9, para. 102; O. Gye-Wado, "The Effectiveness of the Safeguard Machinery for the Enforcement of Human Rights in Africa" (1992) 2(3) *Journal of Human Rights Law and Practice* 143–67, at 144. See also C. M. Tucker, "Regional Human Rights Models in Europe and Africa: A Comparison" (1983) 10 *Syracuse Journal of International and Comparative Law* 135–68, at 150; E. Ankumah, *The African Commission on Human and Peoples' Rights and Procedures* (Nijhoff, The Hague, 1996), at 159.

[10] *Allocation du Professeur Isaac Nguema, Président de la Commission Africaine des Droits de l'Homme et des Peuples à la Séance Ouverture de la 19ème session ordinaire de la Commission Africaine des Droits de l'Homme et des Peuples*, Ouagadougou, 26 Mar. 1996 (no reference). This and the following translations are mine. See also Tucker, above n. 9 at 150.

[11] *Ibid*. "The underlying premise [of the modern Western State] is the separation between State (as an apparatus of government) and civil society (representing social and economic institutions and processes autonomous of the State)": Y. Ghai, "Constitutions and Governance in Africa: A Prolegomenon", in S. Adelman and A. Paliwala (eds.), *Law and Crisis in the Third World* (Hans Zell Publishers, London, 1993), 51–75, at 53.

[12] *Allocation du Professor Nguema*, above n. 10.

On the other hand, the African state has, first, a "pluralistic character, it is not a State in effect, but made up of several structures fulfilling State functions and not . . . dehumanised";[13] and has a "capacity to govern society, not by force or law or decree but the knowledge of man to listen in a concrete and non-abstract sense".[14] In this respect "conflicts are settled not by pre-established and impersonal rules but by a permanent dialogue, resulting in direct contact between the interested parties".[15] Thus, there is "the absence of the separation between the civil society and the State. The State is not above, nor outside, nor sovereign. It is a State which coexists, cohabits, communicates with the society from which it is inseparable. The African State of today gains by being decentralised, deconcentrated, functioning, democratic and living interconnected with civil society".[16]

D. THE AFRICAN STATE AS A MIXTURE OF PRE-COLONIAL AND WESTERN STRUCTURES

Colonial state boundaries were imposed without regard for traditional African ethnic groupings, and these same boundaries were largely maintained after independence. Thus, Africa has not rejected all aspects of Western approaches[17] yet at the same time is still very much attached to the traditional community focus.[18] As a result, African states seem to be a mixture of the pre-colonial structures and those imposed by colonialism, which included French, English and Islamic systems, among others.[19] This combination of structures has been used to explain some of the problems that Africa has subsequently faced:

> pre-colonial Africa witnessed the rise and fall of many empires, kingdoms and sultanates. These dynasties were not nation-States . . . When the colonial States were formed, there were no "nations" within the frontiers but, rather, diverse groups kept together through coercion and manipulation. This ethnic diversity was

[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.
[17] "It is also not being suggested that there is a total rejection of imported Western values. Indeed, there is much injection of imported values into the various constitutions adopted by the African States. They have also, in addition, modified certain practices that correspond to those which existed before colonialism": O. Ojo, "Understanding Human Rights in Africa" in J. Berting (ed.), *Human Rights in a Pluralist World. Individuals and Collectivities"* (UNESCO, Meckler, Westport, Conn., 1990), 115–24, at 119. Further, "Africa's contemporary political realities and the heritage of its colonial past influenced the African conception of human rights. African states are largely a product of colonialism": *ibid*.
[18] "Things have not changed much in Africa. The extent of social atomization is still very limited and largely confined to urban areas. The vast majority of the people still exhibit unflinching loyalty to an organic whole, be it a family, a clan, a lineage or an ethnic group. They therefore still think largely in terms of collective rights": *ibid*, 120.
[19] W. Benedek, above n. 6 at 63. The structures imposed by colonialism disregarded the traditional forms and imposed a totally alien system: Tucker, above n. 9 at 151. Ghai, above n. 11 at 67.

> underestimated by independence leaders, who took the nation-State as a given; all that was needed in their view, was to devise the institutions necessary for a democratic government . . . Africa then tried a range of ideologies and political orientations resulting in widespread disillusionment and loss of confidence in the existing political structures in Africa; the road was paved for the military to assume its dominant role in African politics. The African State is therefore weak, ineffective and often lacks legitimacy. There is a disconnectedness between State and society, a worsening of political and legal dualism and internal relations between constituent elements of the State apparatus remain ambiguous.[20]

It also may help explain the prevalence of one-party states in Africa[21] and other problems,[22] which are seen to have a detrimental effect on the promotion and protection of human rights.

E. IMPACT OF THE NOTION OF THE STATE ON THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL

The relationship between the state and the individual is, thus, arguably different in Africa from the Western European model, given the merger of colonial and traditional structures.[23] This may, consequently, lead to a different concept

[20] A. O.-E. El-Obaid and A. A. Appiagyei-Atua, "Human Rights in Africa—A New Perspective on Linking the Past to the Present" (1996) 41 *McGill Law Journal* 819–54, at 851–2, say this is a reason why military rule has been the way of attaining economic interests. "The present crisis in Africa is widely regarded as the crisis of the State, which has always been perceived as the key player in African development. The State achieved this centrality because there has been no realistic alternative to it as the mobiliser, organiser and manager of resources": Ghai, above n. 11 at 51.

[21] Scoble, above n. 6 at 188, "where independence was begun with a multiparty system, it has now in almost instances given way to a one-party system maintained by the legal authority and coercive power of the State. And the State is the main (if not sole) engine from development of the economy. Thus, in a multi-ethnic population, to the extent that the single dominant party is based on just one ethnic community . . . members of this dominant ethnic group . . . have positive incentives to maintain the existing system."

[22] D'Sa, above n. 3 at 103 and 117 and 103; Mutua, n. 3 at 367: "[t]his difficult social and political transformation from self-governing ethno-cultural units to the multi-lingual, multi-cultural modern State, the disconnection between the two Africas . . . lies at the root of the current crisis".

[23] Mutua, above n. 3 at 342 "The rise of the modern nation State in Europe and its monopoly of violence and instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive State . . . The development of the State in Africa is so radically different from its European equivalent that the traditional liberal conception of the relationship between the State and the individual is of limited utility in imagining a viable regime of human rights." In fact, it has been argued that the Western European state is no longer like this either, "the supranational factor has meant that the individual-State dichotomy is no longer sufficient to explain complex relations in modern society. Not only do supranational organs introduce a new power relationship with potential for abuse of power between the individual and the supranational authority, but there also now exist various groups . . . which may bypass the State machinery and exercise direct influence on supranational authorities, which, in turn, directly exercise power over the individual. Again we see how a conception which posits the individual in his or her activities in the private sphere and the State's activities in the public sphere, is inadequate when attempting to analyse certain modern phenomenon and construct an appropriate reflexive response to the human rights problems raised": Clapham, above n. 4 at 138.

of rights, as "human rights were . . . primarily the historical response to the rise of the modern nation State".[24] In a continent to which the whole notion of the detached and sovereign state was alien and upon which such concepts have been imposed, the principles of international law, created as they were by Western states, and their applicability to non-Western societies, must be analysed.[25]

1. The Relevance of the Public/Private Spheres

A dichotomy assumed by international law is the divide between the public and private spheres of life. The "public"/"private" divide here is employed in relation to the entities which owe duties and have rights in international human rights law.[26] In the traditional liberal state there was a distinction between affairs which fell in the public domain and over which the state should have control, and those which fell within the private domain, most commonly associated with family and private life, with which the state should not intervene, the "*laissez-faire*" approach.[27]

International law traditionally regulates the relationships between states and, in respect of human rights law, concerns only the relationship between the state and the individual, the public arena. Thus, this traditional discourse of international law did not take into account the private relationships between individuals, and therefore, it was argued, failed to account for many violations that occurred.[28]

[24] N. S. Rodley, "Can Armed Opposition Groups Violate Human Rights" in K. Mahoney and P. Mahoney, *Human Rights in the 21st Century* (Martinus Nijhoff, Dodrecht, 1992), 297, at 299. He does go on to say that this should not prevent its evolution.

[25] P. Kunig, "Regional Protection of Human Rights: A Comparative Approach" in P. Kunig, W. Benedek and C. R.Mahalu, *Regional Protection of Human Rights in International Law: The Emerging African System* (Nomos Verlagsgesellschaft, 1985) at 38: "there is the question of how terms like 'State' and 'nation' which are central to international law can be placed in an African context. It is well known that the 'elements' of the African States today (in the sense of the European concept of three elements—territory, population, authority) have not developed in the ideal sense . . . This is problem where international law focuses on States as the subjects and where the State only appeared after independence."

[26] This book does not intend to consider the other ways in which the "public"/"private" divide can be analysed: see for e.g., H. Charlesworth, "The Public/Private Distinction and the Right to Development in International Law" (1992) 12 *Australian Yearbook of International Law* 190–204, at 194. E.g. "the classic distinction between public international law and private international law should be abandoned. On principle, one covers relationships between states, the other, relationships between individuals. We must admit, however, that there exists interactions between these two categories of international law": P. Gonidec, "Towards a Treatise of African International Law" (1997) 9(4) *AJICL* 807–21, at 813.

[27] H. Charlesworth, above n. 26 at 190. See Chap. 1.3.

[28] E.g., feminist theories argue that much violence against women occurs in the home, the private sphere. e.g. C. MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, Cambridge, Mass., 1989), n. 22. This would not be protected by international human rights law as it concerned acts perpetrated by private individuals. In addition, the public/private dichotomy is relevant to the discussion of the marginalisation of the developing world view to international law, where states did not develop in the traditional liberal sense and thus did not necessarily incorporate the assumption of the public and private and the implications that this entails for human rights.

International human rights law traditionally constitutes rights owed to the individual by the state. It provides a form of protection from the abuses of the state, and in this sense falls into the "public" rather than the "private" sphere.

However, in the African context, as has been discussed above, the notion of a state detached from the individual is not the same as it is in the West. The pre-colonial structure emphasised the community rather than the individual, and thus did not see a divide between the individual and the state. As a result the division between the public and the private is less apparent. It is submitted that when colonialism imposed concepts of the liberal state structure on the African continent, this imported some aspects of this public/private divide.

Even in the Western sense, what matters fall into the private or public sphere has not been settled. It is thus worth questioning whether the private sphere can really be defined as an area where the state is not involved.[29] For example, if one considers the area of marriage, the state has become very much involved with the passing of relevant legislation.[30] On the other hand, one could define the private arena as one where it is not the actions of state agents which are predominant but those of other individuals or groups. This relies, however, on a definition of the state and its actors.

It is submitted that the dichotomy between public and private is overdrawn[31] and that "there is no realm of personal and family life that exists totally separate from the reach of the State. The State defines both the family, the so-called private spheres and the market, the so-called public sphere. 'Private' and 'public' exist on a continuum".[32]

2. Problems with the Public/Private Divide

Given that, traditionally, international human rights law applied only to the vertical level, regarding the relationship between the individual and the state,

[29] E.g. K. Goodall, "Public and Private in Legal Debate" (1990) 18 *International Journal of Social Law* 445–58, at 446 argues, "the ideas of 'public' and 'private' are not strictly determined terms but instead serve as symbols of a collection of ideas which constitute real social practices and make sense of real social institutions".

[30] Parallels can be drawn in this respect with arguments raised by feminist writers in relation to the divide, e.g. "[h]istorically the dichotomy of 'public' and 'private' has been viewed as an important construct for understanding gender. The traditional notion of 'separate spheres' is premised on a dichotomy between the 'private' world of family and domestic life (the 'women's' sphere) and the 'public' world of marketplace (the 'men's' sphere)": E. Schneider E, "The Violence of Privacy" (1992) 23 *Connecticut Law Review* 973–99, at 974.

[31] Goodall, above n. 29 at 448 and J. Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989) 1 *International Journal of Refugee Law* 518–27, in general, criticise, as being too simplistic, those who consider that the distinction aims to control those subordinate (in their case, women). They advocate a more holistic approach and note that, e.g. in relation to refugees, the distinction is diminishing. National constitutions have also reflected the move to recognition of private obligations, see M. Horan, "Contemporary Constitutionalism and Legal Relationships between Individuals" (1976) 25 *ICLQ* 848–67.

[32] Schneider, above n. 30 at 977.

this has led some to criticise the public/private division for its failure to recognise that violations of rights can occur in the private sphere.[33] In the same way it is submitted that the public/private division is inappropriate for the African system where the notion of a state does not presume, to the same extent, such a dichotomy. An African stance may take into account a wider range of violations involving non-state actors.[34]

3. Duties Owed by Individuals in Relation to Rights

Of particular importance are duties of individuals and the notion of personality at the international level. Here the African Commission has shown that it is willing to consider the activities and duties of individuals towards each other and, in this sense, appears to view human rights law as occupying the horizontal relationship among private individuals, as well as the vertical one between the state and the individual.[35] It has been argued that the traditional view of human rights law, where only states are responsible, is no longer valid for the reason that "in practice it is impossible to differentiate the private from the public sphere. Even if we can distinguish between the two, such difficult distinctions leave a lacuna in the protection of human rights and can in themselves be particularly dangerous".[36] These duties reinforce principles of solidarity where there is no centralised government.[37]

[33] E.g., feminist writers note incidents of domestic violence against women: "the danger is that in accepting the inviolability of a private sphere (defined by what is not directly connected to Government) important areas of human rights violations come to be 'forgotten' ": Clapham, above n. 4 at 219. Also K. Engle, above "After the Collapse of the Public/Private Distinction: Strategising Women's Rights" in D. Dalleymeyer (ed.), *Reconceiving Reality: Women and International Law* (American Society of International Law, Washington DC, 1993), at 955.

[34] "There should be protection from all violations of human rights and not only when the violator can be directly identified as an agent of the State . . . This could be legally justified by a dynamic interpretation which considered the general evolution of international law . . . This is not the same as advocating the abolition of the notions of public and private": Clapham, above n. 4 at 134.

[35] The enforcement of rights horizontally between private individuals is known as the doctrine of *Drittwirkung*. Some writers have explicitly rejected the application of the doctrine to international instruments such as the ECHR, "[g]iven that this involves the liability of private individuals or the horizontal application of law, it can have no application under the Convention at the international level, because the Convention is a treaty that imposes obligations only upon States. Insofar as the Convention touches upon conduct of private persons, it does so only indirectly through such positive obligations as it imposes upon a State. As noted earlier the basis for the State's responsibility under the Convention in the case of such obligation is that, contrary to Article 1, it has failed to 'secure' to individual within its jurisdiction the rights guaranteed in the Convention by not rendering unlawful the acts of private persons that infringe them": D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995), at 21.

[36] Clapham, above n. 4 at 94.

[37] Cover states, "[i]n a situation where there is no centralised power and little in the way of coercive violence, it is critical that the mythic center of the law reinforce the bonds of solidarity. Common, mutual, reciprocal obligation is necessary": R. Cover, "Obligation. A Jewish Jurisprudence of the Social Order" (1987) *5 Journal of Law and Religion* 65, at 67; B. O. Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights:

The assumed dichotomy that underlies much of the literature on international human rights law and the African system in particular implies the opposition between traditional and Western approaches. This leads to assumptions, for example, that duties are only owed to the state[38] and thus may infringe rights.[39] A lack of understanding of the African notion of community confuses the ideology on which the Charter was based, which saw duties directed towards the community or the family, rather than the state,[40] in contrast to the collectivist approach of a socialist ideology.[41] "The African concept of society is

A Comparative Analysis with the European and American Systems" (1984) 6(2) HRQ 141–59, at 148: "[t]he African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity"; Mutua, above n. 3 at 361: "the philosophy of the group-centred individual evolves through a series of carefully taught rights and responsibilities. At the root were structures of social and political organization, informed by gender and age, which served to enhance solidarity and ensure the existence of the community into perpetuity. . . . Relationships, rights and obligations flowed from these organizational structures, giving the community cohesion and viability."

[38] Benedek, above n. 6; O. Ojo and A. Sesay, "The OAU and Human Rights: Prospects for the 1980s and Beyond" (1989) 8 HRQ 89–103, at 99; Ankumah, above n. 9. They could be used as a type of counterclaim, U. O. Umozurike, "The African Charter on Human and Peoples' Rights" (1983) 77 AJIL 902–12, at 911. "The notion of individual responsibility to the community is firmly engrained in African tradition. . . . It is an open question, however, as to whether 'community' equals 'State' ": R. Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis" 22 *Virginia Journal of International Law* 667–714, at 676. If individuals owe duties the question is then to whom are the duties owed: "in the African context . . . these obligations have a basis in the past, and many seem relevant because of the fragility and the domination of Africa by external agents. Such duties are rights that the community or the State, defined as all persons within it, holds against the individual": M. W. Mutua, above n. 3 at 370. See also E. Kannyo "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background" in C. Welch and R. Meltzer, *Human Rights and Development in Africa* (University of New York Press, Albany, 1984), at 154.

[39] See J. Matringe, *Tradition et Modernité dans la Charte Africaine des Droits de l'Homme et des Peuples. Etude du Contenu Normatif de la Charte et de son apport à la Théorie du Droit International des Droits de l'Homme* (Bruylant, Brussels, 1996). See also, "[t]he Charter's underlying theme, that of preserving State and 'traditional' structures through the 'duties' that it imposes, requires, in essence, the domination and subjection of the individual to the authoritarian State": M. W. Mutua, "The African Human Rights System in Comparative Perspective" (1993) 3 *Review of the African Commission on Human and Peoples' Rights* at 8; B. Weston, R. Lukes, K. Huatt, "Regional Human Rights Regimes: Comparison and Appraisal: (1987) 20 *Vanderbilt Journal of Transnational Law* 585–637, at 627; M. W. Mutua, above n. 3 at 359. This is particularly in the case of Arts. 29(2)–(8) where states could use duties as a defence to violations of rights: C. Bello, "The African Charter on Human and Peopoes' Rights" (1985/6) 195 Hague Recueil 13–268, at 157.

[40] M. W. Mutua, above n. 3 at 364; W. Benedek, "Human Rights in a Multi-Cultural Perspective" in K. Ginther and W. Benedek (eds.), *New Perspectives and New Conceptions in International Law: An Afro-European Dialogue* (Österreiche Zeitschrift für Offentliches Recht und Volkerrecht, Vienna, 1984), at 152; Ankumah, above n. 9 at 171. See, however, the Art. 62 Report of Libya at 18 which states, "in general all the duties in Articles 27, 28 and 29 are provided for by the Libyan legislations in force. They are currently in force and people are committed to them, since they are respected by every Libyan citizen. Social solidarity is the basis of national unity. The family is the nucleus of the community and is founded on religion morality and patriotism. Defence of the homeland and safeguarding the political regime, based on the people's power is the responsibility of every citizen. . . . all rights and freedoms of individuals are guaranteed by Libya without discrimination. They should by no means be subject to encroachments or put in jeopardy so long as they are lawfully exercised without any violation of the public interest, ethics or public morality."

[41] M. W. Mutua, n. 3 at 372: "[u]nder socialist [ideology] the State secures economic, cultural and social benefits for the individual. Hence the State as the guardian of the public interest retains primacy in the event of conflict with the individual. Human rights, therefore are conditioned on the

firmly based on the family as the basic unit of society. Duties in the African Charter therefore do not mean allegiance to the State . . . but the expression of African traditional values in a modern document".[42] Consequently, duties complement, not detract from, individual rights.[43]

The African Commission illustrates a move away from a state-centred approach to the promotion and protection of rights towards viewing an increase in the number of actors and those entities with rights and responsibilities on the international plane as a desirable objective.[44] As Gyandoh advocates, "instead of a State-centred world view . . . a supranational world view [is advocated], to be built gradually upon the present foundations of the world order system . . . even the [United Nations] Charter can . . . be more profoundly understood to be *primarily* concerned with the plight of *people*, not of nation-States".[45]

4. Relationship of the Public/Private Divide to Economic, Social and Cultural Rights

The public/private dichotomy could be used further to offer a perspective on other areas and controversies in international human rights law. For example, it is suggested that a reason why Western nations have been so wary of accepting economic, social and cultural rights may not just have been to do with the expense that their implementation would impose. It is argued that violations of rights such as the right to work and health (although not necessarily education) required state intervention in matters where the violator was not the state but a private employer or individual.[46] Where someone is deprived of his or her liberty or not given a fair trial, the violator is likely to be the state or a state agent, but in relation to health and work the violator may be more likely to be a private individual employer. Recognising that states should intervene in such areas advocates an interventionist approach that does not sit comfortably with the protection of the private sphere or with the free market values held by a liberal state. The African Commission has, however, been willing to require state

interest of the State and the goals of communist development. . . . In this collectivist conception, duties are only owed to the State. In contrast, in the pre-colonial era, and in the African Charter, duties are primarily owed to the family . . . and to the community, not to the State . . . [these] were rarely misused or manipulated to derogate from human rights obligations."

[42] W. Benedek, above n. 40 at 151.

[43] C. R. M. Dlamini, "Towards a Regional Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights" (1991) 24 *Comparative and International law Journal of South Africa* 189–203, at 197: "there is no opposition between rights and duties or the individual and the community—they blend harmoniously".

[44] This is explored in greater detail in Chap. 4.

[45] S. O. Gyandoh, "Human Rights and the Acquisition of National Sovereignty" in Berting, above n. 17 at 171–88, at 173, his italics.

[46] "Private groups could be said to be more likely to violate social rights rather than political rights": Clapham, above n. 4 at 289.

intervention in areas of health,[47] even sexual health,[48] pregnancy[49] and infertility.[50] It has urged State intervention in many aspects of work,[51] education,[52]

[47] E.g. states are required to report on, in relation to Arts. 16 and 18 of the Charter, "[p]rotection of family, mothers and children . . . Information on maternity protection could include: . . . (b) prenatal and post-natal protection and assistance . . . medical health care and maternity and other benefits; (b) special protection and assistance to working mothers . . . paid leave, leave with social security benefits, guarantees against dismissal . . . ; (c) measures in favour of working mothers who are self-employed or participating in family enterprise, especially agriculture or in small crafts including guarantees against loss in income; (e) . . . help mothers maintain their children in case of husband's death or absence; (f) help aged and disabled . . .": *Guidelines for National Periodic Reports*, *Second Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1988–9, ACHPR/RPT/2nd, Annex XII at para. II.A.29. Note in relation to the Draft Protocol to the ACHPR on the Rights of Women, DOC/OS/34c (XXIII), that the rights are to be only of the same standard as are accorded to men, and not some objective standard. This point was raised by one Commissioner at the 23rd session, although not amended by the subsequent Dakar Draft Protocol on Women's Rights, June 1999.

[48] One Commissioner asked, during the examination of the State report of Zimbabwe that "it would appear President Mugabe has decided to eliminate homosexuality. What is the situation today? . . . I should like to know what the present legal situation is in Zimbabwe today": 21st Session Transcripts, 75. There has been a communication on the same issue, "the communication concerns the legal status of homosexuals in Zimbabwe. Domestic law . . . criminalises sexual contacts between consenting adult homosexual men in private. According to the complainant this prohibition is currently being enforced . . . encouraged by statements against homosexuals by the President and Minister of Home Affairs. The communication complains of violations of the ACHPR, namely Articles 1–6, 8–11, 16, 20, 22, 24": No. 136/94, *William Courson* v. *Zimbabwe*, para. 21, although this case has never been decided by the Commission.

[49] "States parties to this Protocol shall take appropriate measures to: ensure that adequate and if necessary free health services are available to women especially in rural areas; establish pre and post natal health and nutritional services for women during pregnancy and while they are breast-feeding": Dakar Draft Protocol on the Rights of Women, above n. 47, Art. 15(2)b. A previous draft did include a right to an abortion but this was removed, Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women (no reference).

[50] "With reference to Article 16 of the ACHPR women shall have the same right to health. This rights includes: the right to control their fertility; the right to decide whether to have children; the right to space their children; the right to choose any method of contraception; and the right to protect themselves against sexually transmitted diseases": Dakar Draft Protocol on the Rights of Women, above n. 47, Art. 15(1).

[51] States are required to report on "[m]easures adopted in the public and private sectors including those relating to working conditions, salaries, social security, career possibilities and continuing education for teaching staff", and "[e]qual opportunity for promotion . . . (b) Principal arrangements and procedures to implement this right in the public and private sectors, including training programmes, placement policies, promotion procedures, career planning and the extent of participation of the workers' representatives in such arrangements": *Guidelines for National Periodic Reporting*, above n. 47, at B.54(b) and II.8.

[52] "In conformity with Article 17 of the ACHPR women shall have equal access and opportunities. States parties shall take all appropriate measures to: eliminate all discrimination against women and also in the sphere of education; eliminate all references in text books and syllabuses to the stereotypes which perpetuate such discrimination . . .", Dakar Draft Protocol on the Rights of Women, above n. 47, Art. 13. In addition, "[t]he Assembly of Heads of State and Government further requests that all States should ensure among other things: (a) that human rights is included in the curriculum at all levels of public and private education and in the training of law enforcement officials and (b) that education for human rights and democracy should involve every organ of the society as well as the media": Resolution on the African Commission on Human and Peoples' Rights, *Sixth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1992–93, ACHPR/RPT/6th.

including social security,[53] hours[54] and conditions of work,[55] health and safety[56] and promotion. Such actions could be seen as being of public importance which justifies their monitoring and involvement by the state. This has been specifically raised in relation to the intervention of states in private schools as being of "public concern".[57]

5. The Private Sphere in the African System

It is submitted that, because the African system does not place, at least traditionally, much emphasis on the existence of a private sphere, it has had no difficulties requiring states to intervene in all areas, as seen above. In addition, it

[53] States should report on "principal laws, . . . relating to the social security system, including social insurance schemes. Main features of the schemes in force for each of the branches of social security listed below . . . the percentage of the population covered, nature and level of benefits and the method of financing the scheme: (a) medical; (b) cash sickness benefits; (c) maternity benefits; (d) invalidity benefits; (e) old-age benefits; (f) survivors' benefits; (g) employment injury benefits; (h) unemployment benefits; (i) family benefits": *Guidelines for National Periodic Reports*, above n. 47 at paras. II.17 and 18.

[54] States should report on "[i]nformation on the position in law and practice in the various sectors of activity as regards: (i) weekly rest; (ii) normal hours of work and over time; (iii) holidays with pay; (iv) remuneration for public holidays; (v) principle arrangements . . . to implement these rights in the various sectors including industries and services where work is organised on continuous basis, e.g. health care, police, etc.": *ibid*, II.9.(b).

[55] States should report on the "[r]ight to just and favourable conditions of work—Article 15. reporting on principal methods used for fixing wages (minimum wage fixing machinery, collective bargaining, statutory regulations, etc.) in the various sectors, and numbers of workers involved, information on the categories and numbers of workers for whom wages are not set by such methods; information on components of workers remuneration other than wages, such as bonuses, temporary cost of living differentials, etc.; statistical data showing the evaluation of the levels of remuneration (covering minimum wages and average earnings in a representative sample of occupations; provisions and methods devised to ensure respect for the right to equal pay for work of equal value and to ensure women are guaranteed conditions of work not inferior to those of men, with equal pay for work of equal value": *ibid*., para. II.6. In addition, one Commissioner asked during examination of an Art. 62 report, "equal pay for equal work and equal opportunities: you say some multinational donor agencies in the informal sector . . . the title is equal pay for equal work and equal opportunities: this is the very first line, so my question is, what is being done to redress this violation of right?": 21st Session Transcripts, 74.

[56] States should report to the Commission on "[s]afe and healthy working conditions . . . (b) principal arrangements and procedures to ensure that these provisions are effectively respected in work places, such as inspection services, at national, industrial local levels, entrusted with promotion or supervision of health and safety at work; (c) information on any categories of workers for which these measures have not yet been fully implemented and any progress made there; (d) information on the number, nature and frequency of occupational accidents and cases of occupational disease": *Guidelines for National Periodic Reports*, above n. 47 at para. II.7.

[57] One Commissioner asked in relation to education "you say on private lands, the schools are substandard, but nothing can be done about it because they are on private land. Doesn't the State have power to legislate over such matters of public concern, on public land, and in answering that you may want to consider whether if murder is committed on private land, the State would be silent about it": 21st Session Transcripts, 74. The Draft Protocol on the Rights of Women, above n. 47, Art. 1, was amended to include "in all spheres" of life, para. 16 of the *Report of the First Meeting of the Working Group on the Additional Protocol to the African Charter on Women's Rights*, DOC/OS/34c (XXIII).

has imposed standards on public and private institutions[58] and made recommendations on issues relating to children,[59] the family and the home,[60] even work in the home,[61] marriage[62] and "social life".[63] This is particularly true in relation to women[64] and their equality in contractual and inheritance matters.[65]

[58] "The Commission . . . stresses further the importance of regular exchange of information between the African Commission on Human and Peoples' Rights, the ICRC and human rights NGOs on the teaching and dissemination activities undertaken on the principles of human and peoples' rights and international humanitarian law, in the schools, universities and all other institutions": Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples' Rights, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–94 ACHPR/RPT/7th, at Annex XI, para. 3.

[59] States should provide the Commission with "[i]nformation on the protection of children and young persons" including details on "principal laws, administrative regulations . . . aimed at protecting and assisting all children and young persons, in order to give them opportunities and facilities for their healthy, physical and psychological development without distinction or discrimination . . . (b) special measures for the care and education of children separated from their mothers or deprived of a family; physically, mentally or socially handicapped children and delinquent minors; (c) measures to protect children against economic, social and all other forms of exploitation, neglect or cruelty and from being subject to trafficking; (d) provisions governing work by children and young persons including minimum age for paid and unpaid employment, regulation of hours of work and rest, prohibition or restriction of night work . . . (e) measures taken to prevent the employment of children and young persons in any work which would be dangerous to them, harmful to their moral or health or likely to hamper their normal physical and psycho-social development . . . (f) statistics on the number of children in fact working . . .": *Guidelines on National Periodic Reports*, above n. 47 at para. II.A.30. One Commissioner, during the reporting procedure, noted "legislation which prohibits children from entering bars and bottle stores so that they cannot get liquor from there, but there is nothing to prevent them from entering supermarkets or stalls to by the same thing. Are you considering filling this gap which defeats the purpose of the legislation?": 21st Session Transcripts, 18.3, 75.

[60] "States parties shall commit themselves to . . . recognise motherhood and the upbringing of children as a social function for which both parents must take responsibility as well as the State and employers": Dakar Draft Protocol, above n. 47, Art. 14(1).

[61] One Commissioner asked during examination of an Art. 62 report: "women form about 70% of the work force in the textile industry and opportunities abound for women to get jobs. Please tell us more about women in politics, the inheritance laws, as they effect women, women and education, and last, but not the least, jobs at home, chores—are these consigned exclusively to women—washing plates, floors, taking care of the baby?": 20th Session Transcripts, 68.

[62] E.g. "[n]o marriage shall take place without the free and full consent of both parties. The minimum age of marriage for men and women shall be eighteen. Polygamy shall be prohibited". The Art. also includes provisions relating to nationality, responsibilities towards children, acquiring own property, divorce and death of the spouse and inheritance: Dakar Draft Protocol, above n. 47, Art. 6.

[63] "I would also like to know something more about the mechanism for regulating social life": 20th Session Transcripts, 72, during examination of an Art. 62 report.

[64] One Commissioner asked the following questions during the examination of state reports: "the principle of equality and equality protection under the law finds a law in the Algerian law which denounces all kinds of discrimination. Now I would like to know the extent to which this is true in relation to women, their right to own property, their right to dispose of property, and their right to inherit property equally with men": 19th Session Transcripts, 88. See also provisions in Dakar Draft Protocol on the Rights of Women, above n. 47.

[65] One other Commissioner asked during examination of the Zimbabwe report, given that the report stated that "a person shall not be regarding as having been treated in a discriminatory manner, as far as the law in question relates to adoption, marriage, divorce, burials, etc. . . . How have Zimbabwean women exercised their right under the Legal Age of Majority Act of 1982, which gives them into the right to enter into a contract without the consent of their husbands or others?": 21st Session Transcripts, 74.

The African Commission has in effect taken any margin of appreciation away from states, even on issues of custom.[66] In this sense, this is unlike the European organs, which has left such issues to the states to decide, particularly where it relates to public morals, holding that a European consensus does not exist.[67]

6. Positive or Negative Rights

Moves by the European system into the private sphere have been identified[68] and the intervention that the European Commission envisaged as being required by the state in this "private sphere"[69] does not just require a duty to refrain from interference, but also to take positive action.[70] In *X and Y* v. *The Netherlands*[71] the European Court of Human Rights held that Article 8 of the ECHR did not just require the state to abstain from interference in the nature of the illegitimacy of a child, but to take positive action, in the form of legislation, to remedy the situation.[72] In respect of a right to work[73] it has been argued that the related freedom of association in Article 11 of the ECHR:

> cannot merely mean that a State must grant legal recognition to the right of an individual to join and form a trade union without interference. It must also embody an obligation on the government to consult and negotiate with the union.[74]

The usefulness of another dichotomy, namely, that of negative and positive rights and corresponding duties by states[75] is, thus, also worth questioning. The African Commission has held that states have a promotional obligation

[66] E.g. during the examination of the state report of Sudan, one Commissioner questioned the compatibility of the Shari'a with the ACHPR, "we know that the criminal court of 1991 has introduced a system of sentence which is in accordance with a certain interpretation of Shari'a and allowed for amputation, crucification, lashing and stoning. I would like the distinguished representative of the Sudan to explain how such provisions are in conformity with our Charter, when it comes to right to life and to physical integrity of individuals": 21st Session Transcripts, 43.

[67] E.g. *Handyside* v. *United Kingdom*, Series A, No. 24 (1976) 1 EHRR 737; *Rees* v. *United Kingdom*, Series A, No. 106 (1987) 9 EHRR 56.

[68] See, in general, Clapham, above n. 4.

[69] In this sense, "[a] negative obligation is one by which a State is required to abstain from interference with, and thereby respect, human rights . . . a positive obligation is one whereby a State must take action to secure human rights. Positive obligations are generally associated with economic, social and cultural rights and commonly have financial implications": Harris, O'Boyle and Warbrick, above n. 35 at 19; H. Steiner and P. Alston, *International Human Rights in Context. Law Politics Morals* (Clarendon Press, Oxford, 1996), at 189.

[70] See Harris, O'Boyle and Warbrick, above n. 35 at 20.

[71] Series A, No. 91 (1986) 8 EHRR 235, 81 ILR 103.

[72] It held that the Art. "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals themselves": *ibid*., para. 23.

[73] Art. 23 UDHR; Art. 6 ICCPR; Art. 15 ACHPR.

[74] F. G. Jacobs and R. C. White, *The European Convention on Human Rights* (Clarendon, Oxford, 1996), at 111.

[75] Harris, O'Boyle and Warbrick, above n. 35 at 21 note that "the full extent to which the [European] Convention places States under positive obligations to protect individuals against infringements of their rights by other private persons has yet to be established".

in the traditional private sphere. Promotion, however, is often more positive than negative and can involve an interventionist stance. For example, states should ensure that "human rights are included in the curriculum at all levels of public and private education and in the training of all law enforcement officials".[76] This was, according to the African Commission, reaffirmed by the Declaration at the World Conference on Human Rights.[77] Questions have been asked of states during examination of their reports, on issues of health, including,

> what were the measures taken by the country to prevent the spread of HIV and AIDS? Are there programmes to enlighten people and what is the public conscience? . . . even here in hotels, I have not seen any educational posters on AIDS. Unlike other hotels which I've seen in my trips, I've noted making condoms available to the clients of the hotels?[78]

The Commission has also required states to take measures including passing legislation to "prohibit all forms of violence against women—physical, mental, verbal or sexual, domestic and family—whether they take place in the private sphere or in society and public life including sexual harassment, sexual abuse or exploitation and rape".[79]

F. CONCLUSION

In order to challenge the applicability of international human rights law to non-Western structures, fundamental concepts need to be questioned. Underlying the field of international human rights law is the state and its relationship with the individual. As a result, issues such as statehood and the public/private divide must be analysed and considered in the context of a continent whose experiences are very different from that of the West, international human rights law in its present form, as expressed in instruments such as the UN International Covenants, the ECHR and ACHR, deals primarily with the obligations of the state to the individual. The aim is the protection of the individual against the abuses of the state, rather than of other individuals. It is nec-

[76] Draft Resolution on Promotional Activities, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1991–92, ACHPR/RPT/5th, Annex X, para. 3; Resolution on the African Commission Human and Peoples' Rights, above n. 52; Resolution on Human and Peoples' Rights Education, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–94, ACHPR/RPT/7th, Annex X, para. 1.

[77] This encouraged "all governments include in the formal sector curricula on the study of human rights in primary, secondary and tertiary institutions as well as those in the administration of justice and for governments to be encouraged to undertake promotion of human rights in the informal sector": Resolution on Human and Peoples' Rights Education, *ibid*.

[78] 20th Session Transcripts, 73.

[79] Dakar Draft Protocol on the Rights of Women, above n. 47, Art. 12(1)a. Art. 12(1) interprets violence against women as being that which takes place "in private or public life".

essary to consider, through the work of the African Commission, whether a different perspective is more appropriate, not only in the African context, but in all other areas.[80]

[80] Clapham, above n. 4 at 352, argues that the public/private distinction should be abandoned and one "should examine the *harm done to the victim*" (his italics). He continues, "this would represent a shift in emphasis away from 'policing' State institutions and the search for 'guilty State actors' towards protection and reparation for those who suffer violations of their human rights as such". Furthermore, "the application of human rights in the private sphere demands a concentration on victims rather than on State actors. It is suggested up till now the weakness of the Strasbourg machinery has been its over-concentration on the State's role at the expense of the victim . . . It is suggested that the State is losing its monopoly over the language of human rights—we may be witnessing a sort of 'privatization' of human rights": at 353–4.

4

The Issue of Personality

A. PRELIMINARY CONSIDERATIONS

1. Introduction

Traditionally only states were said to have personality at the international level[1] and they determined any status that was accorded to other entities.[2] Brownlie admits that the situation of personality is "somewhat complex", in that "various entities, including non-self-governing peoples and the individual, have a certain personality", yet he concludes by stating "it is well to remember the primacy of States as subjects of the law".[3]

The issue of personality is relevant because, as is illustrated by the African Commission as well as other international bodies, rather than international law in reality being exclusively or mainly the domain of the state, it appears that the role of other entities is just as, if not in some instances more, important.

In this regard, there is an assumption in international law, due to the opposing dichotomy approach, of a divide between subject and object. The argument that this approach results in a failure to account for the role or importance of any other entity which does not fit these two extremes will be considered.[4]

Although with the evolution of international human rights law there is now considerable support for the fact that entities other than states have some

[1] L. Oppenheim, *International Law—A Treatise*. Vol. I Peace (8th edn., Longman Green, London, 1995), at 636: "[t]he protection of human rights through international action is a revolutionary idea and traditional international law had no place for it at all"; A. Robertson and J. Merrills, *Human Rights in the World* (3rd edn., Manchester University Press, Manchester 1992), at 2; H. Lauterpacht, *International Law. Collected Papers. I. General Works* (Cambridge University Press, Cambridge, 1970), at 279.

[2] E.g., "as object, the individual is but a thing from the point of view of [international law] or that he is benefitted or restricted by [international law] only insofar and to the extent that it makes it the right or duty of States to protect his interests or to regulate his conduct within their respective jurisdictions through their domestic laws . . . the individual is an object of international law only because this law treats him in fact as one"; G. Manner, "The Object Theory of the Individual in International Law" (1952) 46 *AJIL* 428–49, at 429; L. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Martinus Nijhoff, Dordrecht, 1992), at 149.

[3] I. Brownlie, *Principles of Public International Law* (4th edn., Clarendon Press, Oxford, 1990), at 59.

[4] See G. Manner, above n. 2 at 443–4 and 448–9. As Brownlie, above n. 3 at 67 states, "to classify the individual as a 'subject' of the law is unhelpful, since this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject".

international status,[5] and the other regional and international systems allow individuals and other entities some access to and participation in their systems,[6] the work of the African Commission illustrates that one may need to take a much broader view concerning which actors have a part to play in the international system and the extent to which they do so.

The ability to have personality in international law depends on the entity in question being "*capable* of possessing rights and duties and of bringing international claims and having these capacities conferred upon it".[7]

Because the African system has not rejected so called Western notions and concepts of international law and indeed has embraced some of them wholeheartedly,[8] it would be illegitimate to reject the underlying concepts of international law as being wholly invalid. Rather, their very basis, assumptions and applicability should be analysed in the light of the African Commission's work.

In order to understand the importance of other actors it is important to consider, using the jurisprudence of the African Commission, the role and duties of states, individuals, NGOs, peoples and the international community and how a different perspective may contribute to challenging the usefulness of the subject/object divide and the traditional views of personality in international law.

2. Importance of Community

The close connection between an individual and the community in Africa requires that duties are owed by the former.[9] As a result, rather than being in conflict with each other, "a dialogue and permanent equilibrium should exist

[5] "International responsibility now also involves consideration of the position of individuals and of international organisations", Oppenheim, above n. 1 at 500. The fact that such organisations and peoples claiming independence have also been recognised as subjects in international law shows that it is no longer the exclusive domain of the state: Sunga, above n. 2 at 151.

[6] See below at sections C–F.

[7] Brownlie, above n. 3 at 58, citing the *Reparation for Injuries* case [1949] ICJ Reports 179; E.-I. A. Daes, *Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights. A Contribution to the Freedom of the Individual under Law* (United Nations, New York, 1983), E/Cn. 4/Sub.2/432/Rev.2, chap. 1, at para. 145; see also R. Higgins "Conceptual Thinking about the Individual in International Law" (1978) 4 *British Journal of International Studies* 1–19, at 1; Lauterpacht, above n. 1 at 279–80.

[8] E.g. the Charter refers to the UN Charter and the Universal Declaration of Human Rights in its preamble.

[9] B. O. Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6 1541–59 at 149. See also M. L. Balanda, "The African Charter on Human and Peoples' Rights" in K. Ginther and W. Benedek (eds.), *New Perspectives and New Conceptions in International Law: An Afro European Dialogue* (Österreiche Zeitschrift für Offentliches Recht und Volkerrecht, Vienna, 1984) 134 at 139; W. Benedek, "Peoples' Rights and Individual's Duties as Special Features of the African Charter on Human and Peoples' Rights" in P. Kunig, W. Benedek and C. R. Mahalu, *Regional Protection of Human Rights in International Law: The Emerging African System* (Nomos Verlagsgesellschaft, 1985), 85.

between the individual and the social group to which he belongs".[10] This approach has been affirmed by the Inter-American Commission.[11]

If we transpose this approach to the international level, then we must consider the rights and duties of each entity. This will enable us to analyse how the actors are integrated within the African human rights community, with the different entities each having a role to play. As a result, rather than it being states which have sole status at international level, the operation of the mechanism actually depends on the interplay between a variety of different actors.

B. THE STATE

1. Impact of the African Charter on National Law

Relevant to the issue of subjectivity are the obligations of the various actors. States' obligations under the Charter derive from Article 1, although, controversially, it was questioned whether Article 1 provided as forceful an obligation as is found in other international instruments, and thus whether states were in fact bound by its provisions.[12] However, it is generally accepted that by ratifying the Charter states have bound themselves to respect its provisions, "a principle which is self-evident according to which a state which has contracted valid

[10] E. Bello, "The African Charter on Human and Peoples' Rights" (1985/6) 196 *Hague Recueil* 13–268 at 25; R. Kiwanuka, "The Meaning of Peoples' Rights in the African Charter on Human and Peoples Rights" (1988) 80 *AJIL* 80, at 82: "the individual is not totally aloof, irresponsible and opposed to the society. This is to say that the people of Africa are 'community bound' rather than individualistic", M. L. Balanda, above n. 9 at 139.

[11] In its reports on the human rights situations in Brazil and Ecuador, the Inter-American Commission stated that "certain individual rights guaranteed by the American Convention . . . must be enjoyed in community with others, as is the case with the rights to freedom of expression, religion, association and assembly. The right to freedom of expression, for example, cannot be fully realised by an individual in isolation; rather, he or she must be able to share ideas with others fully to enjoy this right. The ability of the individual to realise his or her right both contributes to and is contingent upon the abilities of individuals to act as a group. For indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture. In construing these rights in relation to indigenous peoples, account must also be taken of the stipulation set forth in the American Convention that its provisions be interpreted so as not to restrict other rights and freedoms accorded under domestic law or other international instruments by which the state concerned is bound. Ecuador is party to a number of international conventions which guarantee certain protections for ethnic and racial groups including the ICCPR . . . Article 27": Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador* (1997), OEA/Ser.L/VII.96, Doc.10 rev.1, 24 Apr. 1997, at 103.

[12] C. R. M. Dlamini, "Towards a Regional Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights" (1991) 24 *Comparative and International Law Journal of South Africa* 189–203 at 194; R. Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis" (1981–2) 22 *Virginia Journal of International Law* 667–714 at 688, states that the obligation in Art. 1 is not as strong as that in the American Convention on Human Rights, Art. 1, particularly as the words "guarantee" and "ensure" were removed from the Dakar drafts of the African Charter: see B. G. Ramcharan, "The Travaux Préparatoires of the African Commission on Human and Peoples' Rights" (1992) 13 *HRLJ* 307–14. U. O. Umozurike, "The African Charter on Human and Peoples' Rights" (1983) 77 *AJIL* 902–12 at 912 believes the provisions are binding.

international obligations is bound to make in its legislation such modifications as may be necessary to ensure fulfillment of obligations undertaken".[13]

In general, it is at the discretion of the state as to the manner in which it incorporates the treaty[14] and other international bodies, such as the UN Human Rights Committee, have held that the instrument leaves it to the states to decide.[15] Apart from implying that rights will naturally be protected by a constitution,[16] the African Commission has not specifically required that the Charter be incorporated in a particular way[17] and has left it largely to the discretion of the States.[18] The Commission views states as bound by ratification of the treaty regardless of whether their systems are monist or dualist.[19] So, in a number of cases against Nigeria where the government had repealed an Act which had given domestic effect to the Charter,[20] the Commission held this was

[13] Advisory Opinion of PCIJ, 21 Feb. 1925, Series B, No. 10, 20–1.

[14] Oppenheim, above n. 1 at 82–3.

[15] General Comment of the UN Human Rights Committee, 3(13) Doc A/36/40 109; D. McGoldrick, *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon, Oxford, 1994), at 270. In respect of the ECHR, the European organs have held that Art. 1 does not require the states to incorporate the Convention into national law, but the state can choose whatever way it wishes to satisfy its obligations: *Swedish Engine Drivers Union* v. *Sweden*, Judgment of 6 Feb. 1976, Series A, No. 20 1 EHRR 617 (1979–80); see D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995) at 24; *Observer and The Guardian* v. *United Kingdom*, Judgment of 26 Nov. 1991, Series A, No. 216 (1992) 14 EHRR 153.

[16] "The Commission . . . Considers that the competent authorities should not override constitutional provisions or undermine Fundamental Rights guaranteed by the Constitution and international human rights standards": Resolution on the Right to Freedom of Association, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1991–92, ACHPR/RPT/5th Annex VII. This method is recommended by others, see R. Bernhardt, "The Convention and Domestic Law" in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Kluwer Academic Publishers, Dordrecht, 1993), 25, at 27.

[17] It has organised a seminar on national implementation of the African Charter on human and peoples' rights in internal legal systems in Africa, see Chap. 2. It is often a question that arises during the examination of periodic reports under Art. 62. E.g., during examination of Mozambique's report the representative was asked, "[i]s the African Charter directly applicable in Mozambique, or should it go through the official legislation first?": 19th Session Transcripts, 106.

[18] "We have made several recommendations to member States . . . (a) to incorporate the Charter in national legal systems as required by Article 1 of the Charter; (b) to promote the Charter through incorporating it at all levels of the educational systems": Presentation of the Third Activity Report by the Chairman of the Commission Professor UO Umozurike to the 26th Session of the Assembly of Heads of State and Government of the Organization of African Unity (9–11 July 1990), *Third Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1989–90, ACHPR/RPT/3rd, at 83. In addition, states should report on "whether the rights (Articles 2–13) are protected by the Constitution of the country or by a 'Bill of Rights' . . . ; (ii) whether the provisions of the Charter can be invoked before the courts, other tribunals or administrative authorities for direct enforcement or whether they have to be transformed into internal laws or regulations before they are enforceable by the authorities; (iii) what judicial, administrative or other authorities have jurisdiction affecting human rights; (iv) what remedies are available to an individual whose rights are violated; (v) what other measures have been taken", *Guidelines for National Periodic Reports*, *Second Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1988–89, ACHPR/RPT/2nd, Annex XII, para. I.4.

[19] Oppenheim, above n. 1, 53, para. 18.

[20] The African Charter (Ratification and Enforcement Act) repealed by cl. 13(1) of the Political Parties Dissolution Decree, see communication No. 129/94, *Civil Liberties Organization* v. *Nigeria*, para. 15.

a "serious irregularity",[21] and not only did this not extinguish its international obligations but it also prevented the judiciary from exercising any control over the government. Referring to Article 1 of the African Charter, the Commission held that "any doubt that may exist as to Nigeria's obligations under the African Charter is dispelled by reference" to this provision.[22] It then went further, "that the obligation of the Nigerian government to guarantee the right to be heard to its citizens still remains, unaffected by the purported revocation of domestic effect of the Charter".[23] The Commission stated that this removed any powers from the courts to ensure the government's compliance with the Charter, thus implying that the power to incorporate the Charter could be left to the judiciary in its decisions even if not through legislation,[24] further restricting the discretion of the state. The Commission also held that if Nigeria wished to annul the effects of the Charter, this would have to be done through "an international process involving notice".[25]

2. Binding Nature of the Charter and Decisions of the Commission

The African Commission has upheld the binding nature of the Charter by attempting to enforce implementation through visiting states[26] and has reaffirmed the duties of states to respect the Charter.[27]

The wording in Articles 1 and 62, pertaining to "legislative and other measures", and the jurisprudence of the Commission affirm that states must go further than merely altering their legislation, by ensuring that the Charter is effected in legal and other decisions,[28] the courts and administrative

[21] *Ibid*., paras. 1–3.

[22] *Ibid*., para. 16.

[23] *Ibid*., para. 17.

[24] "Since there is no legislature in existence in Nigeria, the Constitution can be overridden at will, and the domestic effect of the African Charter has been suspended, the pervasive ouster clauses mean that the military government operates without any significant counterbalance to its power": *Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights*, Second Extraordinary Session, Doc.II/ES/ACHPR/4, 3.

[25] No. 129/94, above n. 20, para. 17. This accords with international law, "the duty to abide by obligations of a treaty means that a party cannot liberate itself from the obligations of the treaty otherwise than on proper grounds": Oppenheim, above n. 1 at 1249, para. 620.

[26] "The dispatch of investigative missions, inquiry missions, would clearly be one of our ways of showing, within these countries, that we hope for the provisions of the African Charter to be properly respected": 19th Session Transcripts, 126–7.

[27] The Commission "reaffirms the need for Member States to ensure respect for human and peoples' rights and thereby promote peace, stability and development in Africa": *Resolution on the African Commission on Human and Peoples' Rights*, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–94, ACHPR/RPT/7th, Annex XV.

[28] "Taking into account the various laws, decrees and executive decisions recently adopted by Nigeria, the Commission will have to examine the compatibility between the provisions of the African Charter on Human and Peoples' Rights and the Nigeria domestic legislation as well as the level of application by Nigeria of its obligations under the African Charter": Agenda of the Second Extraordinary Session of the African Commission (18–19 Dec. 1995), *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th, Annex III,

organs[29] as well as in practice.[30] This approach is similar to that adopted by other international bodies.[31]

The binding nature of the decisions of international organs depends on the instrument under which the body is established,[32] and on face value the Commission had only investigative powers[33] and was little more than a "sub-committee" of the political OAU.[34] This suggests that any relinquishment of sovereignty by the states was purely superficial.[35] However, the African Commission has stated on more than one occasion that it considers its deci-

para. 5. This is also affirmed by the requirement that states forward "principal laws, regulations, collective agreements and judicial decisions mentioned in them": *Guidelines for National Periodic Reports*, above n. 18 at para. 5.

[29] "The aim of the [State reporting] exercise is to show the degree of actual satisfaction of the rights, duties and freedoms of the Charter; the reporting obligation extends to the practices of the courts and administrative organs of the State party": *Guidelines for National Periodic Reports*, above n. 18 at para. I.9.

[30] "Realizing the importance of the reporting procedure in helping the African Commission on Human and Peoples' Rights to assist State parties to ensure that the rights and freedoms recognized by the African Charter on Human and Peoples' Rights are given effect in national law and practice": Draft Resolution on Overdue Reports for Adoption, Fifth Annual Report of the African Commission on Human and Peoples' Rights, 1991–92, ACHPR/RPT/5th, Annex IX. Draft Resolution on Promotional Activities, Fifth Annual Report of the African Commission on Human and Peoples' Rights, 1991–92, ACHPR/RPT/5th, Annex X; also *Guidelines for National Periodic Reports*, above n. 18 at para. I.21(c).

[31] E.g., McGoldrick, above n. 15, notes the attention given in the state reporting procedure by the UN Human Rights Committee to the internal effect of the ICCPR: "States are required to explain how their respective legal regimes would solve problems of conflict between provisions of the Covenant and those of its constitution and internal law . . . Details are sought of the account taken of the Covenant for the purpose of interpreting provisions of domestic legislation and as a standard for the administrative authorities in the exercise of discretionary powers", 270–1; see H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (Clarendon, Oxford, 1996) at 756.

[32] "As with judicial decisions, so too there is no settled practice in national courts as regards the effect to be given to decisions of international institutions. Much will depend on the degree of binding force possessed by such decisions under the treaty establishing the institution and any special measures taken by the State in question to give effect to them": Oppenheim, above n. 1 at 56.

[33] S. K. C. Mumba, "Prospects for Regional Protection of Human Rights in Africa" [1982] *Holdsworth Law Review* 101 at 109; E. Ankumah, *The African Commission on Human and Peoples' Rights: Practices and Procedures* (Nijhoff, The Hague, 1996) at 25, making the Commission a very weak body. The ability of the Assembly's decisions to be binding is also questioned: S. Ropke, *The African Commission on Human and Peoples' Rights—A Case Study* (Danish Centre for Human Rights, Copenhagen, 1995) at 14. The Monrovia Proposal, see Ramcharan, above n. 12, Art. 1(3) gave more status to the Commission's decisions, enabling it to "formulate and elaborate basic standards to serve as bases for adoption of legislation by African governments to deal with legal issues related to the enjoyment of human rights and fundamental freedoms".

[34] Gittleman, above n. 12 at 712; its "powers are less extensive by comparison with other Commissions": Bello, above n. 10 at 62; O. Ojo and A. Sesay, "The OAU and Human Rights: Prospects for the 1980s and Beyond" (1989) 8 *HRQ* 89–103 at 100, the Charter has "politicised the whole issue of human rights in Africa". However, the OAU Secretary General's role as set out in the previous Rules of Procedure has been largely reduced in the amended Rules, Ankumah, above n. 33 at 30. See Chap. 2, section C.

[35] Art. 54 which subjects the Commission's sanction of publication to the approval of the AHSG. This could be seen as another way in which the Assembly supervises the Commission's work, Bello, above n. 10 at 127.

sions as an authoritative interpretation of the Charter and thus binding on states.[36]

(a) Provision of Remedy

As a corollary to the states' duty to incorporate the provisions of the Charter into national law, it is necessary to consider whether states have an obligation to provide a remedy at the municipal level for rights that have been violated by them. Article 1 of the European Convention on Human Rights (ECHR) requires states to "secure" rights within their jurisdiction.[37] In this respect, as an indication of the binding nature not only of the African Charter but also of the African Commission's decisions, the African Commission has required states which have been found to be in violation of the Charter to annul or repeal the offending legislation[38] and has called on states to free individuals who have been

[36] "By ratifying the African Charter without reservation Nigeria voluntary submitted itself to the Commission's authority in this regard": *Account of Internal Legislation*, above n. 24 at 6. This derives from Art. 1 of the Charter, Resolution on the African Commission on Human and Peoples' Rights, above n. 27. It has been argued that it is not important whether these "recommendations" bind the states and thus limit their sovereignty and power, but that "what is relevant . . . is the moral and legal authority which governments and other members of the international community attach to published reports and conclusions of the organs concerned": M. Tardu, "Protocol to the UN Covenant on Civil and Political Rights and the Inter-American system: A Study of Coexisting Procedures" (1976) 70(4) *AJIL* 778–800, at 784. Although the "views" that the Human Rights Committee can give in relation to individual communications, under Art. 5(4) of the Optional Protocol to the ICCPR, do not appear to have the force of judicial decisions, they are considered by the Committee to be judicial and "effective decisions on the merits": McGoldrick, above n. 15 at 151.

[37] *Observer and Guardian* v. *United Kingdom*, above n. 15; see Harris, O'Boyle and Warbrick, above n. 15 at 24. However, even if the treaty is incorporated into national law this does not necessarily provide a remedy in the national court for the individual, "[t]his will only exist if the Convention guarantee as a whole or the relevant Article or part of it, is regarded by the national court concerned as self-executing. By this it is meant that the court accepts that the relevant provision creates a right that can be relied upon directly before it without further steps being needed by way of legislative or other State action", *ibid*. "On the one hand the Convention contains clauses whose wording and origin incline us to the conclusion that States are bound to incorporate the actual text of the Convention or section I at least, into their own law. Article 1 has been quoted in support of this argument . . . it is argued that the Convention therefore confers immediately 'subjective rights' on individuals and that not solely by the intermediary of national legislation. This view is upheld by a comparison of the final text of Article 1 with an earlier version whereby the contracting States 'shall undertake to ensure' to everybody the rights and freedoms guaranteed. Such an undertaking would have been purely between States and an individual would not have been able to rely on it in a national court. In support of the same theory Article 13 is also invoked. . . . This . . . presupposes that the Convention is part of municipal law": M. Sorensen, "Obligations of a State Party to a Treaty as Regards its Municipal Law" in A. Robertson, *Human Rights in National and International Law* (Manchester University Press, Manchester, 1968) 11–30 at 20. Oppenheim, above n. 1 at 81, "the various national legal systems usually contain a number of presumptions which serve to facilitate the application of international law by their courts".

[38] In communication No. 101/93, *Civil Liberties Organization in respect of the Nigerian Bar Association* v. *Nigeria*, the Commission held that in light of the violations of Arts. 6, 7 and 10 of the Charter, "the decree should therefor be annulled", see *Account of Internal Legislation*, above n. 24 at 6.

detained in violation of the Charter.[39] This was in spite of complaints from the state that the Commission's decisions were "an assault on the sovereignty" of the country.[40] The African Commission's action is in contrast to the stance taken by other human rights organs, even the judicial bodies[41] and in this respect it seems that those bodies with less "formal" powers have been willing to take more forceful decisions.[42] In this regard a move to a more "judicial" organ[43] may well not have the desired effect to increase protection for rights.

(b) Ensuring the Compliance of the State

Although the Commission has stated that it will verify compliance during a visit to the state,[44] it has been criticised for failing to carry out many of these stated intentions. Missions have been alleged to be too pro-government,[45] the Commission only sometimes "recommending" to states that they undertake certain action.[46] In practice the Commission has on only a few occasions verified whether the state has complied with its decisions[47] and in general there has been

[39] Where the Commission held that the composition of tribunals violated Art. 7, it "found that all those convicted under such tribunals in both cases should be freed": *Account of Internal Legislation*, above n. 24 at 4; No. 60/91, *Constitutional Rights Project* v. *Nigeria (in respect of Wahab Akamu, G. Adega and others)*; No. 87/93, Constitutional Rights Project (in respect of Zamani Lakwot and others) v Nigeria. It has, however, been less specific in other cases, e.g., in communication No. 159/96, *UIDH, FIDH, RADDHO, ONDH, ANDH* v. *Angola* the Commission held that "with regard to the damages for the prejudice suffered it urges the Angolan government and the complainants to draw all the legal consequences arising from the present decision".

[40] E.g. Nigeria, see *Account of Internal Legislation*, above n. 24 at 6.

[41] E.g., the European Court of Human Rights has ruled that its judgments were "essentially declaratory" and that it "cannot of itself annul or repeal" inconsistent national law or judgments: *Marckx* v. *Belgium*, Judgment of 13 June 1979, Series A, No. 31, para. 58, 2 EHRR 330 (1979–80). Harris, O'Boyle and Warbrick, above n. 15 at 26 note that this also applies to Committee of Ministers' decisions.

[42] McGoldrick, above n. 15 at 153. The Human Rights Committee has also taken some decisions where it has called for legislation to be repealed and for victims to be released: *Marais* v. *Madagascar*, Doc.A/38/40, 141, para. 20.

[43] With the proposed African Court, see Chaps. 2 and 6.

[44] "The Commission . . . declares that there has been a violation of Art. 7(a) (c) and (d); recommends that the government of Nigeria should free the complainants. At the 17th session the Commission decided to bring the file to Nigeria for a planned mission in order to make sure that the violations have been repaired": No. 87/93, above n. 39 at para. 15. No. 60/91, above n. 39 at para. 9. Missions have also been taken to Senegal, Mauritania, Togo and Sudan, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th at 4.

[45] Concerns raised at the 21st session by NGOs related to visits taken to Senegal and Nigeria. See Chap. 2.

[46] See *Report on Mission of Good Offices to Senegal*, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, above n. 44, Annex VIII; *Report of the Mission to Mauritania*, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, above n. 44, Annex IX. In addition, one Commissioner stated: "I have made recommendations based on what I found on the spot, and I hope that all of them would be taken into account by the prison authorities in Zimbabwe, I intend sending the report to them for their comments": 21st Session Transcripts, 68.

[47] In one communication it did follow up the response of the state, "[i]n case 87/93 the death sentences passed on the subjects were commuted to five years imprisonment. The fate of the subjects of Communication 60/91 is not known": *Account of Internal Legislation*, above n. 24 at 6.

little follow-up,[48] except for requiring that the state do so itself,[49] and, in one specific situation, to report on the situation through Article 62.[50]

(c) Impartiality of the International Organ

The binding nature of the decisions of the international organ, and thus the extent of power that states maintain over the system, can also derive from the impartiality and integrity of the process.[51] Although the African Commission is intended to be an impartial organisation[52] there are many criticisms of the close relationships of some commissioners with their home governments and that this has compromised their ability to remain objective and independent,[53] providing a screen for states to have and maintain influence over the Commission. On the other hand, such allegations do not apply to all members of the Commission, and although Article 41 of the Charter makes provision for the Commission to gain its funding from the OAU, this has often not been forthcoming, causing the Commission to rely on other, often Western, bodies for support.[54] Although the sources and their

[48] In some decisions the Commission has not even required any action be taken. E.g., communications No. 64/92, 68/92 and 78/92 (joined) Krischna Achuthan, Amnesty International, *Amnesty International* v. *Malawi*, where violations of Arts. 4, 5, 6 and 7 were found. The Special *Rapporteur* on Prisons did undertake a follow-up visit to prisons in Mali, although not in respect of specific communications: see 25th Session Transcripts, 50. Some recent moves have been made to improve compliance: see above Chap. 2.D.3c.

[49] The Commission "[r]ecommends that States Parties to the African Charter designate high ranking officials to act as focal points in the relation between the Commission and these States as such focal points would facilitate the follow-up on the Commission's recommendations and contact between States and the Commission": Resolution on the African Commission on Human and Peoples' Rights, above n. 27.

[50] After an extraordinary session was held on the situation in Nigeria after the death of Ken Saro-Wiwa. "The Commission invites the government of Nigeria to submit in conformity with Article 62 of the Charter its periodic report on the measures taken to ensure compliance with the rights and liberties recognised and guaranteed in the Charter, relevant past resolutions and decisions of the Commission as well as with the provisions of the Charter, relating to the independence of the judiciary, the safety of persons and property, the freedom of opinion and expression and social rights of workers": Final Communiqué of the Second Extraordinary Session of the African Commission on Human and Peoples' Rights, Kampala, Uganda, 18–19 Dec. 1995, ACHPR/FINCOMM/2nd EXTRAORDINARY/XX, para. 17.6.

[51] One of the members of the Human Rights Committee has stated that the pronouncements of the Committee gain their authority from the impartiality of the procedure and due process to the parties: C. Tomuschat, "Evolving Procedural Rules. The UN Human Rights Committee—The First Two Years of Dealing with Individual Communications", 1981 1 *HRLJ* 249–57 at 255. McGoldrick, above n. 15 at 152 notes that the practice of the HRC stresses the impartiality of this procedure and this gives its views great authority.

[52] Art. 31 requires its members to act in their personal capacity and swear an oath of impartiality. This is the case with the other quasi-judicial bodies, such as the UN HRC which under Art. 38 ICCPR requires its members to take an oath swearing to undertake their functions "impartially and conscientiously".

[53] E.g., the issue is included on the agenda of the sessions, e.g. Agenda of the 22nd session of the African Commission on Human and Peoples' Rights, DOC/OS/REV. 1(XXII) at item 12, "the issue of incompatibility of the membership of the African Commission". It is often raised by NGOs: see 19th Session Transcripts. See Chaps. 2 and 6.C.4.

[54] "According to Article 41 of the Charter the Commission functions with the staff, services and funds provided to it by the OAU. Nevertheless in view of the wide range of activities pertaining to

influence must be questioned, and so the Commission may not be increasingly independent, it could be decreasingly dependent on African states. This is an essential factor to take into account when determining the autonomy of an organ.

3. The Inability of the State to Derogate or Limit Rights

This is examined in detail in Chapter 5, section A and supports the impression that states, in theory at least, have diminishing control in this respect.

4. Lack of State Monopoly in Developing Jurisprudence of the African Charter

(a) Assisting the Commission

States are required to facilitate the functioning of the Commission. They must display goodwill and participate in a dialogue when there are allegations of violations against it,[55] including answering and giving explanations to any communications[56] and providing further information on request.[57] States should permit the Commission to visit the country[58] and co-operate with it in the achievement of its other functions.[59]

the Commission's mandate the funds placed at its disposal are insufficient. For this reason the Commission has been forced to seek extra budgetary funding to implement a number of projects. In the past, many organisations have favourably considered requests from the Commission . . . States, international and regional institutions and NGOs will be requested to contribute to these efforts": *Mauritius Plan of Action 1996–2001* at paras. 69 and 74.

[55] See Chap. 6.C.3.

[56] The Commission has held that "since the government of Chad does not wish to participate in a dialogue, that the Commission must, regrettably, continue its consideration of the case on the basis of facts and opinions submitted by the complaints alone. Thus, in the absence of a substantive response by the Government, in keeping with its practice, the Commission will take its decisions based on the events alleged by the complainants": No. 74/92, *Commission Nationale des Droits de l'Homme et des Libertés* v. *Chad*, paras. 25–6. The same principle was applied in communication No. 103/93, *Alhassan Abubakar* v. *Ghana*. See also No. 25/89, 47/90, 56/91, 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah* v. *Zaire*.

[57] The Government failed to provide further details of the relevant laws on request, merely stating that "if the complainant has violated some laws, he must stand trial for them in the national courts": No. 103/93, above n. 56. In Communication No. 144/95 *William Courson (acting on behalf of Severo Moto)* v. *Equatorial Guinea*, at para. 23, the Commission held that it "deplores the silence maintained by the parties in spite of repeated requests for information . . . It is of the view that such lack of co-operation does not help the Commission to have a clear and precise understanding of the case". In addition, in Communication No. 159/96, above n. 39 at para. 10, it interpreted Art. 57 as implying "that the State Party . . . against which allegation of human rights violations are levelled is required to consider them in good faith and to furnish the Commission with all information at its disposal to enable the latter to come to an equitable decision". See also B.5 below.

[58] "But that a mission should have been decided and not take place, it means there must be some problems somewhere. It means that the State concerned is not showing goodwill in facilitating the mission of the Commission to the country": 19th Session Transcripts, 126.

[59] "The consideration of communications takes a long time because of various reasons, especially because of lack of means, non-cooperation from the concerned States and due to some provisions of

There is also a general duty on states to protect the reputation and image of the Commission. The Commission has seen the need to go as far as passing a resolution on the issue[60] whereby it called on states "to do everything, in collaboration with the OAU Secretariat, to ensure the protection of the name, acronym and logo of the Commission throughout their countries".[61]

In terms of the new Court it appears that states will be required to ensure that the judges represent the main regions of Africa[62] and "shall assist by providing relevant facilities for the efficient handling of the case".[63]

(b) During Sessions

States have some influence over the content of the sessions, for example, in submitting proposals for inclusion on the agenda which they will be sent prior to the sessions[64] and through their ability to participate in the sessions, although without voting rights. They can make proposals, either as a state party,[65] in their capacity as members of a specialised institution[66] or of an intergovernmental organisation.[67]

The question of the standing of national institutions of human rights, namely bodies set up by governments to investigate human rights abuses, with a degree

the Charter which places heavy procedural constraints on the Commission's work": *Mauritius Plan of Action, 1996–2000* at para. 36. In addition, "[t]he Commission . . . Calls upon the States parties to the Charter to cooperate with the Special Rapporteur (of the Commission) in carrying out his mandate": Resolution on the African Commission on Human and Peoples' Rights, above n. 27 at para. 6.

[60] Resolution on the Protection of the Name, Acronym and Logo of the African Commission on Human and Peoples' Rights, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, above n. 44 at Annex XII.

[61] The Commission also refused to grant registration to NGOs, "whose names, acronyms or symbols could cause confusion prejudicial to the Commission": *ibid*.

[62] Art. 13(2) of the Draft Profocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Draft Cape Town Protocol), Cape Town, 1995, OAU/LEG/EXP/AFC/HPR (1) and Art. 14(2) of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Draft, Nouakchott Protocol), Nouakchott, 1997, OAU/LEG/EXP/ACHPR/PROT (2), stated that "states parties shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions". This was amended by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Addis Protocol), Addis Ababa, Dec. 1997, OAU/LEG/MIN/AFCHPR/PROT (1) Rev. 2, Art. 14(2) and (3) which reads: "the Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions. In the election of judges, the Assembly shall ensure that there is adequate gender representation". See Chap. 2.

[63] Including the receipt of "written and oral evidence and other representations including expert testimony and it shall make a decision on the basis of such evidence": (Addis) Protocol, above n. 62, Art. 26(1).

[64] Rule 7(2) and (3). It is worth noting that these two powers equally apply to NGOs: see below at section D.1.

[65] Rule 71.

[66] Rule 6(3). Note that although the time for states to submit proposals is 8 weeks, for NGOs it is 10.

[67] Rule 74, "on issues falling within the framework of the activities of these organisations".

of independence, has also been debated and whether, if standing were granted, this would provide states with another possibility of being presented.[68] The Commission has recently given standing to these entities, naming them as "essential partners" and granting status to several institutions which satisfy the criteria.[69]

However, although the ability of both NGOs and states to attend the sessions is dependant on the request of the Commission, the capacity of the states is, in theory, more limited than that accorded to NGOs, with the states' representatives being able to participate only in issues that "shall be of particular interest" to them.[70] In practice there has been no incident during public debates where the ability of a state to participate has been limited on this ground. Government representatives started to attend the sessions only at the sixteenth session[71] and have generally not been very active in open discussions during sessions.[72] Arguably, however, their influence is felt discreetly behind closed doors.

States do not have complete monopoly during discussion in sessions and their time to participate, and the content on which they can talk,[73] is as limited as those of NGOs. Although participation in the sessions does not entitle govern-

[68] See The African Commission on Human and Peoples' Rights, *Information Note on African National Institutions for the Promotion and Protection of Human Rights* (no reference), produced by Commissioner Rezzag-Bara, and discussions at the 22nd and 23rd sessions: 22nd Session Transcripts; 23rd Session Transcripts.

[69] Resolution on Granting Observer Status to National Human Rights Institutions in Africa (no reference), adopted at 24th Session. The institution must indicate that it is "established by law, constitution or decree; . . . of a State party to the African Charter; . . . conform to the Principles relating to the Status of National Institutions, also known as the Paris Principles . . . ; shall formally apply for status". Once obtained it can attend and participate, although not vote, in sessions where it will have a "distinct status". It must, however, submit a report every two years on its activities and assist the Commission to promote and protect rights at the national level. A number of institutions attended the 25th session and made statements: see 25th Session Transcripts, 31.

[70] In relation to NGOs, see Rule 72, "[t]he Commission may invite any organisation or persons capable of enlightening it to participate in its deliberations without voting rights". In relation to states, see Rule 71(1): "[t]he Commission . . . may invite any State to participate in the discussion of any issue that shall be of interest to that State". There have been recent changes to the ability of NGOs to observe and participate in sessions: see D below.

[71] "The Commission registered with satisfaction the participation for the first time of States parties": Final Communiqué of the 16th Ordinary Session, Banjul, The Gambia, 25 Oct.–3 Nov. 1994, reprinted in International Commission of Jurists, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents October 1991–March 1996* (International Commission of Jurists, Geneva, 1996) 143–54, para. 6. However, a government envoy from Burundi did attend the second session: *Second Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1988–89, ACHPR/RPT/2nd at para. 11. NGOs have been attending continually, see para. 26 of the *Report*, when the first observer status was granted.

[72] E.g., at the 21st session (21st Session Transcripts, 1), when interventions from state delegates were requested, no representatives wished to take the floor. Similarly, see 23rd Session Transcripts.

[73] As one Commissioner stated at the 20th session, "government delegates are here either to convey a message to us, to tell us something about the human rights situation in their countries . . . of course there are complaints against some of the governments here, but the statements we will hear will have nothing to do with the complaints against them . . . I would like to request them to speak within a period of a maximum of three minutes": 20th Session Transcripts, 17.

ments (or NGOs or individuals) to compel the Commission to act,[74] they could have an impact on the development of international law with the submission of draft resolutions.[75] NGOs, more than governments, have made great use of this opportunity during open discussions on particular issues. States do make interventions before the Commission at most sessions, but these tend to be when they are called upon in one part of the agenda to give information about the situation in their home countries.[76]

It is arguable that the influence that states have is more discrete and that in practice, although not on paper, they still maintain significant strength. Their ability to scrutinise the *Annual Activity Report* of the Commission containing jurisprudence of the Commission[77] from its decisions on communications and recommendations may limit the confidence of the Commission to be dynamic and condemnatory, but in reality receives minimum attention at the OAU Assembly and seems to be adopted without discussion.[78] However, in the meetings where the Draft Protocols for the Court have been discussed government representatives have outnumbered significantly those of the Commission and NGOs.[79]

During the session, all participants, including states, should act in an appropriate manner. The Commission has at several sessions reprimanded supporters of a government for cheering and applauding representatives, in the belief that it jeopardised its independence.[80] That states do not have a right to participate is thus emphasised and the Commission has the power to exclude them, at least in theory.[81]

[74] As one member said, "I would like to take this opportunity to specify that the fact that people make here declarations does not confine the Commission to a certain action, statements by you do not mean that we have to automatically implement them. So your intervention here will not necessarily be directive": *ibid*.

[75] "The contents of the decisions are just information for us and if you want to go beyond those statements and see that the Commission initiates action, the follow-up to your statements, it is imperative that the people concerned submitted draft resolutions", *ibid*., 23.2, 42.

[76] See interventions by State delegates, *ibid*., 23.2, 37; Agenda of the 23rd Ordinary Session, DOC/OS/22(XXIII).

[77] Art. 54.

[78] E. Ankumah, above n. 33 at 45, notes that the OAU and its Secretary General do not like to interfere in the work of the Commission.

[79] In the Nouakchott meeting NGOs were largely excluded from participating and at the meeting in Addis Ababa, present were delegates of states and "African resource persons invited by the OAU General Secretariat", Report on the Experts Meeting, Third Government Legal Experts Meeting (Enlarged to include Diplomats) on the Establishment of an African Court on Human and Peoples' Rights, 8–11 Dec. 1997, Addis Ababa, Ethiopia, OAU/LEG/EXP/AFCHPR/RPT.(III) Rev.1, at paras. 5 and 6.

[80] "If one takes statements without evidence one can be accused of participating in a political rally. We are not to undertake this. We will not admit any applause, so if in the future you are admitted to our meetings we ask you to respect this, because our meetings are not political rallies": 21st Session Transcripts, 100.

[81] "This is not a political forum where you have to reaffirm your presence . . . this is a small group of experts . . . there is no provision for this in our Charter . . . we are just being nice": 19th Session Transcripts, 11. In addition, "we are not in a political meeting and we shouldn't applaud . . . I would like to request the assembly here, if they don't want me to adopt stricter measures, I request them not to applaud or shout": 21st Session Transcripts, 97, 99. There has, however, been no occasion on which this has occurred.

State representatives have complained about their lack of status in terms of participation in the sessions. When the Commission held its second extraordinary session in 1995 in relation to the situation in Nigeria, the government complained that, in contrast to NGOs, it had not been given the opportunity to prepare its defence in time.[82] The Commission was eager to refute such claims, suggesting that the Commission wanted to give the impression, at least, of the state's importance.[83] It is worth noting that in the drafting of the Protocol on the Rights of Women, states have not yet been involved in the process.[84]

5. The Ability to be Brought to Answer before the African Commission and to Bring Cases before it

Although the state will be given the opportunity of considering a communication against it[85] it will have only a limited amount of time to do so.[86] If the state fails to make any response the Commission will take the decision on the basis of the information available:

> The African Commission in several previous decisions has set out the principle that where allegations of human rights abuse go uncontested by the government concerned . . . the Commission must decide on the facts provided by the complainant and treat those facts as given.[87]

This conforms with the approach taken by other international organs, such as the UN Human Rights Committee.[88] Where the Nigerian government com-

[82] 19th Session Transcripts, 12.

[83] "The Kampala session was extraordinary, so the normal time frame could no longer be respected. The steps which need to have been taken in organizing this session were taken in a hurry. The moment I got a confirmation of the session, I immediately advised everybody . . . I did everything to acquit myself *vis a vis* our partners, and as far as Nigeria is concerned, I took it upon myself personally to send a *note verbale* to the embassy in Addis Ababa and in Banjul. That is the maximum I could have done. I then dispatched myself to Kampala to arrange the meeting. It is true the time was short, but it was short for everyone, but the exigencies of the moment meant that it was that way. But let it be known that we did not discriminate against anyone, least of all the member States of the OAU to whom we owe so much respect and commitment", 19th Session Transcripts, 31.

[84] The majority of the initial work is being done by Commissioners and NGOs.

[85] Art. 57. But note that the Commission has interpreted this as including not just a right but a duty: see above B.4 n. 57. This is similar to requirements in other international instruments, e.g., Art. 26 of the Rules of Procedure of the Inter-American Court requires it, on application of a case to notify the Commission and the states concerned: Rules of the Inter-American Court of Human Rights, adopted by the Court at its 23rd Regular Session, 9–18 Jan. 1991; amended 25 Jan. 1993; 16 July 1993; 2 Dec. 1995.

[86] Rules 117 and 119(2) of the African Commission's Rules of Procedure. See Chap. 2.

[87] No. 27/89, 46/91, 49/91, 99/93, *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Démocrates, Commission Internationale des Juristes (CIJ), Union Interafricaine des Droits de l'Homme* v. *Rwanda*; No. 25/89, 47/90, 56/91, 100/93 (joined), above n. 56, see also Rule 119(4). The previous Rule 117(3) was less forceful: "the Commission will review the decision in the light of explanations and statements before it".

[88] *Bleier* v. *Uruguay* Comm. no. R.7/30, GAOR 37th session, Supp. 40, Report of the Human Rights Committee, 135; see also P. R. Ghandi, "The Human Rights Committee and the Right of

plained that it had not had the opportunity to answer allegations and thus had not been accorded due process in communications against it, the Commission held that for it "to postpone decisions indefinitely while waiting for the government to send a representative would be to make the communications procedure hostage to governments and effectively place in the government's hands the ability to prevent any decisions".[89] This clearly moves, at least on paper, the discretion and power away from the government.

Although the state can be represented in inter-state communications and submit oral or written observations before the Commission in the hearing on the communication,[90] there is no express provision in relation to the individual communication procedure. The Commission has, however, permitted states to be represented and a number of them have attended the hearings in this respect.[91] As with other international bodies,[92] the African Commission usually considers the case even if the representatives of either party are not present and there is no indication from the Commission that countries are obliged to send representatives to a hearing.

This, until recently, was similar to the reporting procedure where states will be informed of the session where their report will be examined and be able to participate in that session.[93] In practice the procedure was postponed until later sessions when the delegate was present. As a result, many reports were delayed for years[94] which, in effect, made the system wholly dependant on the willingness of states to co-operate. Recently, there has been a more forceful decision by the Commission to consider reports without the representative being present, but the fact that it has done little about this in practice suggests there is still considerable influence from the state.[95] In addition, it used to be that states could prevent their periodic reports under Article 62 being public knowledge, but the Commission now makes this decision.[96] This appears to take it out of the states'

Individual Communication" (1986) 57 *BYBIL* 201, at 242 notes how much leeway the Human Rights Committee has given to states to provide information.

[89] *Account of Internal Legislation*, above n. 24 at 5–6.

[90] Rule 100.

[91] E.g. No. 39/90, *Annette Pagnoule* v. *Cameroon*: "[t]he government was represented by a delegation at the 20th session of the Commission . . . which asked that the communication should be declared inadmissible". In addition, No. 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme* v. *Zambia*: "[a]t the 18th session . . . a delegation of the Zambian government appeared and presented additional information".

[92] E.g. at the Inter-American Court where, if the state does not appear, the Court can complete the case as it thinks fit: Art. 24(1) of the Rules of the Court; S. Davidson, *The Inter-American Court of Human Rights* (Dartmouth, Aldershot, 1992), at 55.

[93] Rule 83.

[94] E.g., it was noted at the 19th session in Apr. 1996 that the report of Mozambique had been submitted in 1994 and there were concerns that it would be out of date: see R. Murray, "Report of the 1996 Sessions of the African Commission on Human and Peoples' Rights" (1997) 18 *HRLJ* 16–27. In relation to reports of states submitted but not examined, see Chap. 2 above.

[95] See Chap. 2.D.2.

[96] "Periodical reports and other information submitted by States parties to the Charter as requested under Art. 62 . . . shall be documents for general distribution. The same thing shall apply to other information supplied by a State party . . . unless the Commission decides otherwise": Rule

subjective control into the hands of the Commission. Any decision taken on a communication by the Commission has to be sent to the state[97] and this will also be the case with the proposed Court.[98]

(a) Confidentiality

Maintaining the confidentiality of proceedings and documents ensured that states had some control over what came into the public domain[99] and was initially used as encouragement to them to ratify the Charter, thus offering them some protection of national sovereignty.[100] The restrictive interpretation of the Commission concerning information pertaining to communications under Article 59 was, until recently, criticised, as all of its work was subject to the approval of the OAU Assembly before being publicly available.[101] As a result, it was claimed, there had been little public scrutiny of its work,[102] thus weakening its effectiveness by giving "unnecessary protection to States".[103] The only sanction said to be available to the Commission was removed and the protection of rights made subject to political expediency.[104] There is evidence, however, that the Commission has become more open in the publication of its work, for example, in its production of details on the Commission's decisions on individual communications in the last five *Annual Activity Reports*, which, given the

78. This was changed from "unless this State shall request otherwise", Rule 79 of the previous Rules of Procedure.

[97] Rule 101(4) in respect of inter-state communications; Rule 120(2) in respect of individual communications.

[98] "The parties to the case shall be notified of the judgment of the Court": (Addis) Protocol, above n. 62, Art. 29.

[99] H. Scoble, "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter: in C. Welch and R. Meltzer (eds.), *Human Rights and Development in Africa* (University of New York Press, Albany, 1984), 196.

[100] "National sovereignty was not easily negotiated away without sufficient guarantees to a government that its national integrity would be duly protected": E. Bello, above n. 10 at 115. See also U. O. Umozurike, "The African Commission on Human and Peoples' Rights" (1991) 1 *Review of the African Commission* 5 at 11, argued, in light of these political sensitivities, that the Commission was more likely to be effective if it did not have to work "in the glare of publicity".

[101] C. Odinkalu and A. An-Na'im, *Enhancing Procedures of the African Commission with Respect to Individual Communications* (Interights, London, 1995) at 6; E. Ankumah, above n. 33 at 25, 38; A. Danielson, *The State Reporting Procedure under the African Charter* (Danish Centre for Human Rights, Copenhagen, 1994) at 29. E. Ankumah, "Towards Effective Implementation of the African Charter" (1994) 8(3) *Interights Bulletin* 59–62, at 60 notes that even the names of states are withheld in giving out details of communications. Ropke, above n. 33 at 9 believes this confidentiality gives the impression that the procedure is not worth trying and explains the small number of communications before the Commission.

[102] P. Amoah, "The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?" (1992) 4 *AJILL* 226–40; E. Ankumah, above n. 101 at 59. The Commission should be more open and accountable, C. Odinkalu and A. An-Na'im, above n. 101 at 1, 6. Information that is available is not necessarily correct or sufficient, S. Malmstrom and G. Oberleitner, "The 17th Session of the African Commission on Human and Peoples' Rights" (1995) 13 *NQHR* 272–5, at 276.

[103] Bello, above n. 10 at 114.

[104] *Ibid*., at 115; Ojo and Sesay, above n. 34 at 99 question the apparent deterrent effect of publicity.

increase in information, suggest that this is now a regular practice rather than *ad hoc* decision.[105] This is evidence for a diminishing control and monopoly that States may have over the international organs.[106]

(b) Bringing a Communication before the African Commission

The ability to criticise other states and bring communications against them to the Commission is provided for in the Charter in Articles 47–54.[107] Before the Court, the state has the right to institute proceedings before it.[108] There has been a suggestion that states have a duty to bring cases of violations of rights by other states to the attention of the Commission.[109]

[105] See *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–94, ACHPR/RPT/7th; *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–95, ACHPR/RPT/8th; *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th; *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th; *Eleventh Activity Report of the African Commission on Human and Peoples' Rights*, 1997–98, ACHPR/RPT/11th. These *Reports* also contained resolutions adopted and documents, such as reports of missions sent.

[106] See further discussion of confidentiality, Chap. 6.C.5.

[107] Although there is no indication that it has been used fully, in common with other international procedures, because of their political nature. The HRC has not received any such communication under Art. 41 of the ICCPR: McGoldrick, above n. 15 at 50. The Commission did state "a complaint was received from Sudan alleging human rights violations by Ethiopian troops in Sudanese territory during the alleged Ethiopian invasion of the Kurmuk and Gissan regions in Sudan on 12th Jaunary 1997. The Commission referred the matter to the OAU Secretariat and advised Sudan to do likewise because Ethiopia is not a party to the Charter and thus not subject to the Commission's jurisdiction": *One Decade of Challenge*, Tenth Anniversary Celebration, 2 Nov. 1987–2 Nov. 1997 at 18. In Mar. 1999 an African radio station, Gabon's African Number One, noted that the Democratic Republic of Congo had submitted a complaint against Rwanda, Uganda and Burundi, although there is no official record of this from the Commission. A case has subsequently been submitted to the ICJ by the same state although it is not clear whether the facts are the same: *Democratic Republic of Congo* v. *Burundi, Uganda and Rwanda*, ICJ Press Communiqué 99/34, 23 June 1999. At the 25th Session (see 25th Session Transcripts, 12), Ethiopia made a statement alleging violations by Eritrea. The Commission mentioned Art. 47 of the Charter and stated that it would be willing to consider a case. It is not known if any has been submitted.

[108] (Addis) Protocol, above n. 62, Art. 5(1)b: the state party which lodged the complaint with the Commission; the state against which the complaint has been lodged; the state party whose citizen is a victim of the human rights violation can bring cases to the Court. See Chap. 2.

[109] For example, one Commissioner asked during the examination of the state report of The Gambia, "in Africa there are widespread practices of violations of human rights and right in the neighbourhood of The Gambia there are violations going on. But The Gambia, the big champion of human rights, has not raised a finger, has not brought any complaint before this Commission . . . What practical use does The Gambia make of Article 45 [*sic*], which enables it to table a complaint against an offending sister State?": Examination of State Reports: Gambia, Zimbabwe, Senegal, 12th session, Oct. 1992 (Danish Centre for Human Rights, Copenhagen, 1992) at 33. The inter-state communication system under the Charter is mandatory, as with Arts. 11–13 of ICERD, but unlike that under Art. 41 of the ICCPR. In the Amendments of General Guidelines, *Amendment of the General Guidelines for the Preparation of Periodic Reports by States Parties*, DOC/OS/27 (XXIII) at p. 1, the Commission requests information from states on how "as an interested party" it was "using the Charter in its international relations, particularly in ensuring respect for it".

The state has no other power to bring an international claim to the Commission, including against entities other than states.[110] Due to political considerations of using the only formal mechanism of the inter-state communication that exists to air its grievances, it could be argued that the ability of the state to use the international organ for its own benefit is very restricted. It can bring to the attention of the Commission, during general public discussions, concerns relating to the actions of other states, but the Commission has treated such matters as information, rather than as a claim requiring it to take any action.[111]

6. Conclusion

Although, in theory, the Commission may have stated its intention to move control away from states, the amount of influence still retained in practice by states is substantial. The allegations of the lack of independence of Commissioners and the impact that government pressure has been implied to have on the Commission,[112] with mission reports not being published[113] and the limited publication of communications, indicates that although the legal statements of the Commission limit their control, in reality this is very different. The still confidential nature of the Commission's proceedings, although there has been shown to be some improvement, suggests the importance of behind-the-scenes discussions with state representatives.

The African Commission has given some indication in its statements at least, although not necessarily in practice, that the central and determining role played by the state in international human rights law is gradually diminishing and being downplayed by the fact that there are other entities involved. A focus

[110] The Committee under the ICERD has considered indirectly complaints against a state which is not party to the Convention. It has decided that if a non-state party is in territorial occupation of a member state, such information can be included in the latter's Art. 9 report which the Committee has then made comments on. It has been said that this uses the state reporting procedure as a "disguised inter-state dispute", particularly given that no cases have been brought by states under Art. 11 of the Convention which enables inter-state communications to be brought.

[111] See Chap. 6.C.1b.

[112] E.g. when NGOs complained that they had been excluded from the meeting in Nouakchott concerning the drafting of the Protocol for the Court, Commissioners were anxious to reassure them: "I will not . . . give the Commission's opinion, but my own. Our [NGO] brother . . . is telling us that African NGOs have been excluded from the debate. This is not true. I thought that the community of NGOs was homogenous, speaking with the same voice and what I noticed from the time of the first draft, which has been reorganised and amended by the States, the initial draft was made by NGOs, particularly African ones, which met in a small committee that I chaired myself. Of course between that project and this one there is a lot of difference, be it in Capetown or Nouakchott, of course we did have the delegates of the States, the legal experts of the States, but we also saw the participation of African NGOs . . . A lot of NGOs took the floor to underscore a few legal mistakes and I must admit that the contribution of the African NGOs was important, it permitted the States to see there were other concerns than those of States": 21st Session Transcripts, 90.

[113] There are concerns that the reports of missions sent to Nigeria and Sudan in 1997 have still not been made available.

on strict application of the "subject"/"object" dichotomy, which maintains the domination of the state (as it is seen as the only "true" subject of international law) does not adequately address the approach adopted by the African Commission and other international organs.

C. THE INDIVIDUAL IN THE AFRICAN SYSTEM

That the individual has rights under the Charter and, thus, at least some recognition in international law is settled. However, what is less clear is his ability to enforce them, participate in the development of international law and have duties imposed and enforced against him at the international level.

1. Standing before the International Organ

On the face of the Charter it is not entirely clear whether the individual is able to petition the African Commission at all, and indeed there is no consensus in the literature.[114] In practice, however, the African Commission has considered communications from persons alleging individual or a series of serious or massive violations of the Charter.[115]

Contrary to the approach of some international bodies,[116] the African

[114] Some writers believe there are two procedures, with individual cases of violations being dealt with on the one hand, which may be dealt with in the same way as inter-state communications by first making attempts at mediation, then writing a report and making recommendations to the Assembly if this fails, H. Scoble, above n. 99 at 195, and those that reveal serious or massive violations being dealt with further under Art. 58, See E. Bello, above n. 10 at 119; O. Gye-Wado, "A Comparative Analysis of the Institutional Framework for the Enforcement of Human Rights in africa and Western Europe" (1990) 2 *AJICL* 187–200 at 196; C. M. Tucker, "Regional Human Rights Models in Europe and Africa: A Comparison" (1983) 10 *Syracuse Journal of International and Comparative Law* 135–68 at 159. Others believe that only the procedure as stated in Art. 58 exists and there is no provision for dealing with individual cases which do not display evidence of serious or massive violations, Ojo and Sesay, above n. 34 at 98; B. Weston, R. Lukes, K. Hnatt, "Regional Human Rights Regimes: Comparison and Appraisal" (1989) 20 *Vanderbilt Journal of Transnational Law* 585–637 at 613. Even if the Commission finds violations, then there is no provision for effective remedies, only in "special cases" where Art. 58 can be used, W. Benedek, above n. 9 at 31.

[115] Unlike some other international procedures the African Commission has not required prior acceptance from the state. The Optional Protocol to the ICCPR requires additional ratification by states party to the Covenant; under Art. 44 of the ACHR the Inter-American Commission can receive communications from individuals or groups, who do not necessarily have to be victims. This is mandatory, there does not have to be a declaration by the state party, unlike cases of inter-state communications, under Art. 45. Petitioners have to satisfy conditions in Arts. 46 and 47; under Art. 14 of the ICERD, the Committee receives and examines communications from individuals or groups, but only after states have recognised its competence. Individuals are also able to use other international procedures, e.g., Resolution 1235 (XLII), 1967, ECOSOC; Resolution 1503 (XLVIII), 27 May 1970, ECOSOC; Art. 22 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, UN Doc.A/RES/39/46.

[116] "As a source of information and witness in international investigations, the individual is cast more in the role of 'object' than of 'subject' of international law. In international investigations of

Commission has provided for the individual to give it information and expert evidence.[117] Individuals have been presenting their cases before the Commission for a number of years[118] and the Commission has encouraged NGOs to act on their behalf.[119]

(a) Recognition in Terms of Remedies

The Commission has also been willing to contact individuals in terms of remedies for and investigations of extra-judicial executions, even where there may not necessarily be a communication submitted.[120]

In terms of remedies, the Commission has called for states to release individuals[121] and has required that compensation be paid, but the quantum decided at the national level.[122] It has also advocated the creation of an international trust fund for the families and victims of extra-judicial executions.[123] Other funds have been set up at the international level for this purpose, but none are under an international treaty where compensation is compulsory.[124]

a judicial nature, the international court or tribunal is not entitled to hear the individual as witness unless he is produced by a competent party to the proceedings or the parties agree. In non-judicial international investigations undertaken by the UN fact finding missions for example, the mission should be free to make use of individuals as sources of information and as witnesses even without the consent of the State of which they are nationals": E.-I. A. Daes, *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels* (United Nations, New York, 1992), at para. 441.

[117] "This was confirmed by the complainants during their arguments before the Commission as well as by expert testimony": No. 71/92, above n. 91 at para. 15; the evidence was a letter of the Director of Afronet Zambia.

[118] Starting at the 16th session, Final Communiqué of the 16th Ordinary Session, above n. 71 at para. 48. E.g., "the complainant also appeared and presented a reply to the government's arguments": No. 71/92, above n. 91.

[119] "The author . . . should also be advised to contact the NGO . . . which enjoys observer status with the Commission for assistance": No. 97/93, *John K. Modise* v. *Botswana*, para. 47.

[120] One Commissioner stated that the Commission had "tried to obtain statements from the families of the victims, from witnesses, people who have been targets of extrajudicial executions. We were able to contact people who had been found and been able to flee through a miracle": 20th Session Transcripts, 101.

[121] In communication No. 60/91, above n. 39, the Commission "recommend[ed] that the Government of Nigeria should free the complainants" after violations of Art. 7 were found. See Part B above.

[122] In communication No. 59/91, *Embga Mekongo Louis* v. *Cameroon* the Commission found violations of the Charter and "being unable to determine the amount of damages . . . recommends that the quantum should be determined under the law of Cameroon".

[123] "Taking into account the irreversible damage caused by an extrajudicial, summary or arbitrary execution, adequate means of compensation must be investigated with the object of sustaining the families of victims. This is the specific and chief duty of the Special Rapporteur inaugurated by the ACHPR. The possibility of creating a trust fund for compensation has been debated by the Commission and will perhaps be debated in more detail in the future": *Report on Extrajudicial, Summary or Arbitrary Executions*, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th, Annex VI. This has not yet been done.

[124] International compensation funds already exist in other treaties, e.g. under the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1978) UKTS 95 Cmnd.7383, (1972) 66 *AJIL* 712, (1972) 11 *ILM* 284, which came into force in 1978, See

(b) The Nature of the International Organ

The status of the individual is said to be dependent on the nature of the treaty body and the African system at present possesses no functioning Court.[125] The (Addis) Protocol holds that "relevant NGOs with observer status and individuals" "may" be entitled by the Court to have standing, but this will also be subject to a prior declaration by the respondent state to this effect.[126] There was a lack of consensus in the meetings where the Draft Protocols were produced concerning the latter's position.[127] It does seem, however, that the Court will recognise witnesses.[128]

2. Role in the Development of International Law

In theory individuals can participate in the sessions of the Commission[129] and although few have done so, it being mainly NGOs which have taken advantage of this power, there are instances of individual observers participating in deliberations and discussions.[130]

(a) Experts

The African Commission has called on individual jurists to assist it in drafting the Protocol on the Court[131] and the Rules of Procedure of the Commission

S. McLean, *Compensation for Damage. An International Perspective* (Dartmouth, Aldershot, 1993), at 139 which permits actions for compensation, but only in national courts.

[125] Although it looks as if this will be in existence in the near future, see Chap.2.E.

[126] Art. 5(3) and Art. 34(6), (Addis) Protocol, above n. 62. See Chap. 2.E.

[127] "This Article turned out to be very controversial and as such was subjected to prolonged and substantive discussions. Most delegations were of the view that the court should be accessible to individuals and NGOs just like the Commission and States parties. It was in fact pointed out that the statutes of the Inter-American Court on human rights were now being fully amended to allow individuals and NGOs to have access to the Court without hindrance": Report on Experts Meeting, above n. 79 at para. 21. See Chap. 2.

[128] "Any person, witness or representative of the parties who appears before the Court shall enjoy protection and all facilities in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court": (Addis) Protocol, above n. 62, Art. 10(3). Art. 10(2) also provides for legal representation for parties coming before the Court and this will be free if justice requires. Who will provide the payment for this representation is not clear. See Chap. 2.E.

[129] Art. 46. Rule 72 permits the Commission to "invite any organisation or persons capable of enlightening it to participate in its deliberations without voting rights".

[130] E.g. at the 22nd session, Professor Ebert, an independent jurist, made contributions to discussion on the embargo on Libya: see 22nd Session Transcripts. Although the Commission did question at a later session whether one individual was representing any organisation before permitting him to speak, 24th Session Transcripts, 42.

[131] "We hope to establish a dossier that will be submitted to the next Council of Ministers meeting, and at that time when experts met, they expressed the hope to see the involvement of jurists to make known their views on the Draft Protocol . . . Here we have many lawyers. So I call upon you to send us ideas which we will send to the Council of Ministers": 20th Session Transcripts, 117.

allow for the involvement of experts, implying that individuals other than Commissioners may be part of sub-commissions.[132]

(b) Judges

The Commission has also envisaged a role for national judges. Noting the situation in Nigeria where the government had ousted the jurisdiction of the courts in considering certain decrees, the Commission commended the actions of the Court of Appeal which "relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is 'offensive and utterly hostile to rationality' ",[133] but considered whether others would be "courageous enough to follow this ruling". Thus although there does not appear to be an obligation on judges to disregard national law, the Commission is in favour of those who do so. In addition, judges have been requested to send the Secretariat their decisions that are relevant to human rights or, where the Charter has been used nationally, suggesting that these will be drawn upon in future jurisprudence of the Commission.[134]

3. Duties of the Individual

The African Commission, at least in its statements, appears to illustrate a move, in general terms, away from the centrality of the state in international human rights law and towards focusing on the individual and other entities having duties in the promotion and protection of human rights. Thus, rather than only considering violations which emanate from the actions of the state, the Commission has been willing to take a more holistic approach and consider those that have been carried out by non-state actors.

The application of human rights between individuals has been recognised by other international bodies.[135] Although it has been argued that international

[132] "The Commission may establish sub commissions of experts after the prior approval of the Assembly. Unless the Assembly decides otherwise the Commission shall determine the functions and composition of each sub commission": Rule 29(1) and (2).

[133] *Account of Internal Legislation*, above n. 24 at 2.

[134] See 3(e) below.

[135] National courts have also applied rights between individuals: see in general, A. Drzemczewski, "The European Human Rights Convention and Relations between Private Parties" [1979] *Netherlands International Law Review* 163–81. Art. 29 of the UDHR and Art. 2(1)d of ICERD also recognise the role of individuals in the protection of rights. Note that the Human Rights Committee held that invasion of privacy by another individual was a violation of Art. 17 of the ICCPR, *S and S* v. *Norway*, Selected Decisions under the Optional Protocol, (1985) Vol. 1, 30; *General Comment* 16(32) UN Doc.CCPR/C/21/Rev.1, 19, paras. 9–10 (1989). In *X and Y* v. *The Netherlands*, Judgment of 26 Mar. 1985, Series A, No. 91, (1986) 8 EHRR 235, 81 ILR 103, the European Court on Human Rights held, in relation to the lack of criminal prosecution of an individual who sexually abused another, that this failure to prosecute was a violation of the state's obligation to protect the private life of the individual under the ECHR, the right of privacy being "essentially that of protecting the individual against the arbitrary interference by public authorities

instruments do not directly confer duties on individuals, they may create "*indirect* obligations for individuals in that [the European Convention] may oblige the legislature or the courts to protect individuals from one another".[136] So, it has been argued that Article 1 of the ECHR requires states to ensure individual rights are protected against state actions as well as against "all other members of society".[137]

It is a well-known feature of the African Charter that it includes duties of the individual as well as rights,[138] although duties have been recognised in other international instruments.[139] The African Commission itself has made few

. . . but it may involve the adoption of measures designed to ensure respect for private life even in the sphere of relations of individuals between themselves".

[136] A. Drzemczewski, above n. 135 at 176. The state will be responsible at the international level for the violations of rights by private entities: see A. Drzemczewski, 177. "It is true that the [European] Convention fundamentally guarantees traditional freedoms in relation to the State as holder of public power. This does not, however, imply that the State may not be obliged to protect individuals through appropriate measures against some forms of interference by other individuals, groups or organisations. While they themselves, under the Convention, may not be held responsible for any such acts which are in breach . . . the State may, under certain circumstances, be responsible for them": A. Byrnes, "Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation? Some Current Issues" (1992) 12 *Australian Yearbook of International Law*, 205–41 at 230–1. See *National Union of Belgian Police* v. *Belgium*, Series A, No. 19 (1975) 1 ECHR 578, Report of the European Commission, Series B, No. 17, para. 59 (1976).

[137] A. Drzemczewski, above n. 135 at 176. "[t]his Article may be understood to mean that States must ensure that individuals' rights are respected not only by public authorities but also by all other members of society . . . However, the [European] Convention and its Protocols do not appear to establish direct obligations upon individuals vis-à-vis others. Certainly, applications directed against private persons are inadmissible as being incompatible *ratione personae*, Article 34": *ibid.*, 176–7; E. A. Alkema, "The Third Party Applicability or 'Drittwirkung' of the European Convention on Human Rights" F. in Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension: Studies in Honour of Gerald J. Wiarda* (Carl Heymanns Verlag KG, Cologne, 1990) 33–46 at 38. There is also an argument that Art. 17 implies duties on the part of individuals: Alkema, 37, and Art. 13: see M. S. Eissen, "The European Convention on Human Rights and the Duties of the Individual" [1962] *Acta Scandin. Juris Gentium* 230–53, at 234–8.

[138] Arts. 27–29.

[139] The title of the American Declaration on the Rights and Duties of Man and its preamble paras. 2, 3, 4, 5 and 6 and chap. 2; Art. 32 ACHR. Art. 17 of the ECHR provides "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". The jurisprudence of the European Court of Human Rights has shown that states can limit the rights of individuals and groups if they fall under this provision: Harris, O'Boyle and Warbrick, above n. 15 at 510–11. "Article 17 allows action to be taken against an individual where he seeks to use his Convention rights in a subversive way. Such a person does not however, become an outlaw deprived of all his Convention rights": at 511. On 512 they refer to the decision of the Court in *Lawless* v. *Ireland*, Series A, Nos. 1–3; 1 EHRR 1 (1979–80), where it held that the aim of the Art. was to prevent individuals from using the Convention to destroy the rights of others. In App. No. 250/57 *Kommunistische Partei Deutschland* v. *FRG*, (1955–7) 1 Yearbook 223, the European Commission held that the actions of the German Communist Party fell within Art. 17 and so it could not use Arts. 9, 10 or 11 for its benefit. "In this way, according to the Commission, the German Communist Party (a private organisation) finds itself obliged to respect the rights contained in the Convention or face dissolution", A. Clapham, *Human Rights in the Private Sphere* (Clarendon, Oxford, 1993) 185.

pronouncements expressly on the Articles in the Charter relating to duties[140] but has given a considerable number of other statements that are relevant in this area.

(a) The Relevance of the "Public"/"Private" Divide

As seen above,[141] the divide between public and private impinges on the obligations which may be owed by non-state entities. Duties owed by individuals to other individuals have been recognised by, for example, the Inter-American Commission, which has acknowledged the doctrine of *Drittwirkung*, "this violence, springing from armed terrorist groups on both the right and the left leads the Commission to once again emphasize its well-known doctrine on the matter. The Commission has repeatedly stressed the obligation the governments have of maintaining public order and the personal safety of the country's inhabitants. For that purpose, the government must suppress acts of violence, even forcefully whether committed by public officials, or private individuals whether their motives are political or otherwise".[142]

Other international bodies have shown that they are willing to consider violations that have occurred in the private arena.[143]

Some writers have explicitly rejected the application of the doctrine to international instruments such as the ECHR: "given that this involves the liability of private individuals or the horizontal application of law, it can have no application under the Convention at the international level, because the Convention is a treaty that imposes obligations only upon States. Insofar as the Convention touches upon conduct of private persons, it does so only indirectly through such positive obligations as it imposes upon a State. As noted earlier the basis for the State's responsibility under the Convention in the case of such obligation is that, contrary to Article 1, it has failed to 'secure' to individuals within its jurisdiction the rights guaranteed in the Convention by not rendering unlawful the acts of

[140] One Commissioner asked during examination of a state report whether there was a law which enforced the provision where "a child who flouts Article 29 of the Charter, which says the children must respect their parents and maintain them in a case of need?": 20th Session Transcripts, 67. Other Commissioners have also asked states how they would implement individual obligations, "namely one that makes it a duty on individuals to implement African unity": 20th Session Transcripts, 68. In addition, the Amendments of General Guidelines, above n. 109 at 1 ask for states to provide information on "what is being done to ensure that individual duties are observed".

[141] Chap. 1.

[142] *Report on the Situation of Human Rights in the Republic of Guatemala*, OAS Doc/OEA/Ser.L/V/11.53, doc.21, rev.2, 13 Oct. 1981, at para. 10.

[143] E.g. CEDAW, as well as the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Res.36/55, adopted by UN General Assembly 25 Nov. 1981, (1982) 21 *ILM* 205, require the state to prohibit "private" discrimination, e.g. ICERD, Arts. 2(d) and 5(f): see Clapham, above n. 139 at 99–100. In addition, see General Recommendation on Violence Against Women, 19, CEDAW/C/1992/L.1/Add.15, 29 Jan. 1992, by the Committee on the Elimination of Discrimination Against Women, which affirms that the Convention covers public and private action and domestic violence. This "represents a giant leap forward in conceptual thinking surrounding human rights theories and illustrates the crucial importance of collapsing the public/private boundary in the human rights field": Clapham, above n. 139 at 100.

private persons that infringe them".[144] Furthermore, the ECHR refers explicitly to the state parties to the treaty as those who owe rights,[145] "[*c*]*es deux articles indiquent clairement que seule la responsabilité d'une des Hautes Parties Contractantes peut être engagée*".[146]

Even if individuals are accorded some international recognition, it is argued that[147] the provisions relate only to the procedural issues at the international level, that is procedural between an individual against the State. Individuals have procedural duties in submitting communications to the Commission, under Article 56, which is an approach apparent in other international procedures.[148]

Others claim, however, that international instruments do apply to individuals' relationships with each other. For example, Article 1(1) of the ECHR "is drafted so widely as to envisage the creation of *Drittwirkung der Grundrechte*".[149] Furthermore, "at its most extreme it requires a State to establish and maintain social conditions under which individuals may enjoy and exercise their rights free from violation by their fellow citizens".[150]

It has been said that the right to reply under Article 14 of the ACHR requires the government to "create appropriate mechanisms for the resolution of human rights violations occasioned by private actions, which is clearly a manifestation of the American Convention's espousal of the *Drittwirkung* concept".[151]

(b) International Crimes

Individual criminal responsibility has been established at the international level in several areas.[152] The African Commission has upheld the idea that torture is

[144] Harris, O'Boyle and Warbrick, above n. 15 at at 21.

[145] E.g. Arts. 1, 19.

[146] D. Spielmann, *L'Effet Potentiel de la Convention Européenne des Droits de l'Homme entre Personnes Privées* (Bruylant, Brussels, 1995), at 41.

[147] M. A. Eissen, "La Convention et les Devoirs de l'Individu" in University of Strasbourg, *La Protection Internationale des Droits de l'Homme dans le Cadre Européen* (Librairie Dalloz, Paris, 1961), 173.

[148] In relation to the ECHR "applicants are told that their applications are inadmissible as they themselves have to respect the Articles contained in the Convention": Clapham, above n. 139 at 183; also M. A. Eissen, above n. 147 at 239. In one communication the African Commission deplored the lack of assistance from "both parties", see above n. 57. Another case was declared inadmissible for using insulting language contrary to Art. 56 of the Charter, Communication No. 65/92, *Ligue Camérounaise des Droits de l'Homme* v. *Cameroon*. As the Commission states in its Information Sheet No. 3, at p. 8, "political rhetoric and vulgar language is not necessary. Insulting language will render a communication inadmissible, irrespective of the seriousness of the complaint". See below Chap. 6.C.1b and 6.C.7.

[149] Davidson, above n. 92 at 20, n. 73.

[150] *Ibid*., 150.

[151] *Ibid*., 170.

[152] E.g. the Convention on the Suppression and Punishment of the Crime of Apartheid imposes criminal responsibility on individuals and State representatives, in Art. 3, and the African Commission has explicitly incorporated these provisions, by requiring that states party to the Charter report on such in their Art. 62 reports: see *Guidelines for National Periodic Reports*, above n. 18 at VI. "What is clear is that individuals have *duties* under international law. This was

an international crime invoking individual responsibility[153] and has directly incorporated the provisions of the Convention on Apartheid into its interpretation of the Charter which thus confers criminal sanctions on individuals.[154] Members of the Commission have also focused on the responsibility of the perpetrators behind the scenes.[155] The Commission has also encouraged the establishment of an International Criminal Court and has condemned the commission of international crimes,[156] showing its wish to co-operate closely with the International Tribunal in Rwanda.[157]

(c) State Agents

If individuals can be held liable for duties at the international level it is necessary to consider whether this is due to their being agents of the state or not.[158] This also calls into question the responsibility of the state at the international level. In this respect, states will be liable for the acts of their agents.[159]

established with the introduction of legal instruments outlawing slavery and piracy and with regulation of the high seas and outer space. In the context of human rights, the Charter of the International Military Tribunal (at Nuremberg) clearly fixes duties on individuals for 'crimes of humanity' ": Clapham, above n. 139 at 95. Note also the Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec. 1948, into force, 12 Jan. 1951, 78 UNTS 277, which imposes punishment of individuals for genocide.

[153] As one Commissioner asked of the Algerian state representative, "[d]o you thus feel that torture is being punished as it should? Who are the perpetrators of acts of torture, in general? How do you proceed to try these perpetrators?", 19th Session Transcripts, 82. In addition, "[t]he Commission recommends that the government should . . . fight impunity by prosecuting those implicated in torture and summary executions": *Report on Mission of Good Offices to Senegal*, above n. 46. In addition, in its Resolution on an International Criminal Court, *Eleventh Annual Activity Report of the African Commission on Human and Peoples' Reports*, 1997–98, ACHPR/RPT/11th at Annex III, the Commission stresses the importance of the Court to try "crimes of genocide, crimes against humanity and serious violations of humanitarian law".

[154] *Guidelines for National Periodic Reports*, above n. 18 at para. VI.10(c), para. VI.11.

[155] E.g. "those who perpetrate the executions should be prosecuted in a legal way and at the same time the victims need to be compensated . . . my mission . . . is . . . to identify the people responsible and the degree of responsibility by executions . . . because often we noted in our assessment, the real initiators are not the people pulling trigger but they are behind the scene giving orders and they are more responsible than the people who have pulled the trigger": 20th Session Transcripts, 102.

[156] Resolution on Rwanda, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–95, ACHPR/RPT/8th at Annex VII, para. 1.

[157] "The Special Rapporteur has suggested that the Secretariat enter quickly into contact with the head of the Criminal Tribunal for Rwanda with the goal of informing it of the mandate of the Special Rapporteur and inviting it to enter into a close cooperation": *Progress of the Report on Extrajudicial, Summary or Arbitrary Executions, Rwanda, Burundi*, above n. 123. It was confirmed that "the various cases have also been submitted to the head of the penal tribunal for Rwanda", 20th Session Transcripts, 101. It is not clear which cases these are.

[158] Indeed, it has been argued that "to limit the operation of the duties prescribed by international law to the impersonal entity of States as distinguished from the individuals who compose them and who act on their behalf is to open the door wide for the acceptance in relation to States of standards of morality different from those applying among individuals": Lauterpacht, above n. 1 at 488.

[159] In Inter-American Court of Human Rights, *Velásquez Rodriguez Case*, Judgment of 29 July 1988, Series C, No. 4, paras. 169–72, the Inter-American Court held, "whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention . . . under international law a State is responsible for

It is not entirely clear who would be viewed as a state agent in this regard. The African Commission has considered security forces,[160] the security service[161] and the military[162] as agents of the government. It has also required that states train their officials, namely those working in "ministries of justice, interior, defence, education, information, and social affairs" and "police, prison wardens,[163] or other officers"[164] and law enforcement officials[165] in aspects of human rights. In this respect, the European Commission of Human Rights has treated a church as a body of the State.[166]

(d) During Time of War

The African Commission has stated that it is not just violations by the government that occur in war[167] but also by all warring factions, such as paramilitary groups,[168] "conflicting parties"[169] and "armed bandits".[170] It has also

the acts of its agents undertaken in their official capacity and for their omissions even when those agents act outside the sphere of their authority or violate internal law . . . Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State". This has been affirmed by the Inter-American Commission which has held that the state's "international responsibility in the field of human rights, whether established or not by internal justice, arises from the acts of the public power in cases which, voluntarily or involuntarily, its agents, by action or omission, violate human rights": *Report 15/95 on Case 11.010 against Colombia*, *Report of Inter-American Commission*, 1995.

[160] Communication No. 27/89, 46/91, 49/91, 99/93 (joined), above n. 87.

[161] Communication No. 74/92, above n. 56.

[162] "The torture of 15 persons by a military unity at Kinsuka . . . constitutes a violation of [Article 5]": No. 25/89, 47/90, 56/91, 100/93 (joined), above n. 56 at para. 41.

[163] See also "Human rights training of prison officers which was organised in May 1996 and evaluated after six months should be continued as planned": *Report on Visit to Prisons in Zimbabwe by Professor E. V. O. Dankwa, Special Rapporteur on Prisons and Conditions of Detention*, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th at Annex VII, para. 5. On his visit to prisons in Mozambique he also recommended that allegations of corruption and assaults by prison officers be investigated and punished, *Prisons in Mozambique*, Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, series IV, No. 3 at paras. 4–5.

[164] *Programme of Activities 1992–1996*, *Sixth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1992–93, ACHPR/RPT/6th at 20, para. II.A. See also the comment by one commissioner during the examination of the Zimbabwe state report: "I'd like to know in what jurisdiction are the defense forces taken, and if the army personally are trained for human rights": 21st Session Transcripts, 76. In addition, it was noted that in Sudan "there is a project to teach human rights to security forces and we trust that the government of Sudan will translate these into reality": 21st Session Transcripts, 50.

[165] Draft Resolution on Promotional Activities, above n. 30 at para. 3.

[166] *X* v. *FRG*, 20 DR, 163; see Alkema, above n. 137 at 39–40.

[167] See further, Chap. 5.

[168] "Which have systematically resorted to massacre of the innocent civilian population": *Report on Extrajudicial, Summary or Arbitrary Executions*, above n. 123. In its *Human Rights Situation in Africa*, DOC/OS(XXV)/96 at 4, the Commission issued an appeal "to warring groups, for them to become aware that they are also expected to respect human rights".

[169] "The African Commission . . . views with grave concern the massive violation of human rights that continue to be perpetrated in Zaire by conflicting parties": Resolution on Zaire, *Tenth Annual Activity Repor6 of the African Commission on Human and Peoples' Rights*, 1993–94, ACHPR/APT/7th, Annex XII.

[170] Who caused "permanent insecurity provoking assassinations and massive displacement of the

"condemned violence and the massacre of innocent civilians by the different armed factions"[171] and has noted serious human rights violations by both government and non-government bodies,[172] even opposition parties.[173]

The African Commission, as a monitor of human and peoples' rights, has also reminded individuals of their obligations in humanitarian law[174] and in peace agreements.[175] They should "immediately . . . cease using military force to interfere with the delivery of humanitarian assistance to the civilian population and . . . allow such assistance to be delivered unhindered"[176] as well as ensure state structures such as the courts are respected[177] and disarm fighters.[178] In this

civilian population": Final Communiqué of the Second Extraordinary Session, above n. 50 at para. 18. In relation to terrorist groups, the Inter-American Commission has stated that if it were involved with such "acts of violence perpetrated by an armed group" this "would have an adverse effect on the American system for the protection of human rights and do nothing to enhance its operation": see Clapham, above n. 139 at 123.

[171] Resolution on the Situation in Rwanda, *Seventh Annual Activity Report of the Acrican Commission on Human and Peoples' Rights*, 1993–94, ACHPR/APT/7th, Annex XII. N. S. Rodley, "Can Armed Opposition Groups Violate Human Rights" in K. Mahoney and P. Mahoney, *Human Rights in the 21st Century* (Martinus Nijhoff, Dordrecht, 1992) 297 at 298, notes in relation to armed opposition groups and paramilitary groups and armed opposition groups with considerable control over the population, the responsibility of the state arises but questions whether it is possible for those which do not "exercise effective power" to violate human rights. In this respect, he considers that the ability of such groups to exercise this power is the most important criterion in the imposition of duties at the international level, at 313.

[172] Such as "security forces, armed gangs and militias": Resolution on Burundi, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th, Annex VII; and "factions of the Sudan Peoples' Liberation Army (SPLA) and the South Sudan Independence Army (SSIA)": Resolution on Sudan, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–95, ACHPR/APT/8th, Annex VIII. Common Art. 3 to the four Geneva Conventions of 1949 contains obligations for "each party to the conflict": see Clapham, above n. 139 at 112–18. See also Chap. 5. C. Chinkin, *Third Parties in International Law* (Clarendon, Oxford, 1993), at 133, argues that the nature of humanitarian law justifies the impact on rights to be lessened and rights will be achieved if both sides respect them.

[173] "He was telling us of an opposition party that has over 60,000 men. In Liberia we have warring factions who members have been photographed executing people in the streets. There is need to start asking what to do. There is need to help vulnerable people,not only women, children, the old and sick, but also ethnic and religious minorities": 20th Session Transcripts, 104.

[174] "The Commission . . . Further calls on all factions of the SPLA and SSIA to respect international humanitarian law, particularly Article 3 common to the four Geneva Conventions of 1949 including ending deliberate and arbitrary killings and the torture of detainees": Resolution on Sudan, above n. 172 at para. 5.

[175] Resolution on Burundi, above n. 172 at para. 2. In addition, the Commission "[e]ndorses the Abuja Peace Accord as the best means for the cessation of hostilities and the restoration of peace to Liberia and calls upon all parties to this Agreement to cooperate in good faith in its implementation": Resolution on Liberia, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–95, ACHPR/RPT/9th, Annex VII.

[176] This includes respecting those "humanitarian organisations working in the field": Resolution on the Situation in Rwanda, above n. 171 at para. 3. Resolution on Sudan, above n. 172 at para. 4.

[177] "The Commission . . . Urges all parties to bring an immediate end to the commission of further violence and to respect the rights to life, to ensure proper administration of justice, the use of exceptional courts, arbitrary detention and torture": Resolution on Algeria, produced in International Commission of Jurists, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996) 165–6.

[178] "The Commission . . . calls upon the Warring Factions to take all necessary steps to disarm their fighters cooperate with the West African Peace Keeping forces (ECOMOG) and UN Observer

respect, each party should "work towards a peaceful settlement through dialogue between all the Peoples of [the country]"[179] and should ensure respect not only for human but also peoples' rights.[180]

In such situations, individuals are viewed as having obligations in international law, and this gives them some standing "to grant rebels international rights and duties means that the divide between insurgents and the legal government has reached a point that the former have a standing, albeit limited, in the international community. To acknowledge that rebels are entitled to invoke international rules implies that they are outside both the physical and legal control of the national authorities. By contrast, to suggest that insurgents cannot rely on international law means that the only body of law applicable to them is domestic criminal law and consequently that the government in power is free from international constraint and can treat them as it thinks best".[181]

(e) Duties Imposed on Professionals

The Commission has also imposed duties on "different professional groups such as judges, lawyers and journalists and human rights activists" on the basis that they have "direct responsibility for ensuring human rights protection"[182] and because they have an impact on the limitation of rights,[183] namely "may be involved in the custody, interrogation or treatment of any individual subjected

Mission in Liberia (UNOMIL) and have fighters encamped, demobilised and reintegrated into civil society so as to pave the way for a free and fair general election": Resolution on Liberia, above n. 175. Also, "Recalling the Abuja Agreement singed [*sic*] by all the parties to the Liberian conflict which the Heads of the Warring Factions were allocated seats on the governing Council of State in the hope that such can arrangement would facilitate and ensure disarmament of their fighters, a prerequisite for a free and fair election": *ibid*.

[179] Resolution on the Situation in Rwanda, above n. 171. "The Commission . . . Urges all parties to responde activity to the dialogue aimed at restoring the rule of law and establishing democratic institutions": Resolution on Algeria, above n. 177. Also, the Commission "Urges all those parties engaged in war on the African continent to abide by the provisions of international humanitarian law, particularly with regard to the protection of civilians and to undertake all efforts to restore peace", Resolution on The Human Rights Situation in Africa, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–95, ACHPR/RPT/8th, Annex VII, at para. 6.

[180] "The Commission . . . urgently appeals to all parties to the conflict in Zaire to respect the human rights of all peoples in Zaire especially non-combatants, refugees and internally displaced persons": *Resolution on Zaire*, above n. 169.

[181] A. Cassese, "Status of Rebels under the 1977 Geneva Protocol on Non International Armed Conflicts" (1981) 30 *ICLQ* 416, at 417. Although individuals may not necessarily be viewed as parties. The 1977 Additional Protocols to the Geneva Conventions, "at least taken on face value, [do] not confer rights or impose obligations on rebels in that it does not permit them formally to become party to it. It would therefore seem that States are the only international entities to which the Protocol applies. . . . The right to demand that a government fighting insurgents should comply with the Protocol would thus only belong to all the other ratifying States, not the insurgents themselves": at 420.

[182] *Programme of Activities 1992–1996*, above n. 164 at 20, para. II.A.

[183] States should report to the Commission on "any special restrictions imposed upon the exercise of the trade union rights mentioned above by members of the armed forces, the police or the administration of the State", *Guidelines for National Periodic Reports*, above n. 18 at para. II.15.

to any form of arrest, detention or imprisonment".[184] Obligations do not seem to be imposed, therefore, on the basis of their being part of the state.[185] So, members of the judiciary have been requested to publicise cases involving human rights to develop the law on human rights.[186] Indeed their duties and role were subjects of a resolution of the Commission which required judges and magistrates "to play a greater role in incorporating the Charter and future jurisprudence of the Commission in their judgments thereby promoting and protecting the rights and freedoms guaranteed by the Charter"[187] and also for judges "to base their reasoning and judgments on all relevant human rights instruments, either as applicable authoritative laws or as persuasive aids to interpretation of constitutional and legislative provisions on fundamental rights, freedoms and duties".[188] Clapham notes the possibility of the state being responsible at the European level for its courts' denial of rights or violating rights of the individual under the European Convention on Human Rights.[189]

(f) Private Individual Duties

Individuals also have duties in relation to the other provisions of the Charter in their relations with other individuals.[190] This may arise expressly, or implicitly

[184] Resolution on Human and Peoples' Rights Education, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–94, ACHPR/RPT/7th, Annex X at para. 1. This can include "medical personnel".

[185] Note that the European system has held that court appointed lawyers belong to the category of state actors and the state will be responsible for lawyers acting in a free legal aid capacity: *Van der Mussele* v. *Belgium*, Series A, No. 70 (1984) 6 EHRR 613; Alkema, above n. 137 at 39. The state itself can be an employer, see *ibid*., at 39; see also *Artico* v. *Italy*, Series A, No. 37 (1981) 3 EHRR 1; *Schmidt and Dahlstrom* v. *Sweden*, Series A, No. 21 1 EHRR 632 (1979–80). The European Commission on Human Rights has held that a decision of a court was the responsibility of the state: *Van der Keijden* v. *The Netherlands*, App. No. 11002/84, (1985) 61 Decisions and Reports, 264. See also *Markt Intern Verlag GmbH and Klaus Beermann* v. *Germany*, Series A, No. 165 (1990) 12 EHRR 161, at para. 27; *Sunday Times* v. *United Kingdom*, Series A, No. 30, 2 EHRR 245 (1979–80); *Hoffman* v. *Austria*, App. No. 12875/87, Series A, No. 255-C (1994) 17 EHRR 293. Clapham, above n. 139 at 243–4, concludes that such case law "implies that the Convention obliges national courts to apply principles in the Convention in a private law dispute . . . [the case law] tends to suggest that national courts are obliged to ensure respect for the guarantees in the Convention when deciding private law disputes . . . The lack of an effective remedy before a national authority to ensure respect by a private person of a Convention right would be seen to be a violation of Article 13 and could be sanctioned at the international level".

[186] The Chairman "also called upon magistrates and judges to publish decisions related to human rights in order to establish an African jurisprudence on this subject": Final Communiqué 19th Ordinary Session of the African Commission on Human and Peoples' Rights, ACHPR/FIN/COMM/XIX, at para. 20.

[187] Resolution on the Role of Lawyers and Judges in Integration of the Charter and Enhancement of the Commission's Work in National and Sub-Regional Systems, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th, Annex VII, para. 1.

[188] *Ibid*.

[189] Clapham, above n. 139 at 240–1.

[190] "It does seem however, that where a convention confers rights and duties on individuals, that in some cases such individuals might also be violators of human and peoples' rights. It is conceivable that an individual may violate another's right where: he exercises his rights without due regard

in the international instrument.[191] Forde interestingly argues that the wording "everyone has a right to" and "no-one shall be deprived of", contained in provisions of the ECHR, could refer to violations by private persons as well, which states must prevent.[192] The inclusion of the word "arbitrarily" in some provisions relating to the right to life, could relate to the state's obligation to protect against murder by private individuals.[193] The right to life is one of those rights which, it has been argued, "by their very nature must envisage governmental responsibility for failure to ensure that they are respected by private individuals and organizations".[194]

Defining Article 27 of the African Charter the African Commission held

> Every individual shall have duties towards other people, society, family and the international community. The personal rights shall be enjoyed subject to the rights and fundamental freedoms of others. Personal and private rights shall not be selfishly insisted upon at the expense of family, society, State, other legally recognised communities' and international community's interests. Individual rights are to be enjoyed with due regard to the rights of others, collective security, morality and common interest. [States should report on] activities in curbing personal and private interests for the benefit of the interests protected by the Article.[195]

In addition, the African Commission has held that there is a duty on all not to use violence.[196] It has been noted that in relation to the European Convention

to the rights of others, Article 27(21) *sic*; acts such as caning may derogate from the rights of the respect of the dignity inherent in a human being, Article 5; he restricts the rights of another to the freedom of movement": O. E. Eze, "The Place of the African Charter on Human and Peoples' Rights in the Enforcement of Rights", on file with the author. For discussion of Art. 10 ECHR and freedom of expression and whether this applies to individuals in the private sphere, see Clapham, above n. 139 at 222.

[191] "Private duties can arise from the language of the particular treaty even though there is no express mention of individuals or individual duties": J. Paust, "The Other Side of Rights—Private Duties under Human Rights Law" (1992) 5 *Harvard Human Rights Law Journal* 51–63, at 52. Note the Resolution by the Council of Europe Consultative Assembly No. 582, 23 Jan. 1970 to the Committee of Ministers, suggesting an additional protocol be created to apply the ECHR to private persons, see Spielmann, above n. 146 at 88. In addition, it has been noted that in treaties "rights are generally set forth without any reference to those who owe a corresponding duty and can be understood to impose duties on individuals": Paust, 52. The language of the UDHR could be used for claiming rights against individuals and groups and not just against states, Note the preamble, Paust, 53. But Rodley, above n. 171 at 305–6, argues that it is merely promotional and it is only states which are obliged to undertake action.

[192] M. Forde, "Non-Governmental Interferences with Human Rights" (1985) 56 *BYIL* 153, at 264.

[193] Daes, above n. 116 at para. 279.

[194] Forde, above n. 192 at 262. Spielmann, above n. 146 at 38 also adds freedom from torture and ill treatment; the right to due process; right to private and family life; liberty of thought; freedoms of expression and of association. Forde notes that Art. 1 of the UN Declaration on Torture refers only to that which is "inflicted by or on the instigation of a public official" and so does refer to acts in private: *ibid*.

[195] *Guidelines for National Periodic Reports*, above n. 18 at para. IV.4.

[196] "The Commission . . . Condemns the use of violence in South Africa to settle disputes by anybody in South Africa an in particular the recent massacre of 18 people", Final Communiqué of the 10th Ordinary Session, Banjul, The Gambia, 8–15 Oct. 1991, para. (a). In this respect, Art. 3(1) of the Convention on the Rights of the Child requires that the "child should be protected from parents", and General Comments passed by the UN Human Rights Committee require states to

on Human Rights certain rights are restricted "for the protection of the rights and freedoms of others"[197] and this applies to Articles 11 and 14 of the African Charter. Both the African and American Commissions have recognised the duty of the state to protect against domestic violence,[198] and thus acknowledging that it is not just the State which wields potentially abusive power.[199] In this respect, the African Commission has addressed recommendations to private bodies whose actions could infringe the rights of others, such as "manufacturers of anti-personnel mines".[200]

prevent private violations of rights: *General Comment on Article 7*, A/37/40, 94, revised by *General Comment No. 20(44)*, Art. 7, CCPR/C/21/Rev.1/Add.3, para. 2, which applies the definition of torture to persons acting in "their private capacity". See in general, Clapham, above n. 139 at chap. 4, and J. Elkind and M. Shaw, *A Standard for Justice. A Critical Comment on the Proposed Bill of Rights for New Zealand* (Oxford University Press, Auckland, 1986).

[197] Arts. 8(2), 9(2), 10(2) and 11(2) of the ECHR. See Clapham, above n. 139 at 186–7. E.g. in *Glimmerveen and Hagenbeeck* v. *The Netherlands*, App. Nos. 8348/78 and 8406/78, 18 Decisions and Reports, 187, the European Commission held that the Netherlands should have prohibited discrimination by private persons under ICERD and the applicants could not rely on the Arts. of the ECHR (namely freedom of expression in Art. 10 and Art. 3 of the First Protocol) because they were seeking to destroy others' rights. See also Alkema, above n. 137 at 38–9.

[198] At the 12th session discussion of the state report of The Gambia, one Commissioner asked the representative "if there have been any prosecutions for wife-beating [which was mentioned in the Report] which is clearly against the letter and spirit of the African Charter": *Examination of State Reports: Gambia, Zimbabwe, Senegal, 12th session, October 1992*, above n. 109 at 25. See also comments Buhedma, 29. In relation to the Inter-American system, *Report on the Situation in Ecuador*, above n. 11 at 127–8, the Inter-American Commission recommended that the State, among other things, "continue and amplify measures to promote participation of women in decision-making at all levels in the public and private spheres; . . . research and report on the prevalence of violence against women, and domestic violence in particular". It has been noted that since Nuremberg "there has been an increasing trend towards the expansion of individual responsibility directly established under international law": Oppenheim, above n. 1 at 506. It is worth noting that duties of individuals have been recognised by a number of international bodies. See Art. 19(1) of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, adopted July 1990, not yet in force, OAU Doc.CAB/LEG/TSG/Rev.1; the Committee on the Elimination of Discrimination Against Women passed a General Recommendation 14 (1990) which called on states to take appropriate action to eradicate female genital mutilation and the UN Declaration on the Elimination of Violence Against Women recognises female genital mutilation as a form of violence against women. It addresses violence "both in public private life" which states should prevent, punish and eradicate. The United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted 25 June 1993, reprinted in (1993) 32 ILM 1661, (1993) 14 HRLJ 352 also "stresses the importance of working towards the elimination of violence against women in public and private life". Amnesty International has also campaigned at the international level for the eradication of female genital mutilation, see *Female Genital Mutilation. A Human Rights Information Pack*, AI Index, ACT 77/05/97. See also UNESCO, *Report of Special Rapporteur on Traditional Practices Affecting the Health of Women and Children*, July 1997, E/CN/Sub.2/1997/10. In addition, one Commissioner asked during the 20th session in the examination of a state report whether "a parent who ill-treats a child commits an offence": 20th Session Transcripts, 67.

[199] "Structural innovations in contemporary societies have in many instances obliged States into sharing their power with influential groups of individuals, large-scale private organisations . . . and other institutions": Drzemczewski, above n. 135 at 164. This is an argument often raised by feminist writers, see Chap. 1.

[200] "Recognising the importance of the NGOs in highlighting public awareness and, the need to strengthen their capacity in assisting mines victims", the Commission appealed to the manufacturers "so that they may be conscious of the dangers and destructions caused by the use of their products": Resolution on Anti-Personnel Mines, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–95, ACHPR/RPT/8th, Annex VIII, para. 4.

The Commission has given some indication that individuals and the 'people' in general[201] have a role to play in ensuring democracy, for example, urging

> the concerned parties in South Africa to take all necessary steps to create an atmosphere conducive to free and fair elections.[202]

Individuals seem to have duties in relation to all rights in the Charter, not just civil and political ones.[203] For instance, in relation to the family, duties thus fall on the individuals, although they may be shared with the State.[204]

The African Commission has derived from the Charter a general duty on individuals to promote rights, necessary for their full realisation.[205] In relation to economic, social and cultural rights, individuals have certain obligations, for example to ensure the right to education, imposing a general duty on individuals "through teaching and education, in particular youth, to prevent violence as a means of achieving economic, social and political goals".[206] The Commission has also appealed to "all those who are sensitive to the cause of rights to devote themselves fully to the implementation of" the promotional plan of action of the Commission.[207] Individuals also should ensure the right to work.[208] This duty

[201] See further, part E below.

[202] Resolution on South Africa, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–94, ACHPR/RPT/7th, Annex XIV, para. 2.

[203] In a Resolution of 8 Jan. 1970, the Consultative Assembly of the Council of Europe stated that Art. 8 and private life applied against public authorities and individuals and institutions: Spielmann, above n. 146 at 39.

[204] Dakar Draft Protocol on Women's Rights, June 1999, Art. 14(1), see Chap. 3.E.5 n. 60 above. In addition, Art. 8(3) of the Draft Protocol requires that where one spouse dies, the remaining spouse has the right to live in the matrimonial residence. In addition, Art. 6(9) of the same Draft Protocol requires that "a man and a woman shall have the same rights and responsibilities towards their children".

[205] The public have been invited "to join governments, the OAU and the African Commission on Human and Peoples' Rights in celebrating the 11th anniversary of the African Charter's adoption and the 5th anniversary of the Charter becoming law on 21 October 1986". This seemed to include more positive action with the aim of "sensitising African public opinion on the need to promote an defend the basic freedoms and rights of the human being". In addition, "Dr Badawi . . . appealed to everyone to take time out on this occasion . . . by reminding each other of the importance of promoting and protecting human rights among ourselves, our families, our neighbourhoods, our work places, and wherever we may be in Africa": *Press Release, Message of the African Commission on Human and Peoples' Rights on the 10th Anniversary of the Adoption of the African Charter on Human and Peoples' Rights*, Banjul, 15 Oct. 1991 (no reference). In relation to the celebrations planned for the 50th anniversary of the UDHR, the Commission noted the "opportunity . . . to heighten awareness of Africans on the need to respect rights of others and on ways of ensuring respect of theirs": *Celebration of the 50th Anniversary of the Universal Declaration of Human Rights*, DOC/OS/29 (XXIII) at para. 8.

[206] Daes, above n. 116 at 62. Daes notes the UNESCO Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples as supporting the fact that individuals have duties as well to respect others and peace.

[207] *Mauritius Plan of Action*, above n. 54 at para. 90.

[208] "The second generation of rights, in particular, can only flourish if our citizens work hard and if the maximum use is made of our human and material resources": Presentation of Third Annual Activity Report of the African Commission on Human and Peoples' Rights, above n. 18. In addition, one Commissioner asked during the examination of the State report of Namibia, "you said that the State gave a pension . . . to the elderly. Is this systematic or only for those who worked up to a certain age?": 23rd Session Transcripts, 8. Note that the Committee on the Elimination of Racial

has been refuted in relation to other international instruments.[209] However, "as work is the basis of all human endeavour it constitutes a basic right with considerable measure of responsibility. The individual who claims the right to work should at the same time be held responsible for the sensible exercise of that right".[210] The Constitutions of Seychelles[211] and Mozambique[212] also impose duties on individuals in relation to work.

Individuals may be liable for the health of others, and this should be enforced nationally with criminal sanctions.[213] Individuals must also respect peoples' rights.[214] The Commission has given some indication that there is a general moral duty on those with more wealth to redistribute it[215] and on everyone to create a peaceful atmosphere.[216] In all of this the Commission has felt able to direct recommendations not only towards the State, but also to individuals and others in the state.[217]

Discrimination under the ICERD Art. 14 complaint procedure, found the state had failed to provide the necessary protection for the right to work in relation to the dismissal by a private employer: see GAOR, 43rd session, Supp. No. 18, *Report of the Committee on the Elimination of Racial Discrimination*, Annex IV, Communication 1/1984, *Vilmax-Dogan* v. *The Netherlands* (A/43/18), opinion adopted 10 Aug. 1988 at the 36th session of the Committee.

[209] Daes, above n. 116 at chap. 2, 61. E.g. in respect of the Employment Policy Convention 1964 (No. 122) of the ILO, "while placing both positive and negative obligations on ratifying States . . . places no obligations or duties upon individuals": *ibid*., para. 316. Art. 6 of the ICESCR adopts a similar approach. However, forced labour is not permitted in many international agreements: para. 318.

[210] *Ibid*., para. 320.

[211] The Art. 62 *Report of Seychelles*, 1994 (not yet examined) includes the text of the constitution (there was not comment from the report) in Chapter III, Part II Article 40: "[i]t shall be the duty of every citizen of Seychelles: (a) to uphold and defend this Constitution and the law; (b) to further the national interest and to foster national unity; (c) to work conscientiously in a chosen profession, occupation or trade".

[212] Art. 88(1) "work shall be the right and a duty of all citizens regardless of sex".

[213] In examining the state report of Zimbabwe e.g., one Commissioner asked whether the government had adopted "a penal sanction for those that indulge in sexual intercourse with others while they know they have AIDS": 21st Session Transcripts, 76. The constitution of Mozambique contains a duty on individuals to "promote and preserve health": Art. 94.

[214] E.g. "[i]n conformity with Article 23 of the ACHPR, women shall have the right to promote and maintain peace and to live in peace", Dakar Draft Protocol on the Rights of Women, above n. 204, Art. 11(1).

[215] In the examination of the state report of Zimbabwe it was asked, "first of all is to have in the same territory people of European origin whose living standards are rather high and the local African population whose living standards are not very high . . . I'd like to know if efforts could be requested of this minority population, which is a minority indeed but very well off, to make additional efforts to help those who are disadvantaged because I understand that most of the good lands are in their hands where the others do not have much": 21st Session Transcripts, 85.

[216] "The Commission . . . Urges all parties concerned to cease the violence and create a peaceful atmosphere": Resolution on South Africa, above n. 202.

[217] This is similar to other action, e.g. the Declaration on the Right to Development, Adopted by GA 4 Dec. 1986, Res.41/128, Art. 2(2) provides that "all human beings have a responsibility for development, individually and collectively, taking into account the need for full respect of their human rights and fundamental freedoms as well as their duties to the community which alone can ensure the free and complete fulfilment of the human being"; note A. Eide, "Strategies for the Realization of the Right to Food" in K. Mahoney and P. Mahoney, *Human Rights in the 21st Century* (Martinus Nijhoff, Dordrecht, 1992) at 459–72, at 463.

Individual duties could also derive from the instrument becoming part of domestic law.[218] In relation to humanitarian law it has been said that "in most States international treaties become part of domestic law upon ratification, but then bind individuals and State authorities *qua* the domestic law and indeed benefit from all the judicial guarantees provided for in that legal system. However, what is at stake in the present case is not whether rebels are subjects of domestic law, but their legal standing in *international law*-their status vis-à-vis both the lawful government and third States and the international community at large".[219]

4. Enforcement

In terms of the individual enforcing his rights there does not seem to be a great deal of difference between the African Commission's and new Court's approach and that of other international instruments.[220] It seems to depend largely on the judicial nature of the international organ itself.[221]

[218] In relation to the Protocols to the Geneva Conventions, "[t]he more widespread opinion is that [common] Article 3, or for that matter the Protocol, is able to confer rights and impose obligations on insurgents because as a consequence of the State's ratification, the treaty becomes part of domestic law and therefore obliges all citizens, including rebels": Cassese, above n. 181 at 429.

[219] *Ibid*., at 429–30, author's italics.

[220] Prior to the coming into force of Protocol 11 to the ECHR, only states parties to the Convention and Commission could bring a case before the Court. An individual could in practice only petition the Court if the state had ratified Protocol No. 9 to the ECHR. However, the European Court of Human Rights held in considering whether the complainant should be able to give observations on the Commission's report, that "in the interest of the proper administration of justice that the Court should have knowledge of and if need be taken into consideration the applicant's point of view": *Lawless* v. *Ireland*, above n. 139 at para. 451. When the government objected to the European Commission's report including the complainant's views, the Court gave another statement, that it would take into account the applicant's views to enlighten the Court, but they should not be considered as part of the proceedings, the Commission could present the applicants views before the Court but not produce them as part of its written pleadings, "it does not follow that the person in question has any *locus standi in judicio*": *ibid*. In the Inter-American system, the Inter-American Court can call an individual to testify, under Art. 34(1) of its Rules of Procedure and the Court can ensure the attendance of a person under Art. 22(2) of the same Rules. But as Davidson, above n. 92 at 51–2, points out, "this is not a *right* to appear before the Court since that would seem to imply an automatic right to *locus standi* where the individual concerned could demonstrate an appropriate legal interest. It would perhaps have been more accurate for the Court to have stated that States parties are under a duty not to interfere with individuals who are called to appear before the Court".

[221] "There is a decisive difference between a judgment given by an international court and a decision taken by an international organ dealing with petitions. Only the judgment can with certainty be considered a purely legal decision, taken by an organ composed of members enjoying functional and personal independence and observing a procedure which guarantees the best elucidation of the case and the impartiality of the decision. In case a decision is taken by an organ other than a court, the possibility that the decision may be influenced by considerations of political expediency cannot be excluded with the same certainty as when the decision is taken by a court . . . Only individuals (with access to a court) can from their knowledge of the law in force know and anticipate their precise legal position in a given situation. For that reason, it seems justified not to place individuals, who only have the right of petitions, in the same legal group as individuals who can assert their rights before an international court . . . to introduce the concept of petitions to describe the individual having a position in international law that is stronger than that of a person only being a

(a) Justiciability

In terms of whether such duties can then be enforced by the Commission, there have been mixed views in the literature with some seeing them as merely aspirational[222] and incapable of enforcement[223] and others viewing them as combining not just moral but legal obligations.[224] The African Commission seems to believe that this may be possible at the national level at least and imposes a general duty on states to promote the duties of the individual.[225] It has been stated in relation to the ECHR that "private police" would be necessary to enforce the duties owed by private individuals and the important role of NGOs has been suggested in this regard.[226] The African Commission has called on states to "propagate knowledge of the Charter amongst people and encourage an attitude of respect for human rights among citizens",[227] prevent such actions occuring,[228] as well as punish the perpetrators of those which do.[229]

subject of rights, but weaker than that of the person being a subject of proceedings and consequently a subject of international law": C. A. Norgaard, *Position of the Individual in International Law* (Munksgaard, Copenhagen, 1962), at 117–2.

[222] "Some [duties] spell out a general philosophy and principles of behaviour rather than operational legal concepts": Benedek, above n. 9 at 86.

[223] E. Bondzie-Simpson, "A Critique of the African Charter on Human and Peoples' Rights" (1988) 31 *Harvard Law Journal* 643–65, 657–8 says: "[t]o the extent that these duties are all legal duties that is ambitious if not aberrant. Moreover, to the extent that these duties are all enforceable by the Commission, that is impracticable and impossible. However, the mere statement of these duties serves to remind Africans that alongside their rights they have duties—some moral others civic and yet other legal and whether or not they can be enforced by the Commission they are necessary obligations demanding performance and laudable goals worth pursuing". They are nothing more than a "code of good conduct" and "more for . . . political appeal than any serious expectations of implementation": Mumba, above n. 33 at 114.

[224] Umozurike, above n. 100 at 6; Dlamini, above Chap. 3 n. 43 at 197. E.g., duties in Art. 29(2) to the national community were to have only moral effect, whereas those owed to the family were legally enforceable: Mumba, above n. 33 at 113; Bondzie-Simpson, above n. 223 at 657.

[225] One Commissioner asked, "[w]hat machinery is there for the promotion of rights? In particular, I refer to the process of education. The State has a duty to educate its citizens, to inform them of their rights and duties. How does Mozambique do this?": 19th Session Transcripts, 109. "On each of these duties the reporting State should furnish the principal statutes and administrative regulations and where applicable courts' decisions establishing the *atmosphere* for enforcement and effectuation of these duties": *Guidelines for National Periodic Reports*, above n. 18 at para. IV.7. (my italics).

[226] Clapham, above n. 139, see in general, chap. 9. The actions of private individuals "were more easily assessed through the help of third party submissions": 288, and 289, the role of lawyers and NGOs in this area.

[227] Examination of State Reports: Gambia, Zimbabwe, Senegal, 12th session, Oct. 1992, above n. 109 at 28.

[228] E.g. "States Parties to this Protocol shall guarantee women equal opportunities to work. In this respect, the commit themselves to: . . . (c) . . . protect [women] from exploitation by their employers": Dakar Draft Protocol on the Rights of Women, above n. 204, Art. 14(c).

[229] "States Parties to this Protocol commit themselves to take all appropriate measures to: . . . (c) punish perpetrators of such violence committed against women", where the violence included that which took place "in the private sphere or in society and public life": *ibid*., Art. 12(2).

(b) Enforcing Duties at the International Level

Yet, at the international level, although the Commission has not been confronted with a communication alleging violations committed by a private individual, it has declared inadmissible a complaint brought against the OAU on the basis that it was not party to the Charter,[230] suggesting that it would not consider cases against "non-state" entities. However, in terms of other activities for the punishment of individuals who have violated rights, the Commission sees itself as having part to play in the collecting of information,[231] the investigation and identification of perpetrators,[232] this being a joint effort between the Commission and the state[233] and to take place nationally. However, at the international level, the focus could therefore said to be more on remedying the wrong done to the victim rather than punishing the individual responsible.[234]

(c) Enforcing Duties at the National Level

The African Commission has focused on the states enforcing the duties themselves and then reporting on this to the Commission under the obligations in Article 62.[235] The *Guidelines* require not only that "every individual shall observe the duties enunciated in [Article 29]" but also that the state should provide "a full report on each of the [individual] duties".[236]

This is similar to the approach adopted by other international bodies.[237] For

[230] Communication No. 12/88, *Mohamed El-Nekheily* v. *OAU*.

[231] "I'd like to insist on the need for the Special Rapporteur to obtain information . . . if I do not have specific cases . . . if I do not have enough proof or testimony, written and living proof, I cannot come up with a list, a register, and I cannot submit to the Commission and the Heads of State, a detailed report and concrete proposals": 21st Session Transcripts, 64.

[232] The Special Rapporteur is to "follow up, in collaboration with government officials, or failing that, with international, national or African NGOs, all enquiries which could lead to discovering the identity and extent of responsibility of authors and initiators of extrajudicial, summary, or arbitrary executions": *Report on Extrajudicial, Summary or Arbitrary Executions*, above n. 123 at para. 2.

[233] The Special *Rapporteur* is "to intervene with States for the trial and punishment of perpetrators of extrajudicial summary or arbitrary executions": *ibid*., para. 4.

[234] "As for impunity, it is part and parcel of the mandate of the Special Rapporteur. In my first report I said one cannot have compensation without finding out the authorities and asking the States to bring them to justice. If you have names of persons, you must being these names forward. We must seek explanations in connection with these persons, if they are alive, whether they are free, if they are personalities in their governments": 21st Session Transcripts, 66. In this respect punishment is seen as necessary for the reparation of the victim.

[235] In discussing amendments to the state reporting guidelines, one Commissioner had considered that such reports should include "steps to . . . ensure that individual duties are being observed": 21st Session Transcripts, 114. See also Clapham above n. 139, 102 ff. See also *Examination of State Reports: Ghana, 14th session* (Danish Centre for Human Rights, Copenhaven, 1995) at 20, where one Commissioner asked of the Ghanaian representative, "how do you ensure these duties are respected, in particular the duty that talks about promoting African unity?".

[236] *Guidelines for National Periodic Reports*, above n. 18 at para. VI.6.

[237] In international human rights instruments states are required to ensure that individuals actually enjoy their rights and this "includes in certain circumstances a duty to take appropriate measures to protect individuals against violation of those rights by private persons": Byrnes, above n. 136 at 228.

example, the Inter-American Court has held that "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention".[238] Similar decisions have been taken by the ECHR organs.[239]

[238] *Velasquez Rodriguez*, above n. 159 at paras. 172–3. The Inter-American Commission has also held that "governments must prevent and suppress acts of violence, even forcefully, whether committed by public officials or private individuals, whether their motives are political or otherwise": Inter-American Commission on Human Rights, *Report on Situation of Human Rights in the Republic of Guatemala*, OAS Doc.OEA/Ser.L/V/11.53, doc.21, rev.2, 13 Oct. 1981, para. 10; see Clapham, above n. 139 at 119. Note also Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* [Arts. 13 and 29 American Convention on Human Rights], Advisory Opinion OC–5/85 of 13 Nov. 1985, Series A, No. 5, at para. 48, where it held that "Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits 'private controls' producing the same result. This provision must be read together with the language of Article 1 of the Convention . . . Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character . . . but the State also has an obligation to ensure that the violation does not result from the 'private controls' referred to in paragraph 3 of Article 13". In addition, in relation to acts of individuals, the Court went further in the *Velasquez* case and held at para. 172, "[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. Violations of the Convention cannot be founded upon rules that take psychological facts into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights . . . is irrelevant—the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognised by the Convention has occurred with the support or acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible . . . The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation . . . The State is obligated to investigate every situation involving a violation of the rights protected by the Convention . . . The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention. . . . Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government thereby making the State responsible on the international plane."

[239] See Part B, above. In *Young, James and Webster* v. *United Kingdom*, Series A, No. 44 (1982) 4 EHRR 38, the European Court of Human Rights held in relation to Art. 1 of the ECHR that "if a violation of one of those rights and freedoms is a result of non-observation of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of events was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which applicants complained". Drzemczewski, above n. 135 at 167, has argued that the "horizontal extension of the [European] Conventions' application within the domestic legal structures of Member States is most likely to arise where the courts are prepared to accept its provisions either as sources of internal law or as directly applicable norms of international law. In such instances the question of whether or not a State has made declarations under [previous] Article 25 and/or Article 46 does not appear to be of importance in this respect".

5. Conclusion

Thus, although individual duties may not be enforceable on the international level, that individuals have duties that derive from international law is clear. The status of an individual is considerable, which, in theory, offers increased protection against human rights violations.[240]

In conclusion, the African Commission's approach highlights what is in fact apparent in other international bodies. A more holistic attitude should be taken as a more honest approach to the status of the individual at the international level. This does not focus on the narrow "subject"/"object" dichotomy adopted at present by international law and which clearly does not reflect the approach taken by not just the African system, but other bodies.

D. THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS IN THE AFRICAN SYSTEM

1. Relationship between NGOs and the African Commission

The role of NGOs in other international bodies is mixed,[241] although their importance has been realised[242] and the impact they have can be considerable.

[240] As Clapham, above n. 139 at 124, notes "it is dangerous to exclude private violators of rights from the theory and practice of human rights. Dangerous because it could leave victims unprotected and dangerous because it reinforces a deceptive separation of the public and private spheres".

[241] Art. 71 of the UN Charter recognises NGOs; ECOSOC Resolution 288(X) and 1296 (XLIV) establish special procedures which recognise NGO participation. A Council (ECOSOC) Committee on NGOs has been established which deals with issues of NGOs and places them in categories, see F. Ermacora, "Non-governmental Organisations as Promoters of Human Rights" in F. Matscher and H. Petzold, *Protecting Human Rights: The European Dimension: Studies in Honour of Gerald J. Wiarda* (Carl Heymanns Verlag KG, Cologne, 1990) 171–80, at 172. The Council of Europe enables NGOs to have consultative status and NGOs are dealt with by the Directorate of Human Rights. In relation to the ICESCR, "NGOs have no formal role in the provision of information to CEDAW, although NGO members often attend the public meetings to observe. Their absence is an acute problem": A. Robertson, *Human Rights in National and International Law*, (Manchester University Press, Manchester, 1968), at 467. Although it has been noted that the UN Committee on Economic, Social and Cultural Rights "became the first of the committees to permit formal submissions of written statements by NGOs. It has subsequently also adopted the practice of permitting NGO representatives to paticipate in their capacity as experts in the day of general discussions". NGOs have not been interested: P. Alston, "The Committee on Economic, Social and Cultural Rights" in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (Clarendon, Oxford, 1995), 473–508, at 501. The European Court of Human Rights has refused submissions by NGOs in relation to cases before it: see D. Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) 88 *AJIL* 611, at 631, until Art. 37(2) of the Rules of Court was amended to permit that "the President . . . invite or grant leave to any contracting State which is not a party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant just leave to any person concerned other than the applicant". The Protocol on the Statute of the ECJ, Art. 37 (UNTS 147, amended by Council Decision 88/591 1989 OJ (C.215) 1) permits 'natural or legal persons establising an interest in the rules of any case submitted to the Court' to appear as *amicus curiae*, but they should support the arguments of one of the parties: see Shelton, 629.

[242] E.g., in the UN Sub-Commission on Minorities, it has been stated that "a remarkable aspect

NGOs have been seen as particularly important in the African system[243] and a unique feature of the African system.[244] This has been recognised by the Commission itself, for example:

> We are rare, the only commission of this kind in Africa which has this close relationship with NGOs. So we would like this relationship to exist and be consolidated and strengthened to promote and protect human rights in Africa.[245]

The NGOs provide the Commission with information on the situation of human rights in African countries[246] and lobby the governments and the Commission to take action.[247] They provide a necessary critique and points for reflection[248] and are the source of many of the communications submitted to the Commission. This is contrary to some international instruments which permit only the victim to petition the organ.[249] It is necessary to examine the extent to which the Commission perceives NGOs as having any status within the African human rights arena.

of the Sub-Commission's work is its openness to the active participation by NGOs. The NGOs play a forceful and creative role", although there has been some friction in the relationship: A. Eide, "The Sub-Commission on the Prevention of Discrimination and Protection of Minorities" in Alston, above n. 241 at 211–64, 259–60.

[243] E.g. C. Welch, "Human Rights and African Women—A Comparison of Protection under Two Major International Treaties" (1993) 15 *HRQ* 549–74, at 570; Danielson, above n. 101 at 38; Malmstrom and Oberleitner, above n. 91 at 293.

[244] See A. Ngefa-Atondoko, "Recent Developments in Human Rights Advocacy within the African Commission on Human and Peoples' Rights", paper presented in relation to the Seminar on International Human Rights Advocacy, Apr. 1996, at 16; Ankumah, above n. 33 at 186; Scoble, above n. 99 in general.

[245] 20th Session Transcripts, 45.

[246] E.g. Agenda of the Twentieth Ordinary Session (21–31 Oct. 1996), *Tenth Annual Activity Report of the African Commission on Human and peoples' Rights*, 1996–97, ACHPR/RPT/10th, Annex II; ACHPR/A/XX, item 9. The Special *Rapporteur* on extra-judicial executions sees the essential role of NGOs in his mandate and the need to create a "pool of NGOs" in order to obtain "reliable information", *Rapport Présenté par M. Hatem Ben Salem, Rapporteur Spécial* (to the 25th Session). In respect of the Inter-American Court, "without specific authorization in either the Convention or the Rules of Court, the Inter-American Court has accepted amicus briefs in all proceedings from its first case; the practice is expansive in the exercise of the Court's contentious jurisdiction, as well as in advisory proceedings": Shelton, above n. 241 at 638. Note Art. 34(1) where the Court can decide to hear any person if necessary to assist it, for contentious cases, and Art. 53 of the Rules of Procedure for advisory opinions.

[247] E.g., the interventions of Penal Reform International requesting that the Commission appoint a Special *Rapporteur* on prisons came to fruition at the 20th session when Commissioner Dankwa was appointed to this position: Final Communique of the 20th Ordinary Session of the African Commission on Human and Peoples' Rights, Grand Bay, Mauritius, 21–31 October 1996, ACHPR/FIN/COMM/XX. This organisation now heavily supports the *Rapporteur* in his activities.

[248] Welch, above n. 243 at 563; Weston, above n. 114 at 621; Ankumah, above n. 114 at 2 and 188; Scoble, above n. 99 at 189.

[249] E.g. Optional Protocol to the ICCPR, Art. 1; ECHR, Art. 34. This has been recognised in relation to other international instruments. Resolution 1503 ECOSOC (XCVIII), Resolution 8 (XXIII) of the UN Human Rights Commission and Resolution (XXIV) of the Sub-Commission on Minorities allow communications to originate from "a person or group of persons who . . . are victims of violations . . . ; any person or group of persons who have direct and reliable knowledge . . . or NGOs acting in good faith": see Ermacora, above n. 241 at 176. Although the ECHR permits only victims to petition the previous Commission enabled NGOs to offer legal aid before it: see Ermacora, above n. 241, 177.

(a) Formal Recognition

There is some formal recognition in the African Charter and the Commission's Rules of Procedure of the role that NGOs should play. Article 45(1) of the Charter requires the Commission to promote human and peoples' rights including encouraging "(a) . . . national and local institutions concerned with human and peoples' rights . . . (c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights".[250] The Rules of Procedure of the Commission specifically enable it to invite "organisations or persons capable of enlightening to participate in its deliberations without voting rights",[251] although the Commission has said on some occasions that this is not a right but a privilege,[252] and thus dependent on granting by the organ itself.

(b) Commission Criteria

The Commission has granted observer status to NGOs[253] enabling them to undertake particular activities. After some deliberation the Commission has now adopted a Resolution on the Criteria for Granting and for the Maintenance of Observer Status with the African Commission on Human and Peoples' Rights to Non-Governmental Organisations Working in the Field of Human Rights.[254] This requires that organisations should "have objectives and activities in consonance with the fundamental principles in the OAU Charter and in the African Charter . . . ; be organisations working in the field of human rights[255]; declare

[250] R. Gittleman, "The African Commission on Human and Peoples' Rights: Prospects and procedures" in Hurst Hannum, *Guide to International Human Rights Practice* (Macmillan Press, London, 1984), 153–62, at 154 believes that NGOs should bear all the burden of promotion.

[251] Rule 72, the previous Rule added, "which shall be of particular interest to this movement". This restriction was removed. In addition Art. 46 of the Charter enables the Commission to "hear from . . . any other person capable of enlightening it". Rules 76 and 77 permit NGOs to send representatives to the session. See Chap. 2.

[252] See Chap. 4.B. See also this argument brought up explicitly by Clapham, above n. 139 at 95.

[253] For list of organisations granted status, see *List of NGOs Granted Observer Status with the African Commission on Human and Peoples' Rights* (no reference) as at 24th session.

[254] No reference, adopted at 25th Session.

[255] E.g., one Commissioner proposed that an application be granted: "this is an NGO that is Mauritanian, it works for the promotion of social justice and the promotion of the rights of workers. It is 14,000 strong in membership. I have the constitution, the minutes of the general assembly, the list of leaders, the programme of activities, which is quite impressive; their funding sources, membership contributions, mainly, of course with 14,000 members. Probably membership contributions should suffice to permit the organisation to carry out meaningful acts. It has relations with other unions, and there is an impressive number of letters, correspondence between the organisation and its partners, newspaper articles that show that the organisation does stand up whenever the rights of workers are violated . . . I think the status should be granted": 22nd Session Transcripts, 4. Another condition appeared to be added at the 23rd session that NGOs should provide minutes from the general assembly of their board, see 23rd Session Transcripts.

their financial resources".[256] They must also have an established structure.[257] Examination of applications during the sessions reveal that the Commission also requires that the organisation should not be political.[258]

Thus, it would initially appear that the strength of the position of NGOs internationally seems to be dependent on the criteria of the Commission, not of the states. However, this was questioned at the twenty-first session where the Mauritanian government, which was hosting the session, questioned whether NGOs were required to be registered nationally as part of the conditions of standing before the Commission.[259] This was during consideration of an application from a local NGO which the *rapporteur* Commissioner and Chairman initially suggested be granted status.[260] The Commission responded that "that is to say, we cannot accept organisations which are not legally recognised in their own countries. If not, we find it difficult to grant status".[261] When the issue was debated, and one Commissioner recognised that some NGOs faced discrimination and oppression in their home countries,[262] although the

[256] It would seem that there has to be a certain amount of independence: "[t]hey always say that funding may come from members and other sources. The problem is to know if this external funding can be prejudicial to the function of the NGO . . . an NGO that receives money from the government of the US. Should we say the White House is coming to vote in our session or our NGO forum? I think we need to know if such an organisation should be granted this status. But, this association is receiving considerable subsidy from a non-African country . . . this doesn't not mean I am against granting it observer status. Always to say, we admit it, but we have to bear in mind this, that it receives more than 80% from a non African country. This is not fatal. We as a Commission have received money from outside, it's just useful to have continuing information on its source of funding": 20th Session Transcripts, 52–3.

[257] The Criteria, para. 3(b) require an organisation to provide "its statutes, proof of legal existence, its list of its members, its constituent organs, its sources of funding, its last financial statement, as well as a statement on its activities". In examining an application for observer status one Commissioner stated, "I have a second application from Prisoners' Rehabilitation . . . it is in Nigeria, it has supplied its list of officers, its sources of funding, its activities, including publication of a booklet. After close study of these documents I believe they meet the criteria for observer status and I recommend the grant to it": 22nd Session Transcripts, 2.

[258] What this means is not clear, but the Commission has taken a restrictive approach, e.g., in respect of an organisation which worked for universal suffrage, one Commissioner stated, "if it is a political party, we cannot give it observer status". In response another member stated "this Commission admits observers and these observers have to be NGOs and associations and not political parties, in as much as the articles of this NGO have not changed, placing at the level of an association and they produce proof to the contrary, we cannot give them observer status, because it seems that they have a political agenda": 20th Session Transcripts, 48.

[259] A representative of the government asked, "earlier on you asked a question on the recognition of the Mauritanian Human Rights League, I'd just like to know, a lot of people might have some doubts. You asked if the NGO is recognised in accordance with the law. I just wanted to know what you meant by that?": 21st Session Transcripts, 23.

[260] 21st Session Transcripts, 2. It was also added, "maybe the Mauritanian association is recognised at the local level by the Mauritanian authorities, it has been legally registered, especially with reference to the law of 1964. I think we could grant an observer status to this association and that proposal which has just been made can be approved by us", *ibid*., 22.

[261] 21st Session Transcripts, 23.

[262] "We know that in some countries these organisations are systematically marginalized and if we start asking them for registration as an obligation, we might leave aside those organisation which are conducting important acts on the field, because within their States these organisations are left out, are marginalised": 21st Session Transcripts, 24.

Mauritanian government disagreed with her statements. Other Commissioners objected to the intervention of a government delegate during what was a matter for Commission alone[263] and what was more important was the organisation's work in the field of human rights.[264] One other application from a Zairian association, which was not registered nationally, was refused status during the same debate but was also lacking a number of other documents.[265]

Although the issue of registration was referred to by some commissioners during the twenty-second session, it did not seem to prevent granting of status[266] and there was a suggestion that the registration is an indication of its seriousness and established structure, rather than the desire for government acceptance.[267] The potential impact such a requirement would have on the status of the NGO is great as it suggests that its status is not a matter of international law but a matter, and under the discretion, of the national law and the state's sovereignty.

[263] "I want to make it clear that whatever the person, organisation or body taking part in the decision, the procedure is wrong, they shouldn't take part, I am sorry . . . I want to say, if we do not respect the procedure that we have, we should refer to the criteria": 21st Session Transcripts, 25.

[264] One Commissioner stated, "we apply the principles of the Charter and we have accorded observer status, and we have accorded many organisations which are not recognised by their States. The criteria we use are not those of States, but based on the Charter. Whether an association is recommended or not by its government, we work on basis of the Charter. Many Mauritanian organisations enjoy status with us without being registered by their State. Now there is a consensus among us according to which an association . . . cannot begin its acts by applying to be an observer. Being an observer is not the key that should unlock the door of opportunity. It is after an organisation has demonstrated itself in the field that we grant them observer status": 21st Session Transcripts, 25.

[265] "Unfortunately this file which was conveyed to me is empty. Of course we do have a copy of the statements of this association, but it's only a photocopy and there's no proof that this association is registered somewhere. We do not have a list of members, we have four people who are signatories of the bylaws. There is no progress report, we have only two photocopies here. This is almost an empty application and I'm sorry to say I'm not in favour of granting this observer status": 21st Session Transcripts, 25. It may be argued now that the term "legal existence" in the Criteria refer to registration, although this is not clear, see above n. 257.

[266] Again this was in relation to applications from Mauritanian NGOs. E.g. one Commissioner stated: "I have another file from an NGO . . . that works in the realm of defense of the rights of the woman and the child . . . there is registration receipt at the home ministry and a report of activities 1995–1996. There are also some photographs that show the work of this NGO especially in kindergartens, in the family. There are a lot of pictures here which leads us to believe that this NGO is already very active in the field. The funding sources are not indicated here but it is an NGO that works with UNFPA and you know that all these women's organisations do work with the UNFPA and UNICEF. What is impressive is the report of activities and the pictures that really show that this NGO is quite active. I believe that the funding sources will be accessible to them as they have received some pledges already. I believe we can grant them observer status": 22nd Session Transcripts, 3.

[267] As one member stated, "I think the registration of the home ministry is evidence that they have a constitution, if they didn't, the ministry wouldn't have accepted the registration. We could write to accept their application but also ask that they send their constitution": 22nd Session Transcripts, 4. Status was granted to the organisation. In other applications the issue of registration was not mentioned. Signatories to the Council of Europe's European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, ETS, No. 124, Strasbourg, 1987, agree that the legal personality and capacity of an NGO recognised in one state will be recognised in another: Art. 2(1). To acquire this personality, NGOs are required to show their memorandum and arts. of association, "or other basic constitutional instruments", and should attach "documents establishing administrative authorities' registration or any other form of publicity in the Party which granted the legal personality and capacity": Art. 3(1).

Although the Commission seems to have avoided the issue and not denied status on this particular ground, the incident does indicate the influence that states still maintain over the Commission and its lack of confidence in its own decisions to deal with such pressures.[268] This was particularly apparent recently with the suspension of consideration of applications for observer status at the twenty-fourth and twenty-fifth sessions. This was the result of an AHSG Resolution requiring such action until the criteria for status was reviewed[269] and in spite of the suggestions by several commissioners that applications be considered in the interim.[270] Given the adoption of new criteria[271] it is hoped that reconsideration of applications will commence at the twenty-sixth session.

The increasing number of NGOs may begin to present problems,[272] leading to suggestions, in both the African Commission and in other international bodies, that NGOs should group themselves into a "coalition".[273]

2. Rights of NGOs

The African Commission has called on governments to protect NGOs in their home states.[274]

[268] At the 23rd session the representative from the Namibian government suggested that the Commission consult with governments in deciding whether to grant observer status to NGOs. This was greeted with laughter from the participants in the meeting: 23rd Session Transcripts, 6.

[269] Resolution 126 AHG(XXXIV).

[270] 25th Session Transcripts, 13.

[271] Above n. 254.

[272] E.g. in relation to the UN Sub-Commission on Minorities it has been noted that although it provides a forum for governments, NGOs and experts, "its openness . . . has given rise to one problem which . . . may be getting out of hand . . . the presence and participation of observers has increased dramatically . . . As a result of this substantive shift, the Sub-Commission functions much less collegially than before, its proceedings are increasingly politicized by observers and the time available for in-depth discussion has been reduced substantially": Eide, above n. 42 at 258–9.

[273] The UN Working Group on NGOs (1994) noted at para. 63, "[c]oncern was expressed at the recent practice of asking non-governmental organisations to form 'coalitions' and 'constituencies' and to speak through a spokesperson. Such forced consensus would result in destroying the diversity of opinions. It was suggested that those participatory rights, warranted by Council Resolution 1296 (XLIV) be fully reinstated". Note that here it is referred to as a "right". An NGO Committee has also been established at the UN Human Rights Committee. At its 23rd session the Commission supported the idea of having an NGO forum, sub-regional groupings or NGOs joining together and electing a representative to stand on their behalf before the Commission and co-ordinate their activities. This would be the responsibility of NGOs to organise, 23rd Session Transcripts, 3 and 7. Similar suggestions were made at the 25th session: 25th Session Transcripts, 15.

[274] E.g. at the 14th session one commissioner pointed out to the representative of Ghana during examination of the state report, "I hope that you would give the NGOs in your country every force to play their part. As you know, the government may be suspicious, but the government alone, may not in fact carry out its human rights obligations. It is in the interest of the government and of the people that NGOs are allowed to operate": Examination of State Reports: Ghana, 14th session, December 1993, above n. 235 at 20. It has also adopted a Resolution on Freedom of Association, above n. 16. In addition, at the 25th Session during examination of its periodic report, the government of Burkina Faso was asked by the Commission why it had suspended an agreement with a renowned NGO which had a close relationship with the Commission. At the same session the Commission also urged states to consider the position of human rights defenders given a recent UN

NGOs with observer status[275] are given considerable space at sessions to make statements[276] and proposals.[277] However, when they are allowed to intervene is not always clear.[278]

It seems that NGOs operate as a check on the Commission's functions, being permitted to ask questions and make comments, for example, on commissioners' promotional reports and in their capacities as Special *Rapporteurs*.[279] The willingness of members to respond to such questions, criticisms and allegations indicates that the Commission believes the NGOs have an important role to play internationally, even if this is within limits.[280] In addition, it could also suggest that the Commission views itself as accountable to NGOs.[281] In other

resolution adopted in Dec. 1998. NGOs are also calling upon the commission to appoint a Special Rapporteur on human rights defenders: 25th Session Transcripts, 60 and 71.

[275] "Of course for NGOs only those with observer status are allowed to take the floor. The rest will have to listen": 21st Session Transcripts, 21. This is not always strictly adhered to and the Commission has had difficulty, e.g. at the 21st session, when asked to verify the situation, in identifying which NGOs had been accorded status.

[276] "The Commission also heard statements from several Africa and international NGO representatives": Final Communiqué of the 16th Ordinary Session, above n. 71; similarly, Final Communiqué of the 21st Ordinary Session of the African Commission on Human and Peoples' Rights, ACHPR/FIn. COMM/XXI, para. 18. In addition, see Rules 75 and 76.

[277] "The meeting was also informed that the International Commission of Jurists will conduct a preliminary investigation on the subject (structural adjustment) and make proposals to the Commission": Final Communique of the 12th Ordinary Session, Banjul, The Gambia, 12–21 October 1991, reprinted in International Commission of Jurists, above n. 177 at 105–12, at para. 10.

[278] "With all respect, I don't think we can allow an NGO representative to intervene in this debate": 19th Session Transcripts, 153. In addition, the newly adopted Criteria, above n. 254, appear to be more restrictive than has been the case in practice: "observers may be authorised by the Chairman of the African Commission to make a statement on an issue that concerns them, subject to the text of the statement having been provided, with sufficient lead-time, to the Chairman of the Commission through the Secretary to the Commission": para. 4.

[279] See the discussion on reports of Special *Rapporteur* on extrajudicial executions, 21st Session Transcripts, and that of the Special *Rapporteur* on prisons and other conditions of detention. Questions are posed which the Special *Rapporteur* has been required to answer: see 20th Session Transcripts, 109, and intervention by Amnesty International on relationship of Commission with NGOs and ability to comment on the Special *Rapporteur*'s Report.

[280] E.g., one commissioner responded to allegations that NGOs were not visited on the mission to Nigeria, "[w]e should be open to criticisms because they can help us grow as a body. On the other hand the danger of compulsive criticism is there and should be avoided. I spent a long time after the morning session with the Nigerian NGOs. They made no reference to all the explanations that I gave . . . Wild allegations are made—it has been said that government delegations went with us everywhere. You cannot know this unless you went with us, and this is just not true. It is not true that no NGOs saw us. It is true that we had troubles with NGOs in Lagos but we went to Abuja, to Port Harcourt, in Kaduna. Even those NGOs that we heard did not want to see us, we disrupted our schedules and went to meet them. There was a difficultly about communications and when we were supposed to meet certain NGOs we were on the road to Abuja we were not able to travel by air. It was not just NGOs who were disappointed—the Supreme Court justices were waiting for us in Abuja and we kept them waiting. It is just not accurate to say that there were communications and we did not take them up. We did take up all the communications that were pending before us . . . So yes, do criticize but do not make wild allegations when you do not know the facts, and especially when I have taken the time to explain to you the problems I have encountered": 21st Session Transcripts, 119–20.

[281] E.g. the Special *Rapporteur* on prisons and conditions of detention met NGOs in order, *inter alia*, to "identify strengths and weaknesses in the Special Rapporteur's terms of reference; advise . . . amendments to be included in the terms of reference for the next period; clarify the relationship

international instruments NGOs have been permitted to submit *amicus* briefs or act as third parties in the provision of information.[282] Indeed, the amendments introduced by the Eleventh Protocol to the ECHR "provides expressly for third party intervention".[283]

The fact that the African Commission permits NGOs to participate in such a significant way in its sessions suggests that it may not be as concerned about the potential adversary effect that this could have on state representatives.[284]

However, their ability to participate is often limited, due to time constraints, although this may have been used as an excuse to curtail their impact.[285] Whilst they can participate in general debate, NGOs cannot make comments during the examination of the state report.[286] This may have more to do with the

between the Special Rapporteur and NGOs": Informal Meeting between the Special Rapporteur on Prisons and Conditions of Detention in Africa and NGOs, 23rd session. A similar meeting was held with NGOs by the Special *Rapporteur* on Extra-judicial Executions at the 25th session.

[282] E.g., the ECJ permits Advocates General as *amicus curiae*, but NGOs have "rarely participated in proceedings before the ICJ": Shelton, above n. 241 at 619, see also, 629. It has however, permitted NGOs to send written comments in relation to advisory opinions and give oral statements. However, in respect of contentious cases the wording permits only public international organisations to submit information—Art. 34(2) of ICJ Statute, *ibid*., 620, which is an international organisation of states. The PICJ permitted non-governmental organisations to submit statements before it: *ibid*., 622–3.

[283] Protocol No. 11 to the ECHR enables the President to request written submissions from individuals and states, as well as oral representations, "the Protocol thus endorses the value and worth of *amicus* briefs as a method of assisting the Court in its deliberations": Harris, Boyle and Warbrick, above n. 15 at 711–12.

[284] E.g. Shelton, above n. 241 at 626, suggests that participation of NGOs in the proceedings of the ICJ would negatively affect the desire of states to participate. She notes that in *amicus* submissions the role is limited, "[i]t provides specific information to the Court almost exclusively through written submissions, and neither controls developments in the case nor has the rights and duties of parties. States could view non-governmental participation as less threatening than inter-State intervention and potentially to their benefit, as it may lessen their litigation burden and show public support for the arguments they make".

[285] E.g., at the 20th session, "we decided to give State and NGO delegations the opportunity to express themselves. We are going to give them the floor, but in view of the number of NGOs, I think there are 182 now who are observers, and we cannot give each and every one the opportunity to individually express themselves. So we want to make a distinction, to make a difference between the declaration statements made by State delegates—this again is an African innovation. There was a time when NGOs thought members of the Commission represented their countries. This is not the case. Members of the Commission are independent of their countries. We do not in the implementation of our work receive directives from countries or the continental organs. This is why in order to try to avoid this ambiguity, we decided to invite delegations representing their governments so they familiarise themselves with our practice, independent of the fact that some countries and governments consider that the Commission is in the grips and directives of NGOs. So here in this room we have State delegations, and on the other hand, NGOs": 20th Session Transcripts, 16.

[286] "During our last session in Praia, we recorded the protests of a Tunisian NGO who did not understand that he was given the floor for two or three minutes, whereas the representative of the Tunisian report was given one hour. It is a pity we raise this issue in his absence, but I ask you to please understand the framework within which we are working. Some of you believe in error that we work as they do in Geneva, in the case of the UN Human Rights Commission, let me say the Human Rights Commission is a political organisation . . . But here at the African Commission, we claim to work in the framework within which the UN Committee works, and that Committee is a committee of experts, which, during the time it considers reports, NGOs are not given the floor . . . NGOs are not supposed to hold a dialogue with governments representatives. If NGOs have information which will be useful, they should discretely communicate this information to members of the

amicable nature of the procedure[287] than with the status of the NGO internationally.

3. Role in the Development of International Law

(a) Contribution

There is an acknowledgment that the participation of NGOs in the proceedings of international organs may "sometimes contribute to the development of international law through litigation".[288] Indeed, their role has been central to the development of international law[289] and international human rights norms,[290] although their impact is sometimes difficult to measure.[291] It has been

Commission. It is only Commissioners who can ask questions, it is not NGOs who should be responding to country representatives who present their report": 19th Session Transcripts, 10.

[287] See Chap. 6.

[288] Shelton, above n. 241 at 611.

[289] They "initiate diplomatic activities, prepare reports on human rights items, make public statements, make efforts to influence deliberations of human rights bodies, mobilize public opinion, make attempts to influence foreign policy and even fulfill functions as unofficial ombudsmen": Ermacora, above n. 241 at 173.

[290] Weissbrodt notes that NGOs were involved in the drafting process of the UDHR and that "by their presence in drafting sessions and by their individual contacts with national delegates or UN staff, NGO representatives can have even more impact than their more formal interventions in open sessions": D. Weissbrodt, "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights" in T. Meron, *Human Rights in International Law*, Vol. II (Clarendon, Oxford, 1985), at 429. Also, e.g., Amnesty International assisted in the adoption of the Convention on Torture (GA Res 3452, 33 UN GOAR, Supp (no. 34) 91, UN Doc. A/10034 (1978). T. Van Boven, "Role of NGOs in International Human Rights Standard Setting. Pre-requisite for Democracy" (1990) 20 *California West International Law Journal* 207–25, at 213–17, further notes the special role that NGOs played in international law relating to torture, rights of detainees and prisoners; children's rights and those of indigenous peoples. In addition, N. Rodley, "The Work of Non-Governmental Organisations in the World-Wide Promotion and Protection of Human Rights" (1991) 90/1 *UN Bulletin of Human Rights* 84, at 85 notes, "NGOs have been actively involved in . . . norm creating exercises. Indeed, it has sometimes been their public activities that have demonstrated the need for the United Nations to take action. . . . Furthermore their consultative status has permitted NGOs to participate without vote, in the drafting discussions. . . . Successive heads of the Human Rights Centre . . . have acknowledged the preponderant role played by NGOs in furnishing the information on human rights violations that constitute the subject matter of the various procedures". They have an "active participation . . . in standard setting of international bodies": *ibid.*, 175; e.g. Ermacora, above n. 241, believes that the UN Convention Against Torture would not have been prepared and adopted without the input of NGOs. Weissbrodt notes at 422 how NGOs have been involved in studies of the UN Commission on Human Rights and the Committee against Apartheid, amongst others. In relation to the ILO NGOs can receive and comment on government reports and measures taken to comply with conventions and recommendations of the ILO. Van Boven notes that whilst the gathering of information has been a task for which NGOs are known, less is said about their involvement in the development of human rights norms: at 207.

[291] In relation to the European Court of Human Rights, it has been said that "the impact of *amicus* briefs is difficult to measure, although the judicial reference to them and quotes from them indicate that they can be influential": Shelton, above n. 241 at 635. Further, "because non-governmental organizations intervene in the more important cases before the plenary Court, where there is no clear precedent and where the Court may be divided, they fulfill a role of assisting the Court in new areas of law where the impact is particularly broad. They provide comparative analysis and

acknowledged that the genesis of the African system owed much to the initiatives of the NGO community.[292]

In terms of the ability of NGOs to influence the development of the interpretation of the Charter itself, their attendance and participation in sessions have enabled them to play a great role. They have been coming to the sessions from the beginning[293] and have generally been more active in open discussions during the sessions than any other entity including states.[294] They also commonly submit communications to the international body, from which jurisprudence is developed.[295] Their role before the new Court does not, however, appear to be as free.[296]

NGOs have been involved in the drafting of additional protocols[297] and resolutions, working with Commissioners in this respect.[298] They have assisted in drafting the Protocol determining the competence of the Court,[299] prompted the appointment of Special *Rapporteurs*,[300] and been influential in determining the

practical information that the parties may be unable to marshal and the Court would otherwise be unable to acquire, thus facilitating the decision-making process": *ibid*., 638. Shelton notes the difficulty of assessing the impact of the briefs in the Inter-American system given that "the Court rarely quotes them or refers to them explicity", however, they have had some impact and organisations do now participate in oral proceedings and "in this manner the public interest is broadly served and the work of the Inter-American Commission supplemented to ensure a full and fair hearing for all issues presented by cases before the Court": *ibid*.

[292] Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, at paras. 63 and 64(e).

[293] See *Second Annual Activity Report*, above n. 71 at para. 26 when the first observer status was granted.

[294] E.g. the Commission noted during the 22nd session where there was a discussion on the Court the lack of submission of states to the debate. See Chap. 6.B.

[295] See above, section 1.

[296] Art. 5(3) of the (Addis) Protocol, above n. 62, provides only that "relevant NGOs with observer status may bring cases" to the Court, provided, in addition, that a declaration has been made by the respective state recognising the competence of the Court in these circumstances: Art. 34(6). The previous Drafts were also restrictive, see Chap. 2.E.

[297] "The NGOs played a major part in the preparation of the original Draft Protocol, they were lobbying and this was very good, I believe . . . it should involve all the parties": 21st Session Transcripts, 87. In addition, they have been closely involved in the drafting of the Protocol on the Rights of Women; a working group was established composed of Commissioners and NGOs, see *Report of the First Meeting of the Working Group on the Additional Protocol to the African Charter on Women's Rights*, DOC/02/34c (XXIII) at para. 2. States were not involved at this stage. See Chap. 4.B and *Report of Special Rapporteur on Women's Rights*, DOC/05/57.

[298] "If you agree with me we will appoint a drafting group on this resolution. I suggest that we call on our friend [Commissioner], with our friend Chidi [of Interights] to get together and prepare a draft resolution": 19th Session Transcripts, 128.

[299] "The draft was prepared by the government experts. We of course received the report here so that Commissioners can make their observations. So I want to propose that Commissioners discuss this issue *in camera*, later. In the meantime we can hear the observations and comments of those that are not going to sit *in camera*": 21st Session Transcripts, 87.

[300] E.g. Amnesty International lobbied for the appointment of the Special *Rapporteur* on extrajudicial, summary and arbitrary executions, and PRI for the appointment of the Special *Rapporteur* on prisons and conditions of detention: see Ngefa-Atondoko, above n. 244 at 17–18 and 20.

competence of the Commission itself.[301] As a result, their role at sessions is often blurred to some extent with that of the members themselves.[302]

(b) Democratic

Whilst this role played by NGOs has been criticised by some,[303] particularly given the number of international NGOs as opposed to African ones,[304] it is arguable, however that this inputs an element of democracy into international law[305] and ensures that "the involvement of the people in rights struggles is

[301] "The Special Rapporteur on Extrajudicial Executions . . . presented a draft proposal of revised terms of reference after considering draft terms of reference from the Commission and NGOs": Final Communiqué of the 17th Ordinary Session, Lomé, Togo, 12–22 March 1995, ACHPR/COM.FIN/XVII/Rev.3, para. 25.

[302] When one commissioner asked an NGO representative to introduce an item that they had been working on together, another commissioner objected: "I don't understand the procedure. There is a reference to an OAU Resolution of 1995 to appoint experts to consider drafting an additional protocol on women's rights. I don't understand why the Commission is not opposing taking it away from itself and giving it to an NGO which has made an introduction without any comments": 21st Session Transcripts, 100.

[303] Whilst Ankumah does not think that NGOs should not necessarily be involved in the jurisprudence of the Commission, she suggests that "it is not the task of NGOs to submit draft resolutions to the African Commission. The situation would be different if the Commission were to entrust an NGO with the task to conduct a study on a particular issue and then propose a resolution on that issue. In order to prevent situations like the one regarding the Algerian resolution, the African Commission should not use NGO draft resolutions as a basis for adopting its resolutions without consulting independent information. It would be prudent for the NGOs to lobby the Commission rather than write resolutions for the Commission to adopt": Ankumah, above n. 33 at 190. She also states, at 188, that the adoption of NGOs' resolutions without further information "is worrisome as political groups acting under the pretext of human rights organizations can use the African Commission to discredit their political opponents . . . As appeared to be the case with respect to the resolution on Algeria, adopting resolutions formally submitted by NGOs potentially undermines the credibility of the Commission". However, the Commission does vet NGOs on application for observer status and does consider their political involvements.

[304] The NGO community submitted a joint statement at the 22nd session of the African Commission alleging that the suggestion by some Commissioners that the debate should be "Africanised" was inappropriate in a system which required the co-operation of all to be effective. The Commissioners in question afterwards clarified their statements. See *Mise au Point*, Rezzag-Bara, 22nd Session (no reference). Such issues have been raised by others; "[t]he numerical strength of foreign observers who participate and therefore influence the development of human rights jurisprudence in the Commission is in itself a potential marginalising force as far as the full participation of African human rights NGOs in concerned": S. Gutto, "Non-Governmental Organisations, Peoples' Participation and the African Commission on Human and Peoples Rights: Emerging Challenges to Regional Protection of Human Rights" in B.-A. Andreassen and T. Swinehart, *Human Rights in Developing Countries*, Yearbook (Scandinavia University Press, Oslo, 1991), 41, at 43 and 47, notes that for too long the intellectual work in human rights has been done by Northerners for their own benefit and ignoring the "dirty work" done by Africans. Ankumah, above n. 33 at 33–7 notes the problems of involvement of foreign organisations in the Commission and the necessity of ensuring Africans not europeans work at the secretariat. Her reasons were a desire to develop an African jurisprudence, enable the direct participation of Africans in an African organisation; ensure the independence of the Commission.

[305] "It is a matter of concern that a great deal of international legislation which directly or indirectly affects the rights and well-being of individuals, groups and entire populations, is the product of national or international bureaucracies without proper democratic control or input. . . . We have now, however, entered a new phase in international relations—at least in theory—a phase of

central in giving proper content and more popular processes to rights as well as contributing significantly to revolutionary strategies for social change".[306] In addition, ensuring that rights are protected at all levels, not just against violations emanating from states, requires organisations that are in touch with individual citizens[307] to ensure protection, promotion and reporting of violations.[308]

4. Duties

(a) Internationally

NGOs are required to be accountable to the Commission if they hold observer status with it. The Commission did initially permit NGOs to make comments

international cooperation which is supposed to serve common goals and common interests . . . The international law of human rights is a people-oriented law and it is only natural that the shaping of this law should be a process in which representative escorts of society participate. This is a logical requirement of democracy . . . Part and parcel of a more coherent consistent and consolidated practice of international human rights standard setting should be the securing of facilities for non-governmental participation and input. Transparency and public discussion are essential elements of democratic processes": Van Boven, above n. 290 at 223. "As the judgments affect not only the rights and obligations of States parties to the dispute, but also increasingly the rights and obligations of individuals, justice requires that nongovernmental organizations representing the public interest have the opportunity to submit information and arguments to the [International Court of Justice]. Such participation reinforces the obligations *erga omnes* and can lead to enhancing the role of the Court and the long-term development of international law": Shelton, above n. 241 at 642.

[306] Gutto, above n. 304 at 39. As Van Boven, above n. 290 at 221, states "the principal decision-makers in the [UN] are governments of Member States. However, in many instances governments cannot be considered as the genuine representatives of the people over whom they exercise authority . . . when the UN made arrangements for consultation with NGOs it was at least assumed that these NGOS would be of 'representative character and of recognised international standing, representing a substantial proportion and expressing the views of major sections of the population or organised persons within the particular field of its competence, covering where possible, a substantial number of countries in different regions of the world' ", citing ECOSOC Resolution 1296 (XLIV) para. 4. See also OAU Grand Baie Declaration and Plan of Action, CONF/HRA/DECL(I), para. 17 where it "recognises the importance of promoting an African civil society, particularly NGOs, rooted in the realities of the African continent and calls on African governments to offer their constructive assistance with the aim of consolidating democracy and durable development".

[307] Gutto, above n. 304 at 34 "NGOs are the expression of democracy because they ensure direct participation". V. Leary, "Lessons from the Experience of the International Labour Organization" in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (Clarendon, Oxford, 1995) 580–619, at 617, argues that the participation of NGOs in the ILO proceedings actually depoliticized the organisation and recommends that it should be applied elsewhere.

[308] There are suggestions that NGOs are the manifestation of the individual's right to association and their "accessibility to ordinary people, which in the view of some participants was one of the most effective forces to be enlisted in the defence of human rights, and their ability to mobilize it rendered them capable of impressive achievements in vindicating the rights of people and preventing or successfully combating the denials or violations of such rights . . . their support and help encouraged the disadvantaged individuals to challenge the formidable apparatus of the State": Seminar on Special Problems Relating to Human Rights in Developing Countries, Nicosia, 26 June–9 July 1969, at para. 156.

on the extent of their own obligations.[309] This accountability includes presenting a report every two years on activities which they have undertaken.[310] Although the Commission often refers to this requirement,[311] it is only recently that it has consider this matter seriously. At the twenty-fourth session the Commission distributed a document listing the extent to which NGOs had complied with their reporting obligations indicating that many were defaulting.[312] It now appears that it will take action against those which continually fail to comply, including suspending or withdrawing status.[313]

Even in the submission of information the Commission relies on them[314] and NGOs should provide alternatives to the state reports under Article 62 and give details to the Commission's Special Rapporteur.[315] As one Commissioner stated at the nineteenth session:

[309] E.g. at the 23rd session an extended debate was held on the relationship of the Commission with NGOs and NGOs were requested to provide suggestions and comments to the Commission in this respect: see Agenda of the 23rd Ordinary Session, DOC/OS/22(XXIII). In addition, "the Draft Protocol on the African Court on Human and Peoples' Rights was discussed by the Commission. 25 NGOs made statements expressing their concern with some of the provisions of the document [including their ability to petition the Court] . . . The Commission will submit comments made by NGOs to the OAU General Secretariat for appropriate action", Final Communiqué of the 21st Ordinary Session, above n. 276 at para. 12.

[310] "At its 11th session the Commission reaffirmed its wish for the continued cooperation with NGOs in the performance of its functions but emphasised the need to observe the limits within which that cooperation is to be rendered, bearing in mind the independence of the Commission and its nature as a commission of experts operating within the context of the African Charter. The Commission has always taken the view that the NGOs which have been granted observer status with the Commission should from time to time inform the Commission of their activities in the field of human rights to assist the Commission in its work. In line with this view, at its 11th session, reiterated that such NGOs should, at least every two years, report to the Commission of their activities which are relevant to the work of the Commission": *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*,1991–92, ACHPR/RPT/5th at paras. 20 and 21. The aim of this reporting requirement is to ensure that NGOs are "serious": see 23rd Session Transcripts, 4.

[311] E.g., 23rd Session Transcripts, 4.

[312] Status of Submission of NGOs Activity Reports, DOC/OS(XXV)/84/Rev.1. In the Final Communiqué of the 25th Ordinary Session, DOC/OS(XXV)/111/Rev.1, para. 6, the Commission "deplored the lack of co-operation" of NGOs who had not submitted their reports.

[313] Criteria for Observer Status, above n. 254, where it states that the "Commission reserves the right to take the following measures against NGOs that are in default of their obligations: non-participation in sessions; denial of documents and information; denial of the opporunity to propose items to be included in the Commission's agenda and of participating in its proceedings. Observer status may be suspended or withdrawn from any organisation that does not fulfill the present criteria, after deliberation by the Commission": at 3–4.

[314] "I don't know if you think we should issue a communique on this issue in Zaire, and if we discuss this in public session it's because NGOs also know the situation very well and they can give us information": 20th Session Transcripts, 120.

[315] "Contacts made have permitted the Special Rapporteur to undertake this task with Amnesty International. A meeting is expected very soon. Moreover, several African NGOs have been requested to furnish useful information to the Special Rapporteur. Correspondence has been addressed to this effect to the UIDH (Union Interafricaine des Droits de l'Homme), la RADDHO (Rencontre Africaine pour la Défense des Droits de l'Homme), whom the Special Rapporteur found very willing. It is envisioned that the next step will be to appeal to other NGOs (International Observatory of Prisons, Penal Reform International, Africa Watch). Permanent contacts will be maintained with the International Commission of Jurists (Geneva) and the Special Rapporteur will

> The cooperation between the Commission and the members of the NGO group, in my mind, continues to be an essential prerequisite, and essential condition for the effective working of the Commission. To illustrate this, there are only 11 Commissioners to cover the whole of Africa, consisting of 52 States of the OAU. How can 11 persons cover the whole of Africa? . . . It would not be physically possible for me to have gathered all this information, but it is possible because of the gathering we have here. Members of NGOs bring this information here.[316]

When making criticisms, the Commission has required comments to be "constructive", which has led to some friction in the relationship.[317] These problems have been noted in relation to other international bodies.[318]

(b) Nationally

NGOs have a role to play at the national level in providing education and training on human rights issues[319] and maintaining links with the local

try to identify sources of credible information, above all on Rwanda and Burundi. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, M. Bacre Waly Ndiaye has been solicited and has demonstrated great willingness to cooperate": *Report on Extrajudicial, Summary or Arbitrary Executions*, above n. 123. Also, NGOs are also required to assist governments in the preparation of their Art. 62 reports: see 23rd Session Transcripts.

[316] 19th Session Transcripts, 25–6.

[317] "We should rather underscore this aspect instead of negative criticism which is need. negative criticism is useful . . . but, what is most needed is positive criticisms . . . We should underscore this type of cooperation, instead of voicing criticism, without voicing any alternative solution. People should come forth and table suggestions. The presence of NGOs is needed by the Commission, and we hope the criticism is done in a positive, not a negative light, for the improvement of our work": 19th Session Transcripts, 26–7. In addition, "[t]he point I am emphasizing is that the cooperation which is being forged, so far, between the Commission and the members of the NGOs community, should be supported, should continue and every effort should be made to maintain it, though, in the course of doing this, there may be rubbing shoulders here and there, but this is human, even in a family, a man and wife rub shoulders, a man and his children rub shoulders. It is something that can happen and it can be put right. All that can be insisted is that we as Commissioners invite advice from NGOs, and criticism from NGOs, and these criticisms should be constructive. We know you are not criticising us out of malice, but out of a desired goal, that's furthering the human rights cause in Africa", *ibid*., 25–6.

[318] Steiner and Alston, above n. 31 at 489 note "the contradictory attitude of the UN to INGOs. On the one hand, Article 71 of the UN Charter acknowledges the important role of NGOs. Moreover, the UN mechanisms for responding to violations rely heavily on INGOs to provide alternative sources of information, as well as to heighten the external pressures on States that are indispensible to those mechanisms' effectiveness. On the other hand, NGOS have only grudgingly been accorded speaking and other lobbying rights and their status before UN bodies is regularly challenged by hostile governmental forces. At the same time the existing 'consultative arrangments' within the UN system are overloaded and unsustainable".

[319] "The Commission . . . Urges . . . NGOs with observer status with the Commission . . . to initiate specialised and comprehensive training for judicial officers, lawyers at national and sub-regional levels": Resolution on the Role of Lawyers and Judges in Integration of the Charter and Enhancement of the Commission's Work in National and Sub-Regional Systems, above n. 187 at para. 3. The Commission has called on NGOs to ensure ratification of the Protocol on the Court, "you have an important role in raising the awareness of African countries to ratify the Protocol on the African Court, this is the work of all activists and friends of the human rights movement. We will all work together to speed up the process of ratification of the Protocol": 23rd Session Transcripts, 1. Commissioners have called on NGOs to assist in promotional issues, e.g., in implementing the Mauritius Plan of Action, above n. 54, "the Commission will not be able to do these acts without the initiatives of NGOs": 23rd Session Transcripts, 6.

people.[320] They should assist in the aftermath of a war, to attempt reconciliation and to assist those organisations at the local level.[321] In addition, this includes submitting communications to the Commission on issues of concern,[322] assisting individual complainants[323] and help in areas of protection and emergency,[324] which has produced some positive results.[325] In addition, NGOs are often called on to assist the Commission where it cannot do the job itself, particularly at the national level:

> The Commission decided to strengthen cooperation with national human rights NGOs especially through the regular exchange of information on promotion and protection of human rights within States parties in which such NGOs operate. That would enable the Commission to benefit from the assistance of NGOs for certain field investigations in areas it cannot itself visit.[326]

NGOs are required to ensure contact between governments and the Commission[327] including facilitating visits by the Commission.[328] They should

[320] "Recognising the importance of NGOs in highlighting public awareness and the need to strengthen their capacity in assisting mines victims": Resolution on Anti-Personnel Mines, above n. 200.

[321] "The Commission . . . Urges international institutions and NGOs in general and African NGOs in particular to contribute to the effort of international solidarity and assist in the rapid reconstruction of Rwanda through the provision of technical and financial assistance especially by facilitating the resumption of the activities of local human rights NGOs in Rwanda", Resolution on Rwanda, above n. 171 at para. 7.

[322] "I was surprised I did not see any communication on Angola by the NGOs and you have an advantage in that you are totally independent": 20th Session Transcripts, 43.

[323] The Commission recommended in one case that the author should exhaust local remedies and "should also be advised to contact the NGO . . . which enjoys observer status with the Commission for assistance, Art. 56(5) of Charter", No. 97/93, above n. 119 at para. 47. See above, Part C.

[324] "In the light of the human rights situation in Africa, the Commission decided to analyse in depth the idea of putting into place an early warning mechanism in case of emergencies and called upon the NGO community to render assistance in that field": Final Communiqué of the Second Extraordinary Session, above n. 50 at para. 20. Clapham has suggested in relation to the European system that the role of NGOs be widened given that they are likely to provide information on the private violations of rights, see in general, Clapham, above n. 139 at chap. 9. See above, part C.

[325] E.g. at the 23rd session, the Commission responded quickly to requests from Amnesty International to call on the authorities in Rwanda to postpone executions the following day, by sending a fax to the government expressing the Commission's concerns: see 23rd Session Transcripts.

[326] *Seventh Annual Activity Report*, above n. 105 at para. 27(d). Ankumah, above n. 33 at 193, "one cannot realistically expect the Commission to promote the Charter in rural areas".

[327] "We as a Commission and NGOs should try to concretely enter (sic) into contact with our administrative officials": 20th Session Transcripts, 118.

[328] "When we say on-site missions we have in mind both States and NGOs. In the past we have had difficulties in getting States to give us permission to conduct investigations or studies with a view to making a report . . . We are requesting that the delegates of the States who are here should grant us the opportunity to do so, and the NGOs should try to facilitate our entry into their countries. In this respect . . . we have distributed countries to various Commissioners for purposes of promotional activities. So far . . . it is the Commissioners who approach the various countries, who approached the government and then the NGOs. So far that has worked. But I should appeal to NGOs also to initiate these visits, when, for example, they are holding seminars or workshops where they will discuss human rights issues relevant to the Commission, they should invite the respective Commissioners, because that would provide a better opportunity than for an individual Commissioner to work out a programme which might not coincide with the convenience of the people in the area": 20th Session Transcripts, 46.

also co-operate with the Commission and with other organisations in the protection and promotion of rights[329] and in some instances almost represent the Commission at the national level.[330]

5. Conclusion

In conclusion, NGOs have a considerable role to play within the African system and one which the Commission has not been afraid of acknowledging as necessary to its functioning. The African Commission does appear to have accepted the role of NGOs much more explicitly than other international organs, although, as seen above, the extent of their involvement elsewhere may not have been as limited as initially thought. In this way the approach of the African Commission illustrates a trend that is occurring in other international bodies, namely, "a manifestation of the growing role of non-State actors in international law generally".[331] Perhaps the impact is more noticeable in the African Commission which has not been wary of referring to work undertaken by, or influences on, NGOs, in contrast to the more reticent attitude of other organs.

It could be argued that the need for NGOs in the African system is largely due to the weaknesses and ineffectiveness of the African Commission itself[332] and the emphasis on their duties could merely be an attempt to deflect attention from the inadequacies of the Commission itself. However, whilst this may in part be true, it is submitted that the holistic and community responsibility advocated by the African Commission is also a more realistic approach to ensuring the realisation of human and peoples' rights on the continent.

[329] "The Commission appeals to NGOs to play a more active role in the areas of promotion and protection of human rights and cooperate closely among themselves and with the Commission with a (view) to executing their mission as effectively as possible": Press Release, above n. 205. See also "[i]n this regard, all human rights organisations and institutions in Africa are invited to work with the Commission so as to combine efforts and harmonise their activities with the aim of achieving maximum results in the promotion and protection of human and peoples' rights in Africa": Mauritius Plan of Action, above n. 54 at para. I.5.

[330] "There is an item on the agenda of revision on the Charter and we would like to know what NGOs say on this. The workload is increasing, but the number of Commissioners remains static, since adopting. Maybe the ideal solution is the representation of each country. So the cooperation we are seeking is for those countries that do not have a resident Commissioner, will have dynamic NGOs, who can refer to the closest Commissioner when there is a problem": 19th Session Transcripts, 26–7.

[331] Shelton, above n. 241 at 616.

[332] Because of the "structural weaknesses of the Commission, more than other bodies, cooperation with NGOs is necessary": Benedek, above n. 9 at 34.

E. PEOPLES IN THE AFRICAN SYSTEM

1. Introduction

The Charter is seen as unique among international instruments in its inclusion of a number of rights for peoples, in Articles 19–24[333] which include rights to equality, self-determination and control over natural resources, development and entitlement to a safe environment. In this respect, "the Charter is the first major human rights document that established a link [between peoples' rights and human rights] in a forceful manner".[334] Two considerations are necessary here: whether the rights are capable of being enforced and secondly, if this can be done through the Commission's procedures.

There have been two areas where the African Commission has specifically been requested to consider peoples' rights.[335] The first concerned a claim by the Katangese People's Congress to gain independence from Zaire under Article 20(1) of the Charter,[336] and the second related to the situation in the Casamance

[333] Art. 1(1) of the two International Covenants contains a right to self-determination for peoples and Art. 1(2) a right of peoples freely to dispose of their natural wealth and resources. The Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 UNTS 277, defines genocide in Art. 2 as an international crime "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such". The International Convention on the Suppression and Punishment of the Crime of Apartheid, *op cit*, declares apartheid as a crime against humanity and defines it, in Art. 2, as those acts "committed for the purpose of establishing and maintaining domination of one racial group of persons over another racial group of persons and systematically oppressing them". The African Commission has expressly required states to report on the implementation of this provision in their reports under Art. 62: see *Guidelines for National Periodic Reports*, above n. 18 at para. VI.2.i. Other documents have recognised peoples' rights: the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 169, adopted 27 June 1989 (1989) 28 *ILM* 1382; United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res.2625 (XXV), 25 UN GAOR, Supp. (No. 28), UN Doc.A/8028, at 121 (1970) (1970) 9 ILM 1292; United Nations Draft Declaration on the Rights of Indigenous Peoples, UN Doc.E/Cn. 4/Sub.2/1994/2/Add.1, 20 Apr. 1994. UN Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960, adopted by General Assembly, Resolution 1514 (XV), 14 Dec. 1960; General Assembly Resolution on Permanent Sovereignty over Natural Resources, 14 Dec. 1962, GA Res.1803 (XVII) See also R. M. D'Sa, "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Actions" [1987] *Australian Yearbook of International Law* 101–30 at 116; Kiwanuka, above n. 10 at 81; F. Ouguergouz, "La Charte Africaine des Droits de l'Homme et des Peuples: Lecture Critique" (1992) 2 *Review of the African Commission on Human and Peoples' Rights* 55–70, at 59; Benedek, above n. 9 at 72.

[334] T. Van Boven, "The Relationship between Peoples' Rights and Human Rights in the African Charter" (1986) 7 *HRLJ* 183–94, at 187, 184. In this respect it goes further than the ICCPR and ICESCR Arts. 1(2).

[335] The Commission has also defined the other peoples' rights in the Charter more fully in its *Guidelines on National Periodic Reports*, above n. 18, although they will not be considered fully here. An item on the agenda at the 25th session was entitled "Indigenous Peoples", Annotated Agenda, 25th Ordinary Session, DOC/OS(XXV)/81. In the ensuing discussion one Commissioner objected to the term used as being offensive and with colonial implications. The Commission decided to appoint one Commissioner to prepare a study on the matter and to report to the 26th session.

[336] No. 75/92, *Katangese Peoples' Congress* v. *Zaire*.

in Senegal, where rebels were trying to gain separation of the area from Senegal.[337] A number of other statements are also important. Although the Commission has made statements in relation to other rights of peoples, this chapter has focused on one right, that of self-determination, as an adequate illustration of its status.

2. Definition of a "People"

The initial consideration relates to whom such rights are owed and the Charter itself does not provide a definition of what constitutes a people.[338] In international law in general, there does not appear to be a consensus on a definition of a people.[339]

The African Commission has not been willing expressly to define a people but has given indications on its meaning. It seems to consider that a people is a population of a state, for example, the people of Rwanda,[340] of South

[337] *Report on Mission of Good Offices to Senegal*, above n. 46.

[338] Bello, above n. 10 at 24 states that the drafters of the Charter had no intention of providing one. D'Sa, above n. 333 at 117; Benedek, above n. 16 at 66; Kiwanuka, above n. 10 at 82; P. Kunig, "Regional protection of Human Rights: A Comparative Approach: in P. Kunig, W. Benedek and C. R. Mamalu, *Regional Protection of Human Rights by International Law: The African System* (Nomos Verlagsgesellschaft, Baden-Baden, 1985) at 48.

[339] P. Thornberry, *International Law and the Rights of Minorities* (Clarendon, Oxford University Press, 1991), at 6, notes that the most widely accepted definition is that of Capotorti, being a "group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members, being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a senes of solidarity, directed towards preserving their culture, traidtions, religion or language". In the Draft Inter-American Declaration on the Rights of Indigenous Peoples AG/Res 1022 (XIX-0/89) the definition given to "indigenous peoples' in Art. 1 is "those who embody historical continuity with societies which existed prior to the conquest and settlement of their territories by Europeans (Alternative 1) [as well as peoples brought involuntarily to the New World who freed themselves and reesttablished their cultures from which they have been torn]. (Alternative 2) [as well as tribal peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations]". See in general, A. Cassese, *Self Determination of Peoples. A Legal Appraisal* (Grotius, Cambridge University Press, 1995); J. Crawford, *The Rights of Peoples* (Oxford University Press, Oxford, 1988).

[340] "The Commission . . . Appeals to OAU Heads of State for increased assistance to Rwanda to put an end to the sufferings of its people": Press Release, *Seventh Annual Activity Report*, above n. 105 at Annex XIII. In addition, "[t]he Commission issued a press communiqué deploring the Security Council's decision and urged the UN to send peace keeping troops to protect the people of Rwanda. The Commission also called on the OAU Heads of State to increase assistance to Rwanda in an effort to bring a speedy end to the sufferings of the people of Rwanda": Final Communiqué of the 15th Ordinary Session, Banjul, The Gambia, 18–27 April 1994, reprinted in International Commission of Jurists, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996) 133–8 at para. 21. See also, "[t]he Commission . . . Urges the parties to the conflict to immediately cease hostilities and work towards a peaceful settlement through dialogue between all the Peoples of Rwanda": Resolution on the Situation in Rwanda, above n. 171 at para. 2.

Africa[341] and Liberia,[342] among others.[343] Indeed the Commission has often talked about the people of the African continent as a whole.[344] However, the Commission has expressly stated that a people is not the state itself[345] nor does it use the term to refer to minority or ethnic groups such as black Mauritanians[346] or the Tutsi in Rwanda.[347] However, its lack of clear statement

[341] "The Minister of Justice . . . stated that . . . the People of South Africa welcomed the opportunity as a gesture of friendship and solidarity": *Report on Experts' Meeting, Cape Town*, above n. 79 at para. 7. See also "[i]t expressed the hope that the people of South Africa will continue the struggle in unity and solidarity until apartheid is totally dismantled and a democratic and non-racial society emerges": *Third Annual Activity Report*, above n. 18 at para. 14.

[342] "Considering . . . hostilities still exist all of which have the potential to derail the peace process and prolong the suffering of the Liberian people and the strain on the West African Sub-Region": Resolution on Liberia, above n. 175. See also "[t]he Commission . . . Appeals to the International Community . . . to keep the peace through the provision of financial and logistic support and to alleviate the suffering and the daily struggle of the Liberian people for survival through the provision of humanitarian relief and medical supplies": *ibid*. Also, the Commission "further calls upon the Council of State to . . . ensure that all perpetrators of crimes against the Liberian people are brought to justice"... *ibid*.

[343] Cassese, above n. 339 at 20–1 notes in respect of the African Charter that "there is little to suggest that peoples means anything other than the whole peoples of a State and not ethnic or other groups".

[344] "Convinced that the celebration of the anniversary of the coming into force of the ACHPR would involve the peoples or the world in general and the African peoples in particular in the activities of the African Commission on Human and Peoples' Rights": Resolution on the Celebration of an African Day of Human Rights, *Second Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1988–89, ACHPR/RPT/2nd, Annex VII. See also "[r]ecalling that the Charter of the OAU declares that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations by the African peoples": Resolution on the African Commission, above n. 27.

[345] "Considering that the solidarity and interdependence amongst peoples and States require that every effort be made to avoid the recurrence of more serious disturbances in Rwanda": Press Release, *Seventh Annual Activity Report*, above n. 105. See also "[t]he Charter is considered to reflect the hopes of African people for a fuller and better life in which their States accept to observe certain minimum standards of treatment for their citizens", Letter, *Ratification of the African Charter on Human and Peoples' Rights*, *Third Annual Activity Report*, above n. 18, Annex II.

[346] "Concerning the object of the communications, the first concerns the massacres perpetrated against black Mauritanians. It concerns murders perpetrated by soldiers against unarmed villagers, and alleges also the expulsion of black Mauritanians from their lands, and the denial of their right to speak their local languages": *Report of the Mission to Mauritania*, above n. 46. A minority is not necessarily thought of as holding collective rights, see Crawford, "The Rights of Peoples—'Peoples' or 'Governments'?", in J. Crawford, *Rights of Peoples* (Oxford University Press, Oxford, 1988) 17–38, chap. 4, at 60–1; Thornberry, above n. 339 at 18; Declaration on Friendly Relations, above n. 333.

[347] "Communication No. 99/93 alleges serious and massive violations between Oct. 1990 and Jan. 1992. A report was submitted at the same time detailing such violations as widespread massacres, extrajudicial executions and arbitrary arrests against the Tutsi ethnic group . . .", No. 27/89, 46/91, 49/91, 99/93 (joined), above n. 87. See also "[t]here is considerable evidence, undisputed by the government that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Art. 2": *ibid*. In addition, "the massacre of a large number of Rwandan villagers . . . and the many reported extra-judicial executions for reasons of membership of a particular ethnic group is a violation of Article 4": *ibid*. During the examination of the state report of Rwanda, one commissioner wished to clarify the meaning of "rights of communities": "[d]oes that mean we have to take into account the rights of the Hutu community, the Tutsi community or the Tua community? I think that according to the interpretation and even the principles which are enforced in the OAU at the

on the definition of a people is evidenced by referring to trade unions as a people.[348]

In this respect, therefore, the Commission has indicated that a people could be something other than the entire population of the state[349] and it has called the Katangese in Zaire and the rebels in the Casamance in Senegal a people.[350] Whilst it recognised that "all peoples have a right to self-determination" it admitted that "there may however, be controversy as to the definition of peoples and the content of this right".[351]

The Commission did however, consider that the characteristics of the entity in the Casamance to be important, noting the government's argument that there

level of the State, I think it is admitted that we do not have to take into account the rights of various ethnic groups, to consider them as peoples' rights. For the OAU, the 'peoples' is the whole group comprising the nation—the groups as a whole that we find within a State": Examination of State Reports: Libya, Rwanda, Tunisia, 9th Session, March 1991 (Danish Centre for Human Rights, Copenhagen, 1995) at 33. The Commissioner continued that whether "ethnic groups within the States" should be considered as peoples within the Charter, should be left to the discretion of the OAU Heads of State, however, he did emphasise that "when the term 'peoples' was introduced in our Charter, at that time, we meant peoples which had been colonized by European States, for instance the Nigerian people. We did not distinguish the Yorubas or the Minas, etc. These are not the communities or the people we are aiming at . . . I think that the dominant opinion when the Charter was elaborated was that the term peoples related to colonized peoples or peoples which were under racial domination or under occupation by a foreign State. But in Africa, it is not meant to recognise the identity of the various ethnic groups comprising the States": *ibid*., 35–6.

[348] "Rights of trade unions to federate . . . The right of trade unions to join national federations and confederations and the right of the latter to form and join international trade union organisations . . . Right of trade unions to function freely. (a) conditions under which trade unions may exercise their right to function freely": *Guidelines for National Periodic Reports*, above n. 18 at II, paras. 12 and 13. One commissioner stated, "there is no way that people here [in the Charter] simply means all the people of the country—it is the people that have an identifiable interest—and this may be carpenters, may be tribes, may be fishermen or whatever": Examination of State Reports: Libya, Rwanda, Tunisia, 9th Session, March 1991, above n. 347, at 9.

[349] "Desiring an immediate end to the harrowing suffering of people from various ethnic backgrounds and all walks of life, urgently appeals to all parties to the conflict in Zaire to respect the human rights of all peoples in Zaire especially non-combatants, refugees and internally displaced persons": Resolution on Zaire, above n. 169.

[350] "The Commission maintains its expression of profound gratitude with the hope that the sincerity, the loyalty, and the transparency which the authorities demonstrated throughout the mission will contribute to reestablish peace, justice and well-being of the populations of Senegal in general and of the people of Casamance in particular": *Report on Mission of Good Offices to Senegal*, above n. 46. See communication No. 75/92, above n. 336, also. F. Viljoen, *The Realisation of Human Rights in Africa through Intergovernmental Institutions* (University of Pretoria, Pretoria, 1997) at 8, argues that the Commission's interpretation in the Katangese People's Congress case gives people a "state-centred content", although it has left the door open to those whose rights have been violated, by being deprived of the right to participate in government.

[351] No. 75/92, above n. 336. Indeed, Crawford has noted that "if those 'peoples' constitute a part only of the population of the State, then the notion of permanent sovereignty presumably limits the power of the national government freely to dispose of the national resources of the region without the consent of the 'people'. Alternatively, if the 'people' is the whole population of the State, the principle apparently establishes that transactions entered into by by or on behalf of the State and involving the disposal of natural resources are subject to subsequent scrutiny and to invalidation or avoidance if these turn out not to have been in the interests of the population", Crawford, above n. 339 at 64.

was no one cultural group.[352] In addition, in relation to Zaire, the Commission seemed to think it irrelevant, although worth mentioning.[353]

3. Rights of Peoples

Thus, although the Commission was willing to say that such groups were a people, it expressly denied the right of either to self-determination to extend as far as independence from the state itself.[354] The territorial integrity of the existing State was upheld, with an emphasis on national unity.[355] For example, one reason given by the Commission for not upholding the claim by the Casamance group was that it might prompt other groups in the area to take similar action[356] and focused on the government's attempts to reach a settlement.[357] This is in line with the approach of other international bodies.[358]

Defining the content of the right to self-determination the Commission stated that "the issue in the case is not self-determination for all Zairians as a people but specifically for the Katangese . . . The Commission believes that

[352] Many of which did not want independence: *Report on Mission of Good Offices to Senegal*, above n. 46 at 43.

[353] "Whether the Katangese consist of one or more ethnic groups is for this purpose immaterial and no evidence has been adduced to that effect": No. 75/92, above n. 336.

[354] The Commission has recognised in some cases that the right to self-determination could mean more than independence. As one Commissioner asked during the examination of the report of Senegal, "I hope that your understanding of self-determination does not limit it to the exercise of independence. I know that some African States have tried to give this interpretation, that is to say that self-determination does not evaporate on the attainment of independence. It in fact continues to operate even after independence, but in different forms": Examination of State Reports: Gambia, Zimbabwe, Senegal, 12th session, above n. 109 at 63.

[355] "In total, it appears that neither the position of the separatists, nor that of the State authorities, can be taken in its entirety. For this reason, a frank and constructive dialogue must be instituted between the two parties, from which a solution can emerge, a solution which will assure the cohesion and continuity of the people of the unified Senegalese State in a community of interest and destiny": *Report on Mission of Good Offices to Senegal*, above n. 46 at para. 12. "The conflict evolved unevenly marked sometimes by grave violations of human rights by one side as by the other, sometimes by cessation of hostilities following cease-fires. In this regard it is necessary to emphasise the unmistakable will of the Senegalese Head of State concerned to resolute the conflict through negotiated means, not by arms, while remaining first on respect for national unity and territorial integrity": *ibid*. In relation to the situation in Zaire, "[t]he Commission is obliged to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the ACHPR, No. 75/92, above n. 336 at para. 5.

[356] "The principle of maintenance of national unity and territorial integrity cannot be questioned. Should Casamance by misfortune become independent, there would be no reason for the other regions of Senegal not to claim the benefits of the same status, using similar arguments": *Report on Mission of Good Offices to Senegal*, above n. 46.

[357] "The Commission maintains its expression of profound gratitude with the hope that the sincerity, the loyalty, and the transparency which the authorities demonstrated throughout the mission will contribute to reestablish peace, justice and well-being of the populations of Senegal in general and of the people of Casamance in particular": *ibid*., 45.

[358] "Following previous United Nations formulations of the principle of self-determination, the Declaration on Friendly Relations places the goal of territorial integrity or political unity as a principle superior to that of self-determination": H. Hannum, "Rethinking Self-Determination" (1993) 34 *Virginia Journal of International Law* 1, at 6.

self-determination may be exercised in any of the following: independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognizant of other recognised principles such as sovereignty and territorial integrity".[359] Thus the boundaries of the OAU state are upheld even though the Commission has recognised that they were defined during colonialism, when the self-determination of the people was not taken into account.[360]

However, the African Commission did not completely rule out the possibility of self-determination in the form of secession, but only under certain conditions, "there are no allegations of specific breaches of other human rights apart from the claim of the denial of self-determination" and "in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire".[361] This has been reaffirmed by other bodies.[362] This, "consistent with the concerns of most United

[359] No. 75/92, above n. 336.

[360] "The principle of territorial integrity and inviolability of borders seen to perpetuate the arbitrary and artificial divisions affected by the former colonial powers, without consulting the concerned populations": *Report on Mission of Good Offices to Senegal*, above n. 46 at para. 10. This was an argument brought up by the head of the rebel movement as a reason for independence, *ibid.*, 40. The Commission in its *Human Rights Situation in Africa*, above n. 168, noted the repudiation of *uti possidetis* by some African States which has "resulted in hostilities . . . bringing in their wake the series of disasters and human rights violations". It cites disputes between Cameroon and Nigeria and between Eritrea and Ethiopia in this regard. See Bello, above n. 10 at 170: "whether African member States of the OAU were prepared to accept a status quo in respect of the territorial boundaries established by the colonial powers prior to independence. . . . The preservation of the status quo among African members of the OAU has been likened to the Latin American doctrine of *uti possidetis* meaning that 'the existing state of affairs should be preserved, whether its origin was lawful or not' ". This supports the decision taken by the ICJ in *Frontier Dispute (Burkina-Faso/Republic of Mali)* [1986] ICJ Reports 554, 80 ILR 440, which appeared to hold self-determination as secondary to the principle of *uti posseditis*. "In these circumstances, the Chamber cannot disregard the principle of *uti posseditis juris* . . . It is a principle of general scope logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers . . . Its primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved . . . This principle of *uti posseditis* appears to conflict outright with the rights of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course . . . The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States . . . to consent to the respect of colonial frontiers to take account of it in the interpretation of the principle of self-determination of peoples": *ibid.*, at paras. 23–26.

[361] No. 75/92, above n. 336 at para. 6.

[362] "However, this restriction applies only to those States which conduct themselves 'in compliance with the principle of equal rights and self-determination of peoples . . . and [are] *thus* possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. The requirement of representativeness suggests internal democracy. However, such a requirement does not imply that the only government that can be deemed 'representative' is one that explicitly recognises all of the various ethnic, religions, linguistic and other communities within a State": Hannum, above n. 358 at 6.

Nations members when the Declaration [of Friendly Relations] was adopted in 1970, is that a State will not be considered to be representative if it formally excludes a particular group from participation in the political process, based on that group's race, creed or colour . . . At the very least, a State with a democratic, non-discriminatory voting system whose political life is dominated by an ethnic majority would not be unrepresentative within the terms of the Declaration on Friendly Relations".[363] Thus the African Commission appears to suggest that the degree of self-determination is linked with that of the degree of representativeness of the government.[364]

4. The Relationship between Individual and Peoples' Rights

This also indicates the relationship between peoples' rights[365] and individual rights and could be evidence of the Commission's attempt to avoid a controversial area by treating an issue of peoples' rights as one of individual rights, for example, in relation to the right to development.[366] This does not enhance the status of people internationally, and could be argued to diminish them. However, the Commission has also held some individual rights have a collective element and become a right of a people.[367] Given the alternative definitions of a

[363] *Ibid*., at 7. In the examination of the Initial Report of Namibia one Commissioner asked for further information about peoples' rights namely, "[d]oes the republic have any understanding of the issues of self-determination for the peoples of Namibia. It would be useful to know how the government . . . understands that—ethnicity, language, culture, tradition, relationship between the various language groups and concerns about the rights or dominance of one or another language group": Examination of the Initial Report of Namibia, 23rd Ordinary Session (no reference), 19.

[364] It has been argued that "one can thus discern degrees of self-determination, with the legitimacy of each tied to the degree of representative government in each State. The relationship is inverse between the degree of representative government, on the one hand, and the extent of destabilization that the international community will tolerate in a self-determination claim, on the other. If a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized", F. Kirgis, "The Degrees of Self-Determination in the United Nations Era" (1994) 88 *AJIL* 304, at 307. At the 25th session examination of the report of South Africa the Commissioner rapporteur asked how the government dealt with requirements by the white minority to establish its own independent state: 25th Session Transcripts, 27.

[365] See, generally, G. Triggs, "The Rights of Peoples and Individual Rights: Conflict or Harmony", in J. Crawford, above n. 339 at chap. 9.

[366] The Commission "[r]eaffirms that the right to development is an alienable Human Right by virtue of which every human person is entitled to participate in, contribute to and enjoy the economic, social, cultural and political development of the society": Resolution on the African Commission, above n. 52. It has been argued that although there is an assumption behind traditional human rights law that group rights will be taken care of with individual rights, this is not always the case: I. Brownlie, "The Rights of Peoples in Modern International Law" in Crawford, above n. 14 at chap. 1, 3. This is because the traditional view does not cover, among other things, "positive action claims to maintain the cultural and linguistic identity of communities".

[367] "The Commission . . . Renews its demands on the AFPRC to accelerate the process of transition to constitutional rule and to abolish all decrees that infringe the freedom of the Gambian people individually and collectively including the freedom of expression, the press and the right of association and assembly": Resolution on The Gambia, *Eighth Annual Activity Report of the African*

people it is arguable that rather than viewing it as a static concept, it changes according to the situation over time.[368]

5. Ability to Enforce Rights

It is necessary to consider the ability to enforce the rights to which people are entitled. In terms of self-determination it is clear from the above that although a people may have some status, this will, in general, not extend as far as permitting them to secede from a state which is already a member of the OAU. The African Commission, in both the Katanga and the Casamance situations, has upheld the territorial integrity of the OAU state, suggesting that the rights in the Charter may not actually be realised.[369]

If they can be, then their enforceability depends on whether a people or representative of such is permitted to use the individual communication procedure under the Charter. In the Katangese people case a representative of the Katangese People's Congress petitioned the Commission which, whilst declaring the case inadmissible, did so not on grounds that the petitioner was not able to submit the case, but on other grounds as discussed above.[370] In addition, although an NGO petitioned the Commission on behalf of the rebels themselves in the Casamance situation, the Commission has been willing to consider the issue, visit the area and enter into discussions to obtain an amicable dialogue with the parties involved in the dispute. It has required both sides to the conflict, which was not the complainant but those whom it represented, to undertake certain measures for reconciliation.[371] In relation to the Inter-American system

Commission on Human and Peoples' Rights, 1994–95, ACHPR/RPT/8th, Annex VII, at para. 3. At the 9th session one Commissioner stated, "the right of the individual seems to be quite high. So high that we begin with them in the Charter. The rights of groups actually come later . . . The rights of groups here, peoples, are necessary in the context of satisfying the rights of the individual . . . One is not necessarily subsidiary to the other . . . [it is] not as if we are setting out the rights of the individual on one side and the rights of the community on the other. We have to protect both." Another commissioner added, "this is precisely one of the peculiarities of our Charter that the European approach to human rights is almost the case of emphasising the right of the individual against the whole State. But as Africans we think of the individual, we think of his duties in society, because it is only in society that he can fully achieve his maximum enjoyment. It is possible to balance both of them without stirring any more controversy": Examination of State Reports: Libya, Rwanda, Tunisia, 9th Session, above n. 347 at 34.

[368] "The Commission believes that the situation which prevailed in Africa in 1981, during the adoption of the Charter, has changed considerably. The present situation is characterised by a strong demand for the rights to peace, freedom and democracy and development": Press Release, above n. 205.

[369] It has been argued that peoples' rights are only "aspirational and exhortatory" and the Commission's function in respect of such, thus, promotional: Bondzie-Simpson, above n. 223 at 654; D'Sa, above n. 333 at 121. S. D. Neff, "Human Rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the Light of Case Law from Botswana, Lesotho and Swaziland" (1984) 33 *ICLQ* 331–47, at 347; E. Kodjo, "The African Charter on Human and Peoples' Rights" (1990) 11 *HRLJ* 271–83, at 282.

[370] No. 75/92, above n. 336.

[371] *Report on Mission of Good Offices to Senegal*, above n. 46.

its Commission has permitted representatives of indigenous peoples to address it, thus implicitly recognising their standing at the international level.[372] However, unlike some other international bodies,[373] the African Commission has recognised the status of such groups internationally and their ability to enforce their rights.

Although in Article 6(1) of the Draft (Cape Town) Protocol standing was given to "individuals, NGOs and groups of individuals", and not expressly a people, to bring cases to the Court, there was the possibility that a people could fall within the latter group. In the adopted Protocol, however, only individuals and NGOs are mentioned,[374] making it ambiguous whether they will be able to stand before the Court unless represented by an NGO.

Peoples' rights could at least seem enforceable through the state reporting procedure, as they are mentioned specifically and extensively in the guidelines on state reporting which the states must include in their Article 62 reports,[375] although this does not provide much of an opportunity for the people itself to petition the Commission, merely to provide it with information. The Commission specifically permits in its Rules of Procedure for the participation of national liberation movements in the sessions of the Commission,[376] although this has never actually occurred.

[372] See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Brazil*, 1997, OEA/Ser.L/V/II.97, Doc.29 rev.1, 29 Sept. 1997; *Report on the Human Rights Situation in Ecuador*, above n. 11 at 105. In the latter report the Inter-American Commission stated that "certain individual rights guaranteed by the American Convention . . . must be enjoyed in community with others, as is the case with the rights to freedom of expression, religion, association and assembly. The right to freedom of expression, for example, cannot be fully realised by an individual in isolation; rather, he or she must be able to share ideas with others to fully enjoy this right. The ability of the individual to realize his or her right both contributes to and is contingent upon the abilities of individuals to act as a group. For indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture. In construing these rights in relation to indigenous peoples, account must also be taken of the stipulation set forth in the American Convention that its provisions be interpreted so as not to restrict other rights and freedoms accorded under domestic law or other international instruments by which the State concerned is bound. Ecuador is party to a number of international conventions which guarantee certain protections for ethnic and racial groups including the ICCPR . . . Article 27": at 103.

[373] The Human Rights Committee of the UN has rejected the possibility of considering a claim from a people under the Optional Protocol in relation to Art. 1 of the ICCPR as it will consider only petitions from individuals, Communication No. 78/1980, AD, on behalf of *Mikmaq Tribal Society* v. *Canada*, GAOR A/39/40 (1981) 134: see Crawford, above n. 339 at 165. However, note the decision by the Human Rights Committee in *Lovelace* v. *Canada*, UN Doc.CCPR/C/DR(XII)/R6/24 (31 July 1983) (1981) 2 *HRLJ* 158 and the argument by Crawford, above n. 339 at 61, that its "treatment of Sandra Lovelace as a member of a 'minority' under Art. 27 of the Civil and Political Rights Covenant was not necessarily inconsistent with the view that the Indian group to which she claimed to belong . . . might be 'peoples' for the purposes of Art. 1 of the Covenant".

[374] (Addis) Protocol, above n. 62, Art. 5(3).

[375] D'Sa, above n. 333 at p. 121. Benedek, above n. 9 at p. 82; Ouguergouz, above n. 333 at 69. The latter would require that the Commission conducts an investigation into state finances which is unlikely to be in its mandate. In addition, it has been argued that peoples' rights should be treated the same as individual rights and enforced through the communication procedures for states and individuals: D'Sa, above.

[376] Rule 72. The Rules of Procedure as amended added "other persons or organisations" to these as entities which the Commission could invite to the sessions. Daes, above n. 116 at chap. 1, paras.

6. Duties

The question arises whether a people has duties at the international level and whether these can be enforced against it or whether they are merely promotional and moral.[377]

Although Article 19 of the African Charter could imply duties on a people not to dominate another, there are no other express obligations imposed on these entities by the treaty.

The African Commission has, however, held on a number of occasions that peoples have duties as well. They have duties to promote rights[378] and to protect and ensure democracy through fair elections[379] and to ensure peace[380] and perhaps, impliedly, to respect the territorial integrity of the particular state.[381] Whether these can be enforced against it is questionable, given the inability of the state or an individual to petition the Commission other than against another state. However, it would appear from the Casamance situation that the Commission will require action by both sides to the dispute in order to resolve it. This is even though the rebels in the Casamance situation were not the complainants and so not officially a party to the communication.[382]

163–5, notes that "[t]he issue of the international character of national liberation movements is one of the difficult and to some extent controversial questions of present international life . . . The traditional legal view of wars of national liberation is that they constitute a category of internal regulation. This view has gradually been changed in particular since the adoption of the Charter of the UN and the relevant international instruments relating to the right to self-determination". She notes that the Palestinian Liberation Organization has been permitted to participate in the meetings of the UN, GA Resolution 3210 (XXIX) of 14 Oct. 1974.

[377] The Draft Inter-American Declaration on the Rights of Indigenous Peoples, above n. 339, preambular para. 1 states "recalling that the indigenous peoples of the Americas constitute an organised, distinctive and integral segment of their population and are entitled to be part of the countries' national identity, and have a special role to play in strengthening the institutions of the State and in establishing national unity based on democratic principles".

[378] "The African Commission on Human and Peoples' Rights seizes this opportunity to make a solemn and pressing appeal to States, NGOs, peoples and individuals and to the international community": Press Release, above n. 205 at para. 2.

[379] "The Commission . . . Urges all political parties and others concerned in South Africa to accept the results of the election if it is declared to be substantially free and fair by the Independent Electoral Commission": Resolution on South Africa, above n. 202 at para. 3.

[380] "Considering further that if peace is to be restored to Liberia, a civil government installed through free and fair elections and democratic institutions established with respect of human and democratic institutions established with respect for human rights under the rule of law, Liberians themselves and with the support of the international community must exert efforts to cease all hostilities disarm their combatants, have them encamped, demobilised and reintegrated into civil society": Resolution on Liberia, above n. 175. "The Commission . . . Commends the governments and the people of the Republic of Benin, the Comoros and the Republic of Sierra Leone for having organising successfully free and fair elections and hopes that their example with encourage and motivate other countries in transition to democratic rule": Resolution on Electoral Process and Participatory Governance, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th, Annex VII at para. 2.

[381] No. 75/92, above n. 336.

[382] "The government should: consider lifting the measures which confine Father Diamacoune to his residence, to permit him to move freely and involve himself more easily in the negotiations and

7. Conclusion

In terms of contributing to the discussion on peoples' rights, although the Commission has in some cases appeared to evade defining a people, at least the incorporation of rights in such an instrument and their interpretation by the Commission will contribute to further discussion on the issue. It is worth considering the entity that was envisaged as worthy of protection at the time of the Charter was adopted, when many African states were still not independent, is obsolete. Instead, peoples' rights can be interpreted as applying to different sets of entities than in 1981, through viewing the Charter as a dynamic instrument capable of change.[383]

In conclusion it appears that the Commission has clearly recognised that a people has some standing before it and has been prepared to make some announcements on the content of the rights owed to it. However, these will not generally extend as far as undermining the territorial integrity of an existing state of the OAU.

F. THE INTERNATIONAL COMMUNITY

1. Introduction

In addition to the actors already considered the African Commission sees the international community as having some responsibility and part to play in the cause and protection of human rights on the continent.[384]

Although there are a few statements that go against this "global" approach,[385] on many occasions the African Commission has called on western

the search for peace; free all political prisoners detained for reasons connected to the conflict; assist all displaced persons and refugees, encouraging them to return to their homes by guaranteeing their security; fight impunity by prosecuting those implicated in torture and summary executions. The separatists should: ensure that their leaders based in Europe and abroad return to Senegal where guarantees of their safety will be given; accept that future negotiations will take place on African soil; work for coherence in statement of their positions. Both parties should: . . .": *Report on Mission of Good Offices to Senegal*, above n. 46 at 45.

[383] This ties with the move to a more community orientated approach to the promotion and protection of human rights at the international level. As R. Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in J. Crawford, *Rights of Peoples* (Oxford University Press, Oxford, 1988) at 17–38, argues, at 18–19, "the rights of peoples challenges the competence of an inter-governmental system to resolve these issues. It seeks to enlarge upon the traditional conceptions, and even institutional capabilities, of international law, by providing a perspective, and some institutional support, for a non-Statist approach to inter-group and inter-societal conflict".

[384] "The universal character of human rights requires close collaboration between the African Commission and its partners within and outside Africa", *Mauritius Plan of Action*, above n. 54.

[385] E.g. "[t]he ACHPR and African Commission emanate from decisions of the Conference of Heads of State and Government of the OAU. Consequently, the accomplishment of the mission of the Commission cannot be conceived outside OAU member States. The attainment of the objectives of human rights promotion and protective activities is possible only with the sustained cooperation of OAU member States": *ibid*., paras. 50–51.

states individually and collectively, the UN and other international organisations[386] to assist in the promotion and protection of human rights in Africa.[387] The Commission has recognised the impact that requirements imposed by the West[388] and changes elsewhere in the world have on African states.[389]

2. Effect of Sanctions

The Commission has noted, particularly, the impact of sanctions on the citizens of a state, which it has called on the international community to lift,

> The Commission . . . Notes the reduction of the timetable of transition to civilian rule by the AFPRC from 4 to 2 years and therefore recommends strongly that the international and donor communities lift the economic sanctions imposed on the Gambia.[390]

At the twenty-second session the Commission heard from a previous commissioner and present head of the human rights commission in Libya of the negative effect of sanctions on the people of that country.[391] One commissioner

[386] "The Commission will cooperate with (a) States parties; (b) OAU secretariat; (c) international and regional organisations; (d) human rights NGOs; (e) national institutions and associations; (f) funding partners", *ibid*., para. 49.

[387] "Professor Nguema . . . condemned the coup d'état which had taken place on the previous day in the Comoro Islands and called upon France to subdue Bob Denard, a French national who masterminded the overthrow of the Government of Comoro", Final Communiqué of the 18th Ordinary Session, Praia, Cape Verde, 2–11 October 1995, ACHPR/FIN/COMM/XVIII, at para. 7(c).

[388] E.g. the effect of structural adjustment programmes, see *Programme of Activities, 1992–1996*, above n. 64, para. II.C.l. Also, "in the economic sphere, both countries were characterised by the deterioration of social conditions for large numbers of peoples following structural adjustment programmes. This was a factor favouring the exacerbation of tensions": *Report of the Mission to Mauritania*, above n. 46.

[389] "The Secretary General pointed out that the 14th session convenes at a critical stage in the history of Africa. He noted that the changed world political circumstances have brought challenges to African States to adjust the systems of governments to respond to the new needs of society, particularly in the field of human and peoples' rights": Final Communiqué of the 14th Ordinary Session, Addis Ababa, Ethiopia, 1–10 December 1993, reprinted by International Commission of Jurists, at para. 9. In addition, "the Commission has been heartened by the Declaration by the Assembly of Heads of State and Government of the OAU on the political and economic situation in Africa and the fundamental changes taking place in the world, which among other things, linked the process of socio-economic transformation and integration with the need to promote popular participation and political environment which guarantees human rights and observance of the rule of law": *Sixth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1992–93, ACHPR/RPT/6th, at para. 31. In its Final Communiqué of the 24th Ordinary Session, DOC/OS/79/Rev.1 at para. 12, the Commission "took note" of the bombing of a pharmaceutical plant in Sudan by the USA and "deplored the harmful consequences on human rights".

[390] Resolution on The Gambia, above n. 367 at para. 1.

[391] The representative of the government of Burundi also noted the effects of an embargo on his country, Final Communiqué of the 22nd Ordinary Session of the African Commission on Human and Peoples' Rights, ACHPR/FIn. COMM/XXI, para. 7. The Commission also recognised this at its 24th session and decided to take the matter up with the Chairman of the OAU and request his intervention to lift the sanctions following a decision of the AHSG in June 1998, see Final Communiqué of the 24th Session, above n. 389 at para. 8.

responded that an embargo "is most obnoxious, and puts this country in unacceptable conditions contrary to the most elementary principles of human rights, as guaranteed by the African Charter" and stated that "the African Commission cannot remain indifferent [in] the face of this situation, I say this not from our political point of view but from a legal point of view. I should therefore like to urge . . . that this issue be submitted to the Commissioners at a meeting *in camera* and I hope the Commission comes up with provisions that would demonstrate the fact that we are monitoring this question, and indeed the violation of people's rights".[392]

Another member stated that he had:

> listened carefully to what Mr Bouhedma has stated concerning the suffering of the Libyan people. I also took note of his reference to the legal aspect and the political aspect, but far more important is his reference to the human aspect and I think the African Commission should try to take measures within its own mandate, to really relieve the suffering of the Libyan people. I think this would and should be in the line of the African Charter and the rights of people . . . we all know that the OAU summit adopted a Resolution on the issue of Libya and I would urge the Commission to have consideration to that, so we can take this Resolution into consideration and see how we can turn such a Resolution into an action that will be within the competence of this Commission.[393]

3. Other Assistance

The Commission has also requested that financial assistance for projects be provided by non-state parties to the Charter and others.[394]. The wider international community also has a role to play in ensuring and maintaining peace[395] and in

[392] 22nd Session Transcripts, 4.

[393] *Ibid*.

[394] The financing of the programme is the primary responsibility of the OAU. However, given the present financial crisis of the OAU it is hoped that international co-operation will be forthcoming to support this programme": *Programme of Activities 1992–1996*, above n. 164 at para. 7B. In addition, "the Commission . . . Requests the UN to provide adequate resources to enable its Commission of Inquiry sent to Burundi to function efficiently and to complete its tasks as soon as possible": Resolution on Burundi, above n. 172 at para. 4. See also the comment by one Commissioner: "I would like to say that a delegation of the German Parliament arrived last night so as to take part in our deliberations . . . Some people might wonder why we are paying so much respect to the German parliamentarians, but there is no need to explain our attitude, because the Germans are an important element in the European policy and our first partners are European countries so we have to give them some attention. Not only do they have considerable weight in German politics, they have also a lot of resources available": 19th Session Transcripts, 118. G. Naldi and K. Maglieveras, "The Proposed African Court on Human and Peoples' Rights—Evaluation and Comparison" (1996) 8 *AJIL* 944–69 at 954 note that "the work of the Commission has suffered as a result of inadequate funding but the international community must ensure that the Court avoids this fate".

[395] "The Commission noted with concern, the UN Security Council's withdrawal of peace keeping troops from Rwanda. The Commission issued a press communique deploring the Security Council's decision and urged the UN to send peace keeping troops to protect the people of Rwanda. The Commission also called on the OAU Heads of State to increase assistance to Rwanda in an effort to bring a speedy end to the sufferings of the people of Rwanda": Final Communiqué of the

supporting democracy[396] in Africa. It should provide humanitarian relief if necessary.[397]

4. Duties on Non-state Parties

The Commission was unwilling, certainly in its early days, to consider communications against non-African states, on the grounds that they were not party to the Charter.[398] It has, however, interpreted its mandate as extending a general protection of human rights over all African states. For example, the Commission "heard statements from a Burundi government envoy on the tragic events which took place in that country" before it had ratified the Charter. The Commission then took the following action:

> the Chairman was instructed by the Commission to meet with the current Chair of the OAU to consider in cooperation with the government of Burundi sending a delegation of the Commission to Burundi to conduct an in depth study of the human rights situation in Burundi; to urge the government of Burundi to take steps to ratify the Charter. The Chairman of the Commission was granted audience with the current Chair of the

15th Ordinary Session, above n. 340 at para. 21. In addition, the Commission "appraised of the Security Council's decision to withdraw UN troops from Rwanda because of the flare up of violence in that country": Press Release, above n. 205. The Commission "deplores the decisions taken by the Security Council; Urges the UN Organisation to request for withdrawal of the decision taken by the Security Council": *ibid*. "The Commission expresses its appreciation for the efforts made at the level of the UN, the OAU and the International Community at seeking a peaceful resolution to the conflict in Zaire and urges them not to relent in their efforts to achieve this goal": Resolution on Zaire, above n. 169. In addition, "[t]he Commission . . . Calls upon the International Community to assist the governments of Burundi and neighbouring countries to rid the sub-region of media which propagate hatred and fuel communal conflict in Burundi especially the Radio Station 'Radio Democratie, la Voix du Peuple' or 'Ruotomorangingo' ", Resolution on Burundi, above n. 172 at para. 5.

396 "The Commission . . . Calls on the international community to mobilise and support democratic forces in Algeria and abroad in their efforts to restore peace, the rule of law and respect for human rights in Algeria": Resolution on Algeria, above n. 177.

397 "The Commission . . . Appeals to the International Community especially the UN, to facilitate Liberia's transition from war to peace by enhancing the capacity of the West African Peace-Keeping Force to encamp all combatants and to keep the peace through the provision of financial and logistic support and to alleviate the suffering and the daily struggle of the Liberian people for survival through the provision of humanitarian relief and medical supplies": Resolution on Liberia, above n. 175.

398 E.g. communication No. 5/88, *Prince J. N. Makoge* v. *USA*, which was a "communication on the activities of the USA in Africa" was declared inadmissible. See also Chap. 3.B. However, the Terms of Reference for the Special Rapporteur on the Rights of Women in Africa, DOC/OS/346 (XMII) Annex II at para. 3, provide that her area of investigation will be "all OAU member States parties to the African Charter. Any other State hosting any organ likely to have information on women's rights in Africa". At the 9th session discussion of the state report of Libya, the government representative appeared to be asking the African Commission to look into the issue of Libyan prisoners of war in Chad who had been trained, armed and kidnapped by the USA. He said that this violated human rights principles and the Geneva Conventions and its Protocols. One Commissioner in response stated that the Commission would give the communication very careful consideration: Examination of State Reports: Libya, Rwanda, Tunisia, 9th Session, March 1991, above n. 347 at 50.

OAU. However, no information has yet been received as to the follow-up to the Commission's request.[399]

Instead, it does seem to impose a duty on the states that are party to the Charter to ensure that these particular duties are realised.[400] It has been argued that, procedurally, the status of such states which are not party to the Charter is comparable to that of private individuals in terms of their responsibilities at the international level.[401]

The legal basis for imposing duties on the international community as a whole is not clear, except that the Commission draws on universal principles[402] and the duty to co-operate and the notion of effective protection offer possible bases in this respect. The responsibilities do seem generally to derive from historical influences of colonialism and continued exploitation,[403] not only by states but also by multinational companies.[404] The role of the latter has been

[399] *Second Annual Activity Report*, above n. 71 at paras. 11–12.

[400] "The Commission . . . Exhorts the government of Rwanda to ensure the rapid deployment of national and international human rights monitors as well as the strengthening of the interceding peace-keeping forces throughout Rwanda": Resolution on Rwanda, above n. 171 at para. 6.

[401] Clapham, above n. 139 at 189, "particularly interesting is Article 3 [of the ECHR] and the emerging idea that States may be responsible for the actions of autonomous groups of terrorists, or even for the actions of other non-contracting States. From a procedural point of view a non-contracting State is in the same juridicial position as a private body. It may not be a respondant before the Convention machinery". It is notable that in *Soering* v. *United Kingdom*, Judgment of 19 July 1989, Series A, No. 161 (1989) 11 EHRR 439, the UK was held liable under the ECHR for the deportation of an individual to a non-state party to the Convention, where he would be subject to treatment contrary to provisions of the Convention. "It is beyond doubt that States can be held responsible under the Convention even where the action which is proscribed by the Convention is not carried out by the States' own agents", Clapham, above n. 139 at 190.

[402] The Inter-American Commission has considered a number of cases and taken some decisions against the USA, despite it refusing to ratify the ACHR: *Report No. 51/96, Case 10.675*. The Inter-American Court has held "for the member States of the Organization, the Declaration is the text that defines the human rights referred to in the Charter [of the OAS]. Moreover, Articles 1(2)b and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization", Inter-American Court of Human Rights, *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the ACHR*, *Advisory Opinion OC-10/89 of July 14 1989*, Series A, No. 10; (1990) 29 ILM 379, (1990) 11 HRLJ 118, at para. 45.

[403] E.g. U. O. Umozurike, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff, The Hague, 1997), at 93 notes an anti-colonial theme in the Charter, "[u]nderdevelopment has been compounded by unequal and inequitable economic relations with the developed countries, characterized by neo-colonialism . . . In order to realize the human rights of Africans in all their manifestations, it is necessary to tackle the formidable obstacles, at home and from abroad".

[404] Art. 21(5) of the African Charter does mention the obligation of states to eliminate exploitation by "international monopolies" and the Commission in its *Guidelines for National Periodic Reports*, above n. 18 at para. III(11–12), regarding Art. 24 stated that "the main purpose here is to protect the environment and keep it favourable for development. Establish a system to monitor effective disposal of waste in order to prevent pollution. As a nation and in cooperation with other African States to prohibit and penalise disposal of waste on the African soil by any company . . . The principal legislation and other measures taken to fulfil the intentions of this article regarding prohibition of pollution and efforts to prevent international dumping of toxic wastes or other wastes from industrialised countries. Scientific and efficient methods utilised for effective disposal of locally produced wastes". In relation to Arts. 21 and 22 "these rights consist in ensuring that the material wealth of the countries are not exploited by aliens to little or no benefit to the African

recognised by others.[405] In turn, the Commission views African states as having a role to play in the wider international community, such as participating in international conferences and other international activities.[406]

5. Conclusion

In this sense the Commission takes an holistic view of those with responsibilities in the protection of human rights in Africa[407]:

> any system of supervision of norms can only be meaningful if it is placed within a society, a development project. There comes the question of whether Africa today has a society project. If we take into consideration the burden of influence and interference from abroad, and the persistence of ancestral value that are incompatible with the development of our beliefs, there are so many factors which determine the way of the life of present Africa.[408]

countries. Establishment of machinery which would monitor the exploitation of natural resources by foreign companies and strictly contrasted to the economic and material benefit accruing to the country. Co-operation with the OAU and the appropriate UN Agencies on the viability and profitability of ventures for exploitation of natural resources proposed by foreign companies. Insistence on adequate taxation on all income derived by foreign companies in the reporting State. Adherence to compensatory ideas like payment of mineral royalty, etc. in addition to taxation. Cooperation with other African States in removing economic exploitation of African countries by foreign monopolies. Measures taken to encourage national entrepreneurship either in the private or public sector, including such matters as provision of facilities for loan capital for industrial utilisation of local natural resources and wealth", *ibid*., para. III(6).

[405] Gutto argues that TNCs should have international responsibility for human rights in light of not only the "historical and effective links between States and TNCs" but also because states may hide behind the veil of corporations: S. Gutto, "Violation of Human Rights in the Third World: Responsibilities of States and TNCs" in F. Snyder and S. Sathirathai (eds.), *Third World Attitudes Toward International Law. An Introduction* (Martinus Nijhoff, Boston Mass., 1987), 275–92, at 285. He cites the Settlement of Investment Disputes between States and Nationals of Other States (1965) 4 ILM 532–44, as an example of something which gives "almost full international legal personality to TNCs but proceeds to deny them direct *locus standi* in certain international fora like the International Court of Justice. To complete the trick, the capital exporting (home) States, which have no responsibilities for wrongs committed by these juridical nationals under the Convention have general rights of diplomatic intervention . . . Such one-sidedness in apportioning responsibility is *weighted against the weak State* and must be corrected in the new norms and structures being established under the NIEO": *ibid*., 285–6.

[406] "The Commission . . . Urgently requests African States to participate in large numbers in the review conference to press for the introduction of a clause on the prohibition or restriction of the use of mines in that convention. Recommends that concrete and effective steps be urgently taken to prohibit the manufacture of anti-personnel mines and to ensure that existing stocks are destroyed and an international control mechanism is set up": Resolution on Anti-Personnel Mines, above n. 200 at paras. 2 and 3.

[407] As one Commissioner explained to justify the need for Commissioners to visit Europe, "African human rights are often influenced by decisions taken in Europe. Africa should assert its presence at the international level, in Europe . . . Africa should defend its position not only in Africa but also outside Africa . . . this is in the Charter . . . if we did not do this the Commission would not be doing its job": 21st Session Transcripts, 37.

[408] 21st Session Transcripts, 2.

It is submitted that this is a more realistic approach and one which is reflected in various provisions of the Charter, for example, Articles 21 and 22,[409] 23 and 24[410] and the OAU Charter.[411] The interdependence of the world community is emphasised by the Commission.

The approach of the Commission to the international community is important and reflects the historical background to the continent. The Commission has taken an holistic approach, by emphasising that actions outside the immediate state parties' territories still have a considerable impact on the protection of rights on the continent. They should thus be taken into account and the necessary entities be required to show a sense of responsibility.

G. CONCLUSION TO THE ISSUE OF PERSONALITY

1. Community Perspective

The African Commission appears to have taken a community rather than individual actor approach. This requires a different perspective, which sees the necessity of all entities working together in order to achieve full protection for human rights[412] that a focus on subject/object principles maybe ignores. In general, the partnership and interdependence of all the actors is emphasised:[413]

[409] "These rights consist in ensuring that the material wealth of the countries are not exploited by aliens to little or no benefit to the African countries. Establishment of machinery which would monitor the exploitation of natural resources by foreign companies and strictly contrasted to the economic and material benefit accruing to the country. Cooperation with the OAU and the appropriate UN Agencies on the viability and profitability of ventures for exploitation of natural resources proposed by foreign companies. Insistence on adequate taxation on all income derived by foreign companies in the reporting State. Adherence to compensatory ideas like payment of mineral royalty, etc. in addition to taxation. Cooperation with other African States in removing economic exploitation of African countries by foreign monopolies. Measures taken to encourage national entrepreneurship either in the private or public sector, including such matters as provision of facilities for loan capital for industrial utilisation of local natural resources and wealth": *Guidelines for National Periodic Reports*, above n. 18 at para. III (6).

[410] *Ibid*., para. III.11 and III.12. See above n. 21.

[411] Indeed it is one of the duties of states to the OAU to promote international co-operation, "Further recalling that all the member states of the OAU have pledged in the Preamble of the Charter of the OAU 'to promote international cooperation having due regard to the Charter of the UN and the UDHR' ", Draft Resolution on Ratification of the African Charter, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1991–92, ACHPR/RPT/5th, Annex VIII. The OAU called upon, in its *Grand Baie Declaration*, above n. 306 at para. 18, "all international organisations, governmental, inter-governmental and non-governmental, to co-operate and harmonise their initiatives with the OAU and its relevant organs . . . for a more co-ordinated approach to implementation of human rights in Africa and for maximum effect of such programmes and initiatives".

[412] "Members of the Commission as well as NGOs should do their part . . . We need to pool resources. The relationship that exists between us should be a community relationship . . . it is not a question of duplicating, it is a question of each person standing up to his identity and seeing a movement of interdependence. This is what I mean by solidarity": 19th Session Transcripts, p. 9.

[413] "Let me reassure you . . . we are a big family here, you can approach the Commission, we always have five minutes to devote to you . . . we are all here working for human rights, which are based on universal principles. They are universally recognised, by Africans, Americans, Europeans are same everywhere, at all time": 21st Session Transcripts, 4.

> It could be concluded that the African Charter should not be quite a *Sleeping Beauty* and that the Commission has to pay the full *bride price* to wake it up. The price has to be contributed by individuals, political leaders, NGOs, the civil society, the international community, etc.[414]

2. "Parties of Varying Status"

A move away from a focus on the subject/object divide permits the participation of other entities to be taken into account.[415] Thus, the entity is neither a subject nor an object of such law, but the "possessor of an as yet undefined international status lying somewhere in-between these two traditional positions".[416] In addition, it has been suggested that it would be more profitable to consider the position of the entity if one drew "a tentative hypothesis on the basis of empirical observation of instances of legal capacity independent of fixed notions of international law or legal subjectivity".[417] To view the entities at the international level in terms of "parties of varying status"[418] is not only relevant in Africa, particular with its history of different state structures, but also to the rest of the world which is increasingly recognising the role of non-state entities:

> There is no doubt that the international community could be imagined as a collectivity that is vastly more participatory than the existing society of nation-States, that international democracy could foster heterogenous, contingent and situated networks of interconnections in contrast to the static elitism of representative politics.[419]

[414] *One Decade of Challenge*, above n. 107 at 21. See also, "the Secretariat of the African Commission . . . urges State parties to the Charter, NGOs as well as African civil society as a whole, to immediately [*sic*] start working on preparations for the commemoration of the 50th anniversary of the UDHR and to initiate concrete actions in this respect": *Celebration of the 50th Anniversary of the Universal Declaration of Human Rights*, above n. 205 at para. 6.

[415] In this respect it has been suggested that it may be more satisfactory to view the situation in terms of "parties of varying status" of international personality: "other than the need for an efficient screening service, there seems to be no necessary reason why an international court . . . cannot deal with parties of varying status": Higgins, above n. 7 at 7–8.

[416] Manner, above n. 2 at 446–7. As Cowles says, "[i]t does not belittle international law to have subjects which do not have a full capacity for rights" and that the "subject/object" divide was created to reinforce the idea that international law was separate from national law: W. Cowles, "The Impact of International Law on the Individual" [1952] *American Society International Proceedings* 71–85, at 81 and 82.

[417] Sunga, above n. 2 at 153.

[418] D. Otto, "Subalternity and International Law—Problems of Global Community and Incommensurability of Difference" (1996) 5(3) *Social and Legal Studies* 37–64, says that, explaining the failure of the New International Economic Order, "despite its oppositional stance to Western domination, the G77 strategy relied on an arsenal of liberal legal concepts to support its case including self-determination, democracy, equity, participation, non-discrimination, equality and State sovereignty. In so doing, the strategy remained uncritical of modernity itself. A Subaltern Studies perspective would suggest that the G77 challenge was both made possible and also prevented from substantial success by the uncritical embracing of a European framework."

[419] *Ibid*., 460.

3. A More Realistic Approach?

As was seen in Chapter 3, African states appear to be a combination of traditional African structures and Western models imposed by colonialism. Taking the approach illustrated by the African Commission, it is submitted that, by concentrating on the community of actors in the protection of rights,[420] rather than a strict application of the principles of the subject/object dichotomy, an ethical dimension is added in relation to all who have responsibilities for human rights.[421] This approach reaffirms the universality of human rights and the responsibilities and impact of all entities on others in the world.[422] This ensures an holistic and, it is submitted, a more realistic perspective on the protection of human rights.

This alternative perspective indicates the inconsistencies that exist in traditional principles of international human rights law and highlights the exceptions to the general rules to the extent that the general rules must themselves be questioned.

[420] "We should be happy to be large in number. We have the NGOs, the government members and the members of the African Commission. If we want to do something to attain our objectives, that is the protection of human and peoples' rights, then it is incumbent on each and every one of us to show a lot of good will so we can meet these objectives. We are in an apprenticeship. We have the three categories of people I have indicated. It is not for any group to work alone. This means that everybody will have a chance": 19th Session Transcripts, 32.

[421] As it has been said that the New International Economic Order did, "prompting this reimagining of the international community was the idea that the Third World was reasserting an ethical framework that had been stifled by colonialism and thereby rejecting the European dualism that separates legalism from morality": Otto, above n. 46 at 346.

[422] "The Commission calls on the sense of responsibility among the socio-political organisations and civil society to reinforce democratic equilibrium and construction": *Report of the Mission to Mauritania*, above n. 46 at conclusions, para. 4.

5

The Law Applicable in Times of War and Peace

This chapter will consider the assumption that different laws apply in times of war and peace, the connection between humanitarian law and human rights law as perceived by the African Commission and assess the contribution of an approach which sees human and peoples' rights law applying in all situations.

A. INTRODUCTION TO THE APPROACH OF THE AFRICAN COMMISSION

1. Lack of Derogation Provision

There is no derogation provision in the Charter, in contrast to other international instruments which permit such action for some rights during times of war or other "emergency threatening the life of the nation".[1] This is said to be one of the distinctive features of the African Charter.[2]

Although, in theory, the powers of states could be said to have decreased, in reality, the lack of a derogation provision may actually provide states with more discretion by failing to set any standards at all, allowing states to act as they please.

The fact that the Charter does not contain a derogation provision does not necessarily prevent the African Commission from an interpretation favourable to states.[3] The American Declaration on the Rights and Duties of Man similarly

[1] Art. 15, ECHR; Art. 4, ICCPR; Art. 27 of the ACHR reads during times of "war, public danger, or other emergency that threatens the independence or security of a State party". Art. 4 of the ICCPR also permits derogations, where such circumstances have been proclaimed, from some of the rights in the Covenant.

[2] R. Gittleman, "The African Commission on Human and Peoples' Rights: Prospects and Procedures" in H. Hannum, *Guide to International Human Rights Practice* (MacMillan Press, London, 1984) 153–62 at 160; E. Ankumah, *The African Commission on Human and Peoples' Rights: Practices and Procedures* (Martinus Nijhoff Publishers, The Hague, 1996) at 193; M. W. Mutua, "The African Human Rights System in Comparative Perspective" (1993) *Review of the African Commission* 5–11 at 5; H. Scoble, "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter" in C. Welch and R. Meltzer (eds.), *Human Rights and Development in Africa* (University of New York Press, Albany, 1984) at 176.

[3] Although, "generally only the exceptions allowed by the international law and spelt out in the Vienna Convention on the Law of Treaties apply": W. Benedek, "The African Charter on Human and Peoples' Rights: How to Make it More Effective" (1993) 11 *Netherlands Quarterly on Human Rights* 26 at 26–7.

included no explicit provision, but before the American Convention on Human Rights came into force its Commission referred to the provision in the latter instrument[4] to support the argument that some rights could not be derogated from in the former.[5]

The European Commission and Court of Human Rights have stated that there must be "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".[6] Measures can only be taken to the "extent strictly required by the exigencies of the situation"[7] and they must be in line with other obligations in international instruments.[8] In *Brannigan and McBride* v. *United Kingdom*[9] the European Court of Human Rights held that the government was in a "better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it" and, as a result, "a wide margin of appreciation should be left to the national authorities", subject to the limitations as outlined. Thus, although there is some supervision of the situation by the international organ, most of the responsibility lies with the state.[10]

It is submitted that the African Commission has ample opportunity, through Articles 60 and 61, to refer to other international instruments and their derogation provisions if it wished to provide states with this discretion. Indeed its

[4] ACHR, Art. 27.

[5] Inter-American Commission Human Rights, *Report on the Status of Human Rights in Chile*, 22 July–2 Aug. 1974, OAS Off. Rec. OEA/Ser.L/II.34, Doc.21 (English) Corr. i (1974) at 2–3; T. Buergenthal, "The Revised OAS Charter and Protection of Human Rights" (1975) 69 *AJIL* 828–36, at 835–6.

[6] *Lawless* v. *Ireland*, Series A, Nos. 1–3, (1979–80) 1 EHRR 1; *McVeigh, O'Neil and Evans* v. *United Kingdom*, App. Nos. 8022/77, 8025/77 and 8027/77 (1983) 5 EHRR 71, Report of the Commission, 18 Mar. 1981 (1982) 25 DR 15, Judgment of 1 July 1981, para. 28. There have been problems with defining what situations should fall under Art. 15 in the ECHR to permit states to derogate from their obligations, and particularly what constitutes "threatening the life of the nation": see discussion by D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995) at 491–5.

[7] In *Greece* v. *United Kingdom*, App. No. 176/56, (1958–59) 2 Yearbook 182; *Greece* v. *United Kingdom*, App. No. 299/57, (1958–59), 2 Yearbook 178 and 186, the European Commission held that the "government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation": at 176. In *Ireland* v. *United Kingdom*, Series A, No. 25, 2 EHRR 25 (1979–80), the Court stated that the measures taken required three things to be considered: whether derogations were necessary to cope with the threat; whether the measures were no greater than those required to deal with an emergency, in terms of proportionality; thirdly, how long the measures had been applied, F. G. Jacobs and R. C. A. White, *The European Convention on Human Rights* (Clarendon, Oxford, 1996) at 320.

[8] *Lawless* v. *Ireland*, n. 6. Jacobs and White, above n. 7 at320 conclude that this requirement has "played little part in the case-law of the Court", citing *Brannigan and McBride* v. *United Kingdom*, Series A, No. 258–B; (1994) 17 EHRR 539, and the requirement under Art. 4 of the ICCPR to proclaim an emergency.

[9] *Ibid*.

[10] "The doctrine of the margin of appreciation reflects the subsidiary role of the Convention in protecting human rights. The overall scheme of the Convention is that the initial and primary responsibility for the protection of human rights lies with the contracting parties", Harris, O'Boyle and Warbrick, above n. 6 at 14.

practice in referring to other instruments shows that it is not shy in doing so.[11] Despite this, the Commission has explicitly stated that the Charter does not permit derogations during war:

> The African Charter, unlike other human rights instruments, does not allow for States parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.[12]

However, Meron argues that the *travaux préparatoires* do not support the suggestion that it was the intention of those who drafted the Charter to "exclude the right of States under customary law to invoke jurisdictions such as state of necessity". If it were the case, this would "undoubtedly serve the cause of the effective protection of human rights".[13] The African Commission has acknowledged that states may have provisions nationally for doing so and has questioned states about these during the examination of their reports.[14] There is no evidence, however, that the Commission has permitted states to derogate from rights on the grounds of necessity. As a result, states will be responsible under the Charter for permitting wars to jeopardise the protection of rights:

> Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals.[15]

[11] E.g., "these consequences have been recognised by other international human rights bodies such as the Inter-American Commission on Human Rights and the African Commission was inspired by their example": *Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African and Peoples' Rights*, *Second Extraordinary Session*, DOC.II/ES/ACHPR/4. E.g. see *Guidelines for National Periodic Reports*, *Second Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1888–89, ACHPR/RPT/2nd, Annex XII, at Parts II–VII where the Commission takes whole provisions from the ICESCR, CEDAW, Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention Against the Elimination of All Forms of Racial Discrimination, as well as drawing directly from provisions under the UDHR. See Chap. 2.

[12] No. 74/92, *Commission Nationale des Droits de l'Homme et des Libertés* v. *Chad*.

[13] "Regrettably there is a danger that the absence of a derogations clause in the Charter will be used to infer that the Charter implicitly allows States to invoke the customary law exception of state of necessity to derogate from the rights enunciated in the Charter, without the safeguards routinely built into such clauses. It is hoped however, that when it begins to function the African Commission on Human and Peoples' Rights will balance the various interests implicated and not allow necessity and the 'preeminence of State interest' to take precedence over the human rights which are stated in the Charter": T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon, Oxford, 1989), at 218–19.

[14] E.g., one commissioner asked the Mozambican representative, "the constitution of Mozambique, which came into force in November 1990, has an impressive range of human rights that should be protected. Are there limitations or restrictions to those rights and freedoms enshrined in your constitution?": 19th Session Transcripts, 107. See also examination of the Algerian report, "[w]hat is the position of the Charter in your present legislation. Because you told us that only a few months ago the legislative decree decreed a state of emergency, so what is the position of the Charter?": 19th Session Transcripts, 82. In addition, see Examination of State Reports: Ghana, 14th session, December 1993 (Danish Centre for Human Rights, Copenhagen, 1995) at 18.

[15] No. 74/92, above n. 12 at para. 22.

Furthermore, the Commission has even recommended that States reduce spending on the military in order to finance the protection of rights:

> States parties . . . commit themselves to: reduce military expenditure significantly in favour of spending on social development while guaranteeing the effective participation of women in the distribution of these resources.[16]

The African Commission has been willing to hold states liable for violations of both civil and political rights and economic, social and cultural rights during times of disturbances.[17] Although it is arguable that an additional derogation provision is not necessary where second generation rights are required to be implemented only progressively and not immediately,[18] it seems that in situations of war states cannot remove what is already in place. For example, the Commission found Zaire had violated rights to education and health by closing schools and universities and failing to provide adequate medicine and clean drinking water.[19]

2. Limitations on Rights in the African Charter

It could be argued that derogations may be permitted through the use of clawback clauses[20] and the margin of appreciation they give to states. The second

[16] Dakar Draft Protocol on Women's Rights, June 1999, Art. 11(3).

[17] No. 25/89, 47/90, 56/91, 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah* v. *Zaire*.

[18] Art. 4 of the ICESCR does not include a provision on permitting derogation in a state of emergency, although states must "recognise that in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society": A. Robertson and J. Merrills, *Human Rights in the World* (Manchester University Press, Manchester, 1992) at 230. In addition, it was argued that Art. 2 requires states to take measures "progressively" and "to the maximum of its available resources". These were the reasons why a general derogation clause was thought not to be necessary: E.-I. A. Daes, *Individual's Duties to the Community and Limitations on Human Rights and Freedoms under Art. 29 of the Universal Declaration of Human Rights: A Contribution to the Freedom of the Individual under Law* (United Nations, New York, 1983) E/CN.4/SUb.2/432/Rev.2 at III, para. 89.

[19] "The failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine . . . constitutes a violation of Article 16 . . . The closures of universities and secondary schools . . . constitutes a violation of Article 17": Communication No. 25/89, 47/90, 56/91, 100/93 (joined), above n. 17 at paras. 47–48.

[20] There are several differences between clawback clauses and derogation provisions. The latter are intended to be only temporary and for emergency situations, whereas clawback clauses can be permanent and used at any time. In addition, derogations cannot be claimed in respect of certain rights, whereas with clawback clauses there is no limit: E. Bondzie-Simpson, "A Critique of the African Charter on Human and Peoples' Rights" (1988) 31 *Harvard Law Journal* 643–65 at 660; F. R. M. Dlamini, "Towards a Regional Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights" (1991) 24 *Comparative and International Law Journal of South Africa* 189–203 at 196. R. M. D'Sa, "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Actions" [1987] *Australian Yearbook of International Law* 101–30 at 109 states that Charter uses clawback clauses "instead" of derogation provisions, whereas B. Weston, R. Lukes, K. Hnatt, "Regional Human Rights Regimes: Comparison and Appraisal" (1987) 20 *Vanderbilt Journal of Transnational Law* 585–637 at 627, sees them as both the same.

paragraphs of Articles 6 and 8–14 of the African Charter have been widely criticised for limiting rights.[21] The limitations are not defined exactly in the Charter,[22] arguably leaving it purely to the discretion of states and thus, in effect, allowing rights to be denied.[23] Despite these concerns there are no instances where states have been permitted to limit rights on the basis of national law. Members of the Commission themselves have also admitted the danger of the clauses and during discussion at the nineteenth session, of amending the Charter, such provisions were suggested as candidates for change.[24]

In terms of derogation from or limitation of rights, the African Commission has not satisfied the concerns of those who believed that the Charter focused on the community at the expense of the individual.[25] The same criticisms have not been directed towards the previous European Court of Human Rights, even though it has held that there must be a balance "between the exercise by the individual of the right and the necessity . . . to impose (limitations) for the protection of a democratic society as a whole".[26] This would appear to be a clear illustration of the community taking priority over the individual, whilst we have seen that the African Commission permits no derogations or limitations on rights. Consequently and ironically, it offers, at least in theory, although it could hardly be said in practice, more protection to the individual than the European system.

B. THE LACUNA IN INTERNAL CONFLICTS

1. The Different Spheres Occupied by Human Rights Law and Humanitarian Law

Humanitarian law has been defined as "all those rules of international law which are designed to regulate the treatment of the individual-civilian, wounded or active-in international armed conflicts".[27]

[21] P. V. Ramaga, "The 10th Session of the African Commission on Human and Peoples' Rights" (1992) 10 *NQHR* 3 at 364; M. Mutua, "The Banjul Charter and African Cultural Fingerprint: An Egaluation of the Language of Duties" (1995) 35 *Virginia Journal of International Law* 339–80 at 359; Ankumah, above n. 2 at 176. Scoble, above n. 2 at 194 states they are the "most imperfect feature and failure of the Charter".

[22] Neither are any guidelines provided: O. Ojo and A. Sesay, "The OAU and Human Rights: Prospects for the 1980s and Beyond" (1989) 8 *HRQ* 89–103 at 100; U. O. Umozurike, "The African Commission on Human and Peoples' Rights" (1991) *Review of the African Commission* 5 at 13.

[23] "Domestic law is not an adequate tool for the protection of rights": R. Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis" (1981–2) 22 *Virginia Journal of International Law* 667–714 at 701. Such clauses render the rights "meaningless", Ankumah, above n. 2 at 176. See also Bondzie-Simpson, above n. 20 at 661; Ojo and Sesay, above n. 22 at 100.

[24] E.g. 19th Session Transcripts, 54, 59.

[25] See Chap. 3.

[26] *Klass and others* v. *Germany*, Series A, No. 28, 2 EHRR 214 (1979–80), at para. 59, in respect of Art. 8(2) of the ECHR.

[27] D. Fleck (ed.), *Handbook of Humanitarian Law of Armed Conflicts* (Oxford University Press, Oxford, 1995), at 9. He continues, "while the term is generally used in connection with the Geneva

It is assumed that "human rights law is designed to operate primarily in normal peacetime conditions and within the framework of the legal relationship between a State and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a State and the citizens of its adversary".[28] There is an assumption that human rights law and humanitarian law occupy different fields:[29] "scholars have assumed that in conflict situations, either 'human rights' or humanitarian rights' or sometimes both will apply, excluding a legal void".[30]

2. Internal Conflicts

Although humanitarian law covers situations of armed conflict, there has always been some controversy over the extent to which it applied in internal dis-

Conventions and the Additional Protocols of 1977, it also applies to the rules governing methods and means of warfare and the government of occupied territory . . . It also includes a number of rules of customary international law". The International Committee of the Red Cross defined humanitarian law as "international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the rights of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict": "The efforts of the ICRC in the Case of Violations of International Humanitarian Law" [1981] *The International Review of the Red Cross* (Mar.–Apr.) 4.

[28] Fleck, above n. 27 at 9.

[29] Note that D. Forsythe, "Human Rights and Internal Conflicts: Trends and Recent Developments" (1982) 12 *California West Journal of International Law* 287, at 287, does term humanitarian law as "human rights in armed conflicts". He says that "this bifurcated history is reflected in the traditional language used to refer to these two bodies of law. Some commentators have said that 'human rights' pertains only to the general law and simultaneously refer to rules for victims of armed conflict as humanitarian or Red Cross law. Yet it is increasingly clear that the two bodies of law share a common concern and similar values; the two can even apply to the same situations". MacBride also notes the dichotomy: J. MacBride, "Human Rights in Armed Conflict" (1970) 9 *Revue Droit Penal Militaire et Droit de la Guerre* 373–91, at 373. "[o]ne can understand the work of the Conference on International Humanitarian Law only in the setting of human rights law and humanitarian law in general. Until comparatively recently, the general perception was that there were two separate bodies of law, human rights law applicable to one's nationals in time of peace, and the law with respect to protection of war victims . . . The two bodies of law went their own ways": R. Baxter, "Modernizing the Law of War" (1977) 78 *Military Law Review* 165, at 168; see W. Solf, "Human Rights in Armed Conflict: Some Observations on the Relationship between Human Rights Law to the Law of Armed Conflict" in H. Han (ed.), *World in Transition: Challenges to Human Rights, Development and World Order* (University Press of America, Washington, DC, 1979), 41–53, at 45.

[30] T. Meron, *Human Rights in Internal Strife: Their International Protection* (Grotius, Cambridge, 1987), at 135. In many cases of armed conflict states derogate from peacetime human rights through a number of techniques without recognizing the applicability not only of humanitarian law as a whole, but even of common Article 3": T. Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law in the Need for a New Instrument" (1983) 77 *AJIL* 589, at 602. Solf, above n. 29 at 46, notes that "subject to the emergency derogation provisions of human rights instruments, these instruments (e.g. ECHR) remain applicable even in time of internal conflicts".

turbances.[31] In such circumstances it is left up to municipal law, and as Bedjaoui[32] says, "a balance is hardly ever struck between the requirements of law and order and the observance of humanitarian law". This is particularly relevant in Africa given the plethora of such conflicts which occur regularly on the continent. In fact the close relationship between human rights and humanitarian law is indicated by the fact that many such internal conflicts result from claims for participation in government or ethnic conflicts of interests, which leads to abuses of rights:[33]

> The relationship between international humanitarian law and the international law of human rights is obviously close, but in detail it is both unclear and controversial . . . The relationship is, however, closest in the context of non-international strife where the State concerned will tend to regard the problem as "criminal" rather than one falling within the ambit of the *jus in bello*.[34]

If humanitarian law does not apply, then this leaves civilians and others to the protection of human rights law, which in most situations, could be derogated

[31] Protocol II of 1977 to the Geneva Conventions explicitly excludes internal disturbances from its protection. Although common Art. 3 was expanded by Protocol II, such that parties to the conflict had to abide by certain provisions in "armed conflict not of an international character", there is no definition of what this means, and it is unclear to what extent there must be violence before the protection it offers comes into play. As a result, there is considerable political controversy caused, given that it is going to be an important question for the parties to the conflict, especially if the case is one concerning self-determination of a rebel group, when the international or national character of the conflict must be decided. Meron says that "prospects for the formal application of the Protocol are poor": Meron (1987) n. 30 above, at 45–7. "[W]hilst that body of law known as human rights in armed conflict attempts to regulate internal armed conflict and while Protocol II of 1977 makes important strides in specifying and thus promoting the rights to be protected in those situations, there exist obvious problems of application and enforcement . . . in concluding tentatively that the technicalities of Protocol II do not assure the guaranteed protection of human rights. Governments and other parties have ample leeway to avoid applying the law and meeting its prima facie requirements": Forsythe, above n. 29 at 294; see generally, Meron, *ibid*.; A. Eide, "The New Humanitarian Law in Non-International Armed Conflict" in A. Cassese, *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, sr1, Naples, 1979), 277–309, at 277 ff.; J. Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff, The Hague, 1985), at 44–8. It is "not easy to distinguish between . . . internal disturbances and non-international armed conflicts": M. Bedjaoui, "Humanitarian Law at the Time of Failing National and International Consciousness" in Independent Commission on International Humanitarian Issues, *Modern Wars. Humanitarian Challenge* (Zed Books, New Jersey, 1986), 1–42, at 19.

[32] *Ibid*., 19.

[33] "Particular emphasis should be given to the right of participation in the political system and therefore also in influencing the laws of the country. This is of fundamental importance for giving reality to human rights. Reference should also here be made to the principle of self-determination, which has now been made a collective human right. It is relevant in this context, because denial of self-determination also means denial for a people to create its own laws": Eide, above n. 31 at 280. He continues on 282, "internal armed conflicts are most likely to develop in cases of strong social or ethnic conflicts of interests. To a large extent the focus of the armed conflict is the control of the State apparatus and of the military forces . . . general political participation is likely to be eliminated . . . the non-application of the right of political participation and all the provisions of the human rights system surrounding this fundamental rights, is a major cause of the wide-spread brutality which tends to occur during internal armed conflict".

[34] H. McCoubrey and N. White, *International Law and Armed Conflict* (Dartmouth, Aldershot, 1992), at 173.

from for all but a few rights on the grounds of emergency,[35] "in every situation there should be either a convergence of humanitarian and human rights norms, or one of these two systems should clearly apply".[36]

However, the African Commission's prohibition on derogations means that, rather than only humanitarian law applying during war time,[37] the state's obligations under the Charter also continue. It thus appears that the same measure of protection is accorded in peace as in war, thus avoiding the lacuna caused by internal conflicts. Others have stated that there does not appear to be anything wrong with this approach.[38] It also means that any political controversy over whether to categorise the situation as an international war or not, is avoided.[39]

Given the frequency with which internal conflicts occur in Africa, and the rest of the world,[40] it is submitted that to argue that human rights do not apply in times of war would be in effect denying protection to a large proportion of the population of the continent at any one time, and at a time when it is needed most.[41] As a result, it is not really appropriate to argue that peace is normal and war is exceptional:

> The law of war has developed because of very specific interests; currently it is justified mainly by humanitarian reasons. The law of peace is by and large a system of rules binding exclusively in normal conditions which often involve tension and conflicts, but which do not involve bloodshed. This law is aimed at maintaining tranquillity and favouring and strengthening various forms of cooperation but it rarely has a direct humanitarian significance. Violation of it usually carries no great consequences for

[35] As Forsythe, above n. 29, states on 295, "it is possible, and indeed it has transpired, that a State would declare a national emergency but not invoke Common Article 3 . . . This situation would leave the emergency clauses from general human rights law as the major international human rights provisions applying to the situation". He then says that it is also possible that "but it is not clear that it has yet transpired, a State would declare a national emergency and also an internal armed conflict falling under Common Article 3 and/or Protocol II. In such a situation both the emergency provisions of general human rights law and the relevant parts of the law of human rights in armed conflict would apply", at 295–6. See also Meron, above n. 30 at 43 and 49–50.

[36] "Our object is to determine whether there exists a serious lacuna in the area where humanitarian law meshes with human rights law, ie. internal strife": Meron, above n. 13 at 3. MacBride, above n. 29 at380, also urges that both humanitarian law and human rights law "should be brought into conformity with each other and reinforced".

[37] Which the derogation provisions in other international instruments permit.

[38] "Human rights in general, as a body of law, can also pertain to internal conflict": Forsythe, above n. 29 at 294.

[39] "States are reluctant to admit that the strife which is occurring within their territory has reached the proportions of armed conflict or civil war even in cases of protracted, widespread and bloody hostilities": Meron (1987), above n. 30 at 46–7. See also 50.

[40] "If one conceives of internal conflict as comprising a range of situations running from internal tension through internal trouble to internal war, it can clearly be found that internal conflict is a prevalent part of contemporary world politics": Forsythe, above n. 29 at 290. "Internationalized internal armed conflicts have become a common feature of the past decades": D. Schindler, "International Humanitarian Law and Internationalised Internal Armed Conflicts" [1982] *International Review of the International Committee of the Red Cross* (Sept./Oct.) 255.

[41] Solf, above n. 29 at 43, says that the Nuremberg trials "showed that human rights are in greater peril in time of war than in time of peace and that the law of human rights and humanitarian law of war are actually closely related". See also, H. Almond, "Human Rights in Armed Conflict-Interaction of Foreign Policy and Law in War and Peace" in H. Han, above n. 29, 21–40, at 21.

human life or dignity, as is, for example, the case with transgression of commercial or other economic rules as well as some political ones.[42]

Thus, although humanitarian law may have originated as being applicable to relations between states at the international level, this is no longer the case.[43] Indeed, as Meron concludes, "the convergence between humanitarian and human rights law is progressing rapidly. Although these systems of protection continue to have different institutional 'umbrellas' . . . a strict separation between the two is artificial and hinders efforts to maximise the effective protection of the human person".[44]

C. THE UTILITY OF A CLOSER INTEGRATION OF HUMANITARIAN AND HUMAN RIGHTS LAWS

The African Commission has seen a close relationship between humanitarian and human rights law and the consequences which violation of one has on the other.[45] This has been pointed out by others and in other international legal arena where they have been linked directly,[46] as being based on the same philosophy,[47] such as the principle of humanity.[48]

[42] M. Mushkat, "The Development of Humanitarian Law and the Law of Human Rights" (1978) 21 *German Yearbook of International Law* 150–68, at 152.

[43] "Although humanitarian law originates in armed conflicts between States and has historically focused on the development of international protections for victims of international violence, it has recently become increasingly implicated in the regulation of intra-State behaviour in situations of violence. Human rights, on the other hand, originate in intra-State tension between the government and the governed. Nevertheless, human rights law is also concerned with protecting certain basic human rights in situations of international and internal armed conflict and in other situations of violence. This significant overlap of humanitarian law and human right law highlights their growing convergence": Meron (1987), above n. 30 at 26–7.

[44] *Ibid.*, 28.

[45] "Mindful that the need for large scale humanitarian aid in parts of Sudan is principally a result of continuing war and gross human rights abuses": Resolution on Sudan, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–95, ACHPR/RPT/8th, Annex VII. See also the comment of one commissioner in relation to extra-judicial executions, "unfortunately there are many civil wars and ethnic conflict in Africa and these are some of the causes of extrajudicial executions in Africa. In countries with civil wars there has been a rise in the number of paramilitary groups": 20th Session Transcripts, 104. The Commission also noted in its document, *Human Rights Situation in Africa*, DOC/OS (XXV)/96 at 1 that "situations of conflict are the terrain for the most massive and serious violations of human rights on the continent".

[46] See also the UN Security Council Resolution 237, June 1967, and the International Conference which took place in Teheran, Mushkat, above n. 42 at 157. Mushkat argues that at this conference participants called for Israel to respect human rights in the occupied territories, "while the law of war, the *jus in bello*, recognises the right of a population to take military action on its own territory. The Conference's Resolution no. 1 actually claimed that residents of other Arab countries had the right to take military action in the territory occupied by Israel. In this way it tried to enlarge the *jus ad bellum*, decided actually to grant international recognition to terrorist organisations, claiming that they are anticolonial organisations". Also, UN General Assembly Resolution of Dec. 1981, 2852 and 2853/XXVI which used the phrase, "[h]uman rights in armed conflicts" and which is now used by many others. Mushkat at 158, states that "this is an example of inept wording. It was produced for political reasons without any consideration for the international law ramifications of the

By linking the laws applicable in war and peacetime, issues that were previously in the states' discretion under derogation provisions are now legitimate subjects for international concern.[49] This will prevent the situation where "States have adopted . . . positions to avoid their obligations".[50] This arguably increases protection of rights, because usually states "have been aided by the fact that humanitarian law and human rights law have not been tightly woven

phrase. It disregards the obvious fact that wars negate human rights, that the latter actually do not exist in times of armed conflicts, and their function is then taken over by the humanitarian law but only in regard to certain individuals and under certain conditions. While the former (human rights) are a part of the law of peace, the latter (humanitarian law) represent the typical law of war". The United Nations Conference on Human Rights, Teheran, 1968 adopted a resolution on human rights in armed conflicts, which was affirmed by the General Assembly in Dec. 1968: see MacBride, above n. 29 at 379.

[47] "Human rights and humanitarian law regulate . . . similar rights, at least insofar as they all intend to increase the protection of individuals, alleviate pain and suffering and secure the minimum standard for persons in various situations. One may perhaps say that human rights is the genus of which humanitarian law is a species, but it seems desirable to retain a horizontal distinction, rather than to introduce a new, hierarchical one, as human rights really concern rights enjoyed by all at all times, but essentially in peacetime, whereas humanitarian rules concern rights protecting individuals in armed conflicts. It would appear appropriate, therefore, to view human rights and humanitarian law a ratione materiae interrelated fields, both raising the level of behaviour towards individuals and both concerned with the rights and protection of individuals". In addition, "[i]n the field of ideas, however, the two movements had the same historical and philosophical origin. Both were born . . . from the need to protect the human person against hostile forces which menaced him. This common origin gave rise to two distinct efforts: to limit the evils of war and to defend man against arbitrary treatment. In the course of centuries these two efforts have developed along parallel lines": Pictet, above n. 31 at 3.

[48] "Obviously the post-UN Charter international human rights instruments have the humanitarian object of recognising human rights and extending international protection to them. This object is achieved through the enunciation of various obligations of the contracting States. Humanitarian law, while protecting the rights of States and governing their duties, also contains a prominent human rights component, dating from the 19th century when the law of war had 'come to be seen as a law of humanitarian restraints upon the conduct of belligerents'. This humanitarian and humanizing aspect of the law of war is significantly manifested in the preamble (Martens) clause to Hague Convention IV . . . The post-UN Charter human rights, as reflected in the UDHR, had an influence on the humanitarian character of the Geneva Conventions of 1949. The 1977 Additional Protocols also reveal the influence of international human rights, both in taking those rights into consideration (Art. 75 Protocol I; Art. 6 Protocol II) and in referring explicitly to them (Art. 72 Protocol I) . . . in matters such as the prohibitions of torture and cruel, inhuman or degrading treatment of punishment, arbitrary arrest and detention and discrimination on the grounds of race, sex, language or religion, and the guarantee of due process, a very large measure of convergence and parallelism exists between norms stated in human rights instruments and those stated in instruments on international humanitarian law. There is also growing convergence in the applicability *ratione personae* and *ratione materiae* of these two systems": Meron (1987), above n. 30 at 12–13.

[49] In relation to the UN Covenant it has been noted that "a final consequence is that acceptance of the Covenant . . . involves accepting that respect for its provisions is a matter of concern to international law and the international community. It follows that a party to the Covenant cannot properly object that the question of respect for the rights protected is a matter 'essentially within the domestic jurisdiction of the State' within the meaning of Article 2(7) of the Charter. It can therefore be seen that the inclusion of certain humanitarian rights in the UN Covenant is of major significance because as part of the Covenant they are subject to a greater measures of international control than under existing humanitarian Conventions": Robertson and Merrills, above n. 18 at 282.

[50] Meron (1987), above n. 30 at 136.

into each other".[51] In fact the African Commission has stated that violations of the two sets of laws actually occur simultaneously[52] and what is a state of war and what is peace is not always clearly defined.[53] As a result situations of war and conflict violate the Charter.[54]

The African Commission appears to see both sets of laws as being based on the same principles.[55] Thus, if no rights can be derogated from at any time, this recognises not just "that some human rights are so fundamental that they must be respected at all times, even in periods of armed conflict",[56] but that all rights should be protected.

However, it has been argued that the two sets of laws should not be integrated, for example, on the grounds that they derive from different historical backgrounds[57] and are based on a different philosophy and principles;[58]

[51] Meron (1983), above n. 30 at 603, "[t]he combined effect of derogations from the normally applicable human rights and of the inapplicability of humanitarian law results in denial of elementary protections to denizens of States involved in armed conflicts . . . In short, it must be recognised that there is a legal uncertainty, or perhaps lacuna, in the law".

[52] "Considering the report of the UN Special Rapporteur indicating that genocide and massive human rights and international humanitarian law violations have been committed in Rwanda": Resolution on Rwanda, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–94, ACHPR/RPT/7th, Annex XII. "Due to the civil wars and ethnic conflicts which grip it, the African continent finds itself in the front line of extrajudicial executions": *Report on Extrajudicial, Summary or Arbitrary Executions*, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th, Annex VI.

[53] E.g. land mines have a continuing impact on the country long after war has finished. This has been reaffirmed by the Commission in a resolution on the issue, where it has held "considering the significant ravages caused by indiscriminate use of anti-personnel mines, particularly in Africa where more than 30m mines are scattered": Resolution on Anti-Personnel Mines, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, above n. 45, Annex VIII; "[n]oting with concern the consequences of the proliferation of mines in African countries, particularly the failure of efforts of rehabilitation in the affected areas and of reconstruction, in countries which emerged from wars": *ibid*.

[54] "Considering that this phenomenon constitutes a flagrant violation of the provisions of the ACHPR and more specifically, of its Article 4": *ibid*.

[55] "Considering that human rights and international humanitarian law have always, even in different situations, aimed at protecting human beings and their fundamental rights": Resolution on the Promotion and the Respect of International Humanitarian Law and Human and Peoples' Rights, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, above n. 52 at Annex XI.

[56] Robertson and Merrills, above n. 18 at 278.

[57] Humanitarian law developed much earlier than human rights: Mushkat, above n. 42 at 155; Cassese, above n. 31; Fleck, above n. 27 at chap. 1; G. Herczegh, *Development of International Humanitarian Law* (trans., Sándor Simon and Lajos Czante, Akadémiai Kiadó, Budapest, 1984); McCoubrey, above n. 34; Pictet, above n. 31 at chaps. 1 and 2.

[58] Such as the principle of reciprocity, "the analysis of the role of reciprocity in the application and sanctions of human rights and humanitarian law reveals that reciprocity permeates both bodies of law without constituting a fundamental principle of either. Broad statements that reject reciprocity in the field of human rights altogether, or that insist on the essentially reciprocal nature of humanitarian law, must be considered unsound. Yet the fact that reciprocity plays a much more prominent role in humanitarian law at all levels clearly distinguishes that body of law from human rights. Greater relevance for reciprocity in humanitarian law goes hand in hand with the bilaterizable character of many humanitarian obligations. Human rights, on the contrary, generate substantive obligations which are almost exclusively non-bilaterizable. Despite this fundamental difference, both systems contain norms, which by their nature, are of interest to the international

humanitarian law only applies in specific situations, unlike human rights law,[59] and the extent of state acceptance of the laws also needs to be considered.[60] In addition, it is argued that rather than increase the protection offered by each law a combination will diminish the strengths of both,[61] with human rights law failing to provide the specificity required and afforded by humanitarian law,[62] resulting in "disregard for both".[63]

community as a whole. Thus the erga omnes character of human rights obligations has been much discussed, while the consequences of characterising humanitarian law obligations in a similar war require further attention", R. Provost, "Reciprocity in Human Rights and Humanitarian Law": (1994) 65 *British Yearbook of International Law* 383–454, at 453.

[59] "It is recognised that human rights represent the most general principles, whereas humanitarian law has a particular and exceptional character since it enters into force at the precise moment when war intervenes to prevent or limit the exercise of human rights": Pictet, above n. 31 at 3.

[60] Meron then notes that, first, "humanitarian law has been codified more systematically than have ordinary peacetime human rights . . . humanitarian instruments have been accepted far more extensively than human rights instruments as the positive law of the international community", Meron (1987), above n. 30 at 4–5. In addition, "there is considerable difference between the customary law status of many of the norms contained in the humanitarian law instruments and those in the human rights instruments. . . .while a very important segment of international humanitarian law, ie.the Hague Regulations of 1907, is customary international law, no major portions of international human rights instruments have similar status. Various provisions of these instruments have attained the status of customary law, but a determination *in concreto* is often difficult": at 8–10. However, this could not be said to apply to the African Charter which has been accepted by all OAU states.

[61] "International humanitarian law must not be confused with international human rights. First, it must be borne in mind that some wartime international human rights exist not as part of international humanitarian law but as a component of the ordinary . . . law of armed conflict. . . . Secondly, international humanitarian law bestows rights not only on human beings as such but also (and chiefly) on States": Y. Dinstein, "Human Rights in Armed Conflict: International Humanitarian Law" in T. Meron, *Human Rights in International Law* (Clarendon, Oxford, 1985), II, 345–68, at 347. He notes that humanitarian law was around before human rights law as we now know it, in the UDHR. It "reduces the effectiveness of both": Mushkat, above n. 42 at 161; at 158, "[w]ar negates human rights. Human rights do not exist in times of armed conflict and that their function is then taken over by the humanitarian law . . . The humanitarian law comes into force when the human rights system is not longer valid".

[62] "The effective protection of the victims of armed conflict, such as medical care, the right of prisoners to correspond with their families, the right of repatriation in certain circumstances and so on. These are the matters on which the provisions of humanitarian law for the particular situation of armed conflict go beyond the requirements of human rights law, which are of general application": Robertson and Merrills, above n. 18 at 278. In addition, "[h]umanitarian rules cover specific circumstances and specific categories of persons. They are rooted in customary universal international law, partially codified and continually perfected by conventions and diverse protocols and reaffirmed by numerous national and international judgments. No State or movement has ever questioned their peremptory significance, although they grant rights not applicable in peace time and admit deviations from rights being in peacetime. This is not the case with human rights, which is another reason why these two different systems should not be treated as one complex": Mushkat, above n. 42 at 156.

[63] *Ibid*. He argues that it "confuses the prohibition of the use of force, *jus ad bellum* with the prohibition of certain methods of combat and the use of certain weapons, *jus in bello*. This not only creates legal and political misinterpretations, but encourages disregard for both systems": at 158. He also claims that human rights law imports the vague and "biased political interpretations" of human rights law to the more precise nature of humanitarian law: at 164.

D. THE RESPECTIVE PROTECTION OFFERED BY HUMANITARIAN AND HUMAN RIGHTS LAWS

It is believed, however, that it is not enough that human rights standards apply in times of war, "human rights are less suited to situations of armed violence than humanitarian law".[64]

It has been noted that many human rights violations occur when there is a State of war (internal or inter-state) and Commissioners have noted that human rights abuses can cause conflicts[65] and that such conflicts prevent human rights from being respected.[66] It is submitted as part of the state's duties under Article 26, and perhaps Article 7, that they must ensure that institutions central to rights are protected at all times. Regarding the situation in Burundi, the African Commission held that "attention was drawn to the urgent need to assist in improving the judicial system, prison administration and the national reconciliation process"[67] and the independence of the judiciary should be guaranteed, by "ensuring, inter alia, that there is no interference in its functioning by the executive and that judges and magistrates are protected in the carrying out of their duty".[68] Duties of states also extend to after the war, to establish "a new police force and a local administration respectful of human rights and composed of members of all ethnic groups of Rwanda" in order "to prevent the perpetration of acts of reprisals and vengeance".[69] As Meron has said, "the role of national courts in trying to protect human rights in such situations is often negligible. The real value of human rights instruments should therefore be tested by examining their derogation clauses".[70] At least, by not permitting any derogations, it could be argued, that the Commission, in theory offers more protection.

Members of the Commission themselves, however, have doubted whether their approach is realistic and actually offers protection given the prevailing conflicts in Africa:[71]

[64] Bedjaoui, above n. 31 at 20.

[65] "Dr Badawi El-Sheikh pointed out that many conflicts in Africa stem from human rights breaches": Final Communiqué of the 14th Ordinary Session, Addis Ababa, Ethiopia, 1–10 December 1993, reprinted by International Commission of Jurists, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996) 62–6 at para. 13.

[66] "Also concerned with the consequences of persistent wars in several African States on the civilian population which prevent the realisation of the right to development": Resolution on the Human Rights Situation in Africa, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, above n. 45 at Annex VII.

[67] Final Communiqué of the Second Extraordinary Session of the African Commission on Human and Peoples' Rights, Kampala, Uganda, 18–19 December 1995, ACHPR/FINCOM/2nd EXTRAORDINARY/XX at para. 18.

[68] Resolution on Burundi, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th, Annex VII, at para. 1.

[69] Resolution on Rwanda, above n. 52 at para. 5.

[70] Meron (1987), above n. 30 at 52.

[71] See also D'Sa, above n. 20 at 109; Ankumah, above n. 2 at 8; E. Bello, "The African Charter on Human and Peoples' Rights" (1985/6) 194 *Hague Recueil* 13–268 at 71.

> there is nothing more irreversible than the attempt on the right to life, as it is in Article 4 of the African Charter. Human beings are entitled to respect for life, and no one may be arbitrarily deprived of this life. This principle is protected by special instruments, the Universal Declaration on Human Rights, and the Pact on Civil and Political Rights. Unfortunately . . . this has not prevented States, groups or individuals from attempts on this fundamental human right. Unfortunately Africa has become "famous" for this violation. Most of the States have ratified the Charter, but still they have carried out genocide.[72]

The Commission has appeared to combine considerations of humanitarian and human rights law in a number of ways. It sees a need for promoting both together[73] and has drawn the attention of governments at war to their international obligations under various human rights instruments on slavery, torture and the protection of the child, etc. and humanitarian treaties such as the Geneva Conventions, thus linking their provisions in this way:

> Recalling that Sudan is legally bound to comply with international human rights and international humanitarian law treaties and has ratified, including the ACHPR, the ICCPR, the ICESCR, the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, the Convention on the Rights of the Child, and the four Geneva Conventions of 1949.[74]

Given the fluctuation between war and peace in many African states, the Commission's approach seems sensible. In addition, it has linked states' obligations associated with war and those with peace time:

> his report says the idea of extrajudicial executions violates the right to life and also in a preoccupied to avoid encouraging impunity, we have also to look into this issue. What is the difference between extrajudicial or political association and the massacre of civilians? What is the relationship of crime against humanity and genocide?[75]

States are required to promote both sets of laws[76] and train those state agents

[72] 20th Session Transcripts, 99–100.

[73] "Emphasizing the importance of propagating the principle of human rights law as well as international humanitarian law": Resolution on Human and Peoples' Rights Education, *Seventh Annual Report of the African Commission on Human and Peoples' Rights*, above n. 52 at Annex X; "[r]ecalling also the conclusions of the seminar held . . . following the 12th session of the African Commission on Human and Peoples' Rights on the national implementation of the ACHPR which underscored the need to disseminate and implement the provisions of international humanitarian law applicable in time of armed conflicts; . . . Considering the Resolution on human and peoples' rights education adopted by the African Commission": Resolution on the Promotion and the Respect of International Humanitarian Law and Human and Peoples' Rights, above n. 55. In addition, the Special *Rapporteur* on prisons and conditions of detention pointed out at the 23rd session that he had participated in a conference organised by the ICRC on humanitarian law: see 23rd Session Transcripts.

[74] Resolution on Sudan, above n. 45.

[75] 20th Session Transcripts, 106.

[76] "The Commission . . . Invites all African States parties to the ACHPR to adopt appropriate measures at the national level to ensure the promotion of the provisions of the international humanitarian law and human and peoples' rights": Resolution on the Promotion and the Respect of International Humanitarian Law and Human and Peoples' Rights, above n. 55 at para. 1.

who are most involved in such situations,[77] Indeed there is an implication that it holds itself out as the supervisor of the implementation of all instruments.

E. ENFORCEMENT DEPENDENT ON THE WILL OF STATES OR COMMUNITY ACTION

1. Introduction

Although there may be considerable protection offered in theory, a basic knowledge of the situation in Africa at present would be enough to reveal that the African system does not work in reality. The ability to enforce such rights and for such to be protected is still dependent on the will of the states to co-operate and to guarantee the rights, which few may be prepared, or indeed able, to do. The main responsibility, thus, still seems to fall on the states to ensure the rights are protected in the first place. Furthermore, neither the preventive nor responsive powers of the Commission are strong. The Assembly of Heads of State and Government, for example, has, as far as is publicly known, never responded to an appeal by the Commission under Article 58(1),[78] leaving the Commission in a powerless position and without the political force necessary to take matters further. The greater force which may be given to the decisions of the new African Court on Human and Peoples' Rights may help in this situation, but they still require the voluntary compliance of states.

However, as Meron notes, "at least in the first stages, a 'soft law' (declaration) approach would be particularly effective in defining minimum standards of conduct for internal strife. Respect for such standards would be ensured by public opinion and encouraged by international governmental and non-governmental organisations".[79]

2. Relevance to the Notion of Personality

The notion of personality in international law[80] and the relationship between, for example, the state and the individual, is relevant in this respect[81];

[77] "The Commission stresses the need for a specific instruction of military personnel and the training of forces of law and order in the international humanitarian law and human and peoples' rights respectively", *ibid*., para. 2.

[78] Which requires that the Commission contact the OAU AHSG in the event of a series of serious or massive violations of rights.

[79] Meron (1987), above n. 30 at 141. Meron himself advocates the creation of a new instrument.

[80] "International law is primarily an inter-State legal system. That is to say that rights and the duties that it creates devolve mainly on States. In this cardinal respect, there is very little difference between the special rules governing the law of armed conflict and the international legal norms applicable in general in peacetime. Nevertheless more and more rights are being conferred by modern international law directly on individual human beings per se. Again this is equally true in

"humanitarian law deals with consequences of conflicts among States or between States and some other specifically defined belligerent, but the law of human rights is concerned with controversies between the government and individuals inside the State borders".[82] The Commission's lack of strict application of principles of personality in international law would appear to be more practical in situations which change between war and peace. As Bedjaoui states:

> we should not regard the excessive dependence on State consent as a major obstacle for the State itself has evolved . . . The State used to be the sole actor in the international order . . . The double role of the State as the only subject of international law and as the unique actor for internal matters, is now contested. The final recipient of the norms of humanitarian law is not the State but the individual . . . The State is not alone in contributing to this end. The international community also does so because man ultimately represents the common heritage of humanity. The State is only justified by the justice it guarantees mankind.[83]

As has been shown,[84] the African Commission has taken a community approach and has broadened the range of potential actors and those who are responsible. This is particularly relevant in situations where the participation of individuals or groups in government is the cause of the conflict and where the divide between state and individual is central.[85] Less attention on the intricacies of subjectivity in international law and a requirement that human rights must be respected by all entities in all situations, avoids problems of determining what obligations are owed by rebels in internal conflicts:

> where common Article 3 and Protocol II are applied they clearly do have at least a limited effect upon the legal status of parties in that, irrespective of a connotation of "recognition", the dissident forces are clearly accepted as being capable of undertaking what amounts to quasi-governmental obligations. This is jurisprudentially problematic in the dissident forces involved in a relevant conflict *ex hypothesi* lack all *locus standi* in international law and cannot at the time in question aspire to it. In this respect their position is different from that of those dissident or secessionary forces involved in "internal" conflict, which under the aegis of self-determination, is deemed

general as in the particular case of armed conflict. In other words, both in peacetime and in wartime, international law creates human rights": Dinstein, above n. 61 at 345, 355.

[81] "The two juridical systems are different. Whereas humanitarian law takes effect only in the event of armed conflict, the law of human rights is of practical application most of all in peacetime and its instruments have clauses providing for derogations in the event of war. In addition, human rights relate essentially to relations between the State and its own citizens, and humanitarian law the relations between the State and the citizens of its adversary": Pictet, above n. 31 at 3.

[82] "Although the humanitarian law recognizes the individual's right to remain faithful to his nation even under foreign subjection and during the struggle against the occupying power, it is not concerned with civil and political freedoms and even confirms the legality of derogation, suspension or even invalidation of human rights": Mushkat, above n. 42 at 161.

[83] Bedjaoui, above n. 31 at 40.

[84] Chap. 4.

[85] Human rights law "manifest[s] an international concern with the relationship between authorities and subjects. This normative development requires a more qualified notion of sovereignty, ie.*popular* sovereignty, based on the consent of and participation by the people, the whole of the people, in political decision-making and legislation" in Cassese, above n. 31 at 303.

> to be internationalized under Protocol I. In such a situation a body like the FLN during the Algerian War of Independence can obtain recognition upon the international plane as having the effective status of a provisional government capable of assuming quasi-international obligations. This cannot be so in the case of dissident forces to assume the obligations under the Protocol which is a requirement for the application of the Protocol.[86]

Provost notes that:

> States' rights in the human rights system should be understood as secondary to those of individuals. They exist only because of the non-existence of effective mechanisms at the international level permitting individuals to act on their own behalf. If effective remedies were put at the disposal of individuals . . . the justification for corresponding State rights would be largely eliminated. This pertains to a deeper and slower transformation of the structure of the international legal system involving the gradual erosion of State sovereignty.[87]

Indeed, as has been seen, the African Commission has emphasised the need for co-operation between all the different actors and entities involved, as well as between them and the Commission.[88]

The Commission has imposed duties of a humanitarian and a human rights nature on the government, insurgents and rebels, etc. in such situations, thus offering further protection. In addition, parties to any conflict are required not only to respect humanitarian law but also human rights law.[89]

As has been pointed out, there are an increasing number of actors in humanitarian law, e.g. freedom fighters, etc. and "one of the unusual features of humanitarian law is that, unlike most rules of international law, it binds not only the State and its organs of government but also the individual. Thus, the individual soldier or civilian who performs acts contrary to humanitarian law is criminally responsible for those acts and liable to trial for a war crime".[90] Although "this should have led to greater observance since these new actors

[86] McCoubrey, above n. 34 at 174. He goes on, "[a]nalytically the answer may lie in the grey area of institutional status in which the most useful analogy is with de jure and de facto sovereignty . . . it may usefully be suggested in the present context that the dissident 'authority' exercising the degree of territorial control demanded by Protocol II must be regarded as capable of taking upon itself *de facto* obligations originating upon the international plane, even though it does not (yet) enjoy *locus standi* upon that plane".

[87] Provost, above n. 58 at 431.

[88] Chap. 4.

[89] "The Commission . . . Calls on all parties to respect the ACHPR, the principles of international humanitarian law as well as the activities of humanitarian organisations operating in the field": Resolution on the Situation in Rwanda, above n. 52 at para. 3; "[f]urther calls on all factions of the SPLA and SSIA to respect international humanitarian law, particular Article 3 common to the four Geneva Conventions of 1949 including ending deliberate and arbitrary killings and the torture of detainees": Resolution on Sudan, above n. 45 at para. 5; "[u]rges all those parties engaged in war on the African continent to abide by the provisions of international humanitarian law, particularly with regard to the protection of civilians and to undertake all efforts to restore peace": Resolution on the Human Rights Situation in Africa, above n. 66 at para. 6.

[90] Fleck, above n. 27 at 33–4.

have been granted new responsibilities",[91] this has not happened and "humanitarian law is not close enough to the real world. This is particularly the case for the crucial distinction between civilians and combatants. Reality has become more complex and distinctions more uncertain. Total conflicts with total mobilization of human and economic resources have meant an increasing participation of civilian facilities and of civilians themselves in the war efforts, thus blurring the distinction between civilians and combatants, especially for those responsible for applying humanitarian law".[92]

Given the situations in many African states which fluctuate between war and peace, it is arguable that it is realistic for the Commission in such situations to impose duties and rights at the international level on a variety of actors. In such situations it seems necessary to impose duties on entities other than states, when aiming at the protection of rights.[93]

3. Pragmatic Approach

It could be argued that the African Commission is taking a pragmatic approach, focusing on the protection of rights, rather than asserting traditional legal principles such as personality and application of rules during internal wars. By imposing duties on non-state entities, necessary to increase overall protection, the Commission avoids the political problems associated with having to determine legal points, for example, whether a war is of international or national character.

This "community" approach to the protection of rights removes emphasis from, when talking of war/peace, having to identify "parties to the conflict".[94] This also avoids the problem where "in a non-international or internal armed

[91] Bedjaoui, above n. 31 at 28.

[92] *Ibid*., 28–9.

[93] Meron notes that "a question of particular importance is whether instruments pertaining to internal strife should state obligations directed not only to the government but also to the opposition. The prospects for humanizing internal strife are greatly improved if the obligation to abide by essential humanitarian principles is addressed to the opposition as well as to the government in such a way that duties are reasonably balanced and the norms of behaviour are not unduly favourable to one side. However, in internal strife, relations between the government and the opposition continue to be governed by the internal law, as tempered by international norms. Any implication that the elements confronting the government are to be granted an internationally recognised legal status would encounter vigorous opposition from governments and thereby impede the acceptance of norms tending to humanize internal strife": Meron (1987), above n. 30 at 151.

[94] "To avoid difficulties which arise in the application of Article 3 it is essential to avoid framing the problem in terms of parties to the conflict. Additionally, the declaration [which Meron is proposing should be made to protect such situations] should contain a provision stating that its application shall not affect the legal status of groups of persons involved in a situation of internal strife. Such a provision is necessary to encourage governments to respect the declaration without fear that its application might constitute recognition of, or a grant of political status to, dissidents or other oppositional elements. Where duties are not imposed upon the government alone, they should be addressed to everyone, thus avoiding questions concerning international recognition of the opposition": Meron (1987), above n. 30 at 151.

conflict the adherents of the opposing side, whether 'military' or 'civilian' tend to be seen as either 'oppressors' or 'traitors' with consequent deleterious effects upon humanitarian observance in treatment of them. There are even difficulties in the way of establishing humanitarian norms for non-international armed conflicts than is the case with international armed conflicts".[95]

The African Commission appears to be attempting to avoid conflict and maintain amicable relations by not pronouncing legally on a situation in the event of a conflict, but setting down responses which have a flexible application. By operating in this manner the Commission avoids and lessens the possibility of exacerbating conflict. As a result, rather than criticising the Commission for failing to prevent the conflict, it is worth considering if it would not have been aggravated if legal ideas, principles, decisions and implications had been strictly imposed:

> The war-preventing, peace-keeping and peace-building law is largely based on declaratory provisions. If we accept the view that the legal peremptory law is a part of the international humanitarian law, a peremptory law in its essence, then why not include all the documents concerned with basic human values: respect for man in terms of his honour, status, prestige and the disadvantaged segments of society, women, children, migrant workers and the like.[96]

Indeed, in relation to imposing duties on rebels, Meron notes that the "soft law" approach is probably the more appropriate, "[a]t least initially, 'soft' instruments may indeed have a larger personal reach and perhaps even a lower threshold of applicability and a more developed normative content than an instrument of a formally binding character (such as a convention)".[97]

The fact that the Commission has required states to teach human rights and humanitarian law to their personnel and to individuals and others in the state[98] suggests that such international obligations are owed by more than just the state:

> each individual shall be responsible for realizing the ideals of international humanitarian law and observing its provisions. Military leaders shall highlight this by their own behaviour. They shall make clear that everyone is required by his or her conscience to stand up for the preservation of the law. International humanitarian law is also binding on every individual. In addition, a powerful moral obligation flows from the realization that the objective of international law is to reduce, as far as possible, the human suffering caused by military conflicts.[99]

[95] McCoubrey, above n. 34 at 171.

[96] Mushkat, above n. 42 at 152.

[97] Meron (1987), above n. 30 at 152. See also above n. 77.

[98] "The Commission . . . stresses . . . the importance of regular exchange of information between the African Commission . . . the ICRC and human rights non-governmental organisations on the teaching and dissemination activities undertaken on the principles of human and peoples' rights and international humanitarian law, in the schools, universities and all other institutions": Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples' Rights, above n. 55 at paras. 2 and 3.

[99] Wolfrum, "Enforcement of International Humanitarian Law" in D. Fleck (ed.), *Handbook of Humanitarian Law of Armed Conflicts* (Oxford University Press, Oxford, 1995) 549–50 at 549–50.

Thus, this community approach to the enforcement of humanitarian law and human rights law which the Commission seems to advocate would appear, theoretically, to be more effective:

> effective implementation is dependent upon dissemination of humanitarian law. Providing information about it is the necessary basis from which to educate and to further the attitude of peoples towards a greater acceptance of these principles as an achievement of the social and cultural development of mankind . . . the observance of international humanitarian law can only be expected if all authorities, armed forces, and peoples are made familiar with its contents.[100]

F. ENFORCEMENT OF THE TWO SETS OF LAWS

1. Use of Charter Mechanisms

The African Commission has required states to comply with humanitarian obligations to punish acts that are war crimes.[101] By permitting more "interpenetration" of the two disciplines this enables the reporting mechanisms and individual and state communication procedures in the international human rights instrument to be utilised in humanitarian situations, resulting in more international supervision over rights in times of war.[102] The African Commission has received and examined communications from individuals and NGOs relating to situations in countries which are at war and has specifically questioned states on such issues during the reporting procedure.[103] It has suggested using human rights to resolve war issues[104] and there have been cases where the Commission has made pronouncements on violations of the Charter that have been committed by states during times of war.[105] In addition, Provost has pointed out that human rights treaties do enable third party states to peti-

[100] *Ibid*., 549.

[101] E.g. "States should . . . protect women against rape and other sexual assaults in time of war or armed conflict, recognise such assaults as war crimes and punish them as such": Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, DOC/OS/34c (XXIII), Art. 11. In addition, punishment of war crimes criminals "reinforces the conception that peace is fundamental for the realization of all other rights, national and individual, including the right to life, to freedom, security and development": I. P. Blishchenko, "Humanitarian Law and Human Rights" in Independent Commission on International Humanitarian Issues, *Modern Wars, Humanitarian Challenge* (Zed Books, New Jersey, 1986) at 142–57, 149.

[102] Robertson and Merrills, above n. 18 at 281–2. They also discuss on 281 the areas where the interlinking of human rights law and humanitarian law are noted.

[103] E.g. Communication No. 74/92, above n. 12. One Commissioner, examining the Algerian report, asked "[w]hat is the position of the Charter in your present legislation, because you told us that only a few months ago the legislative decree decreed a state of emergency, so what is the position of the Charter?": 19th Session Transcripts, 82.

[104] Seminars to be organised by the Commission include, e.g., "the peaceful resolution of ethnic and social conflicts from a human rights perspective": *Programme of Activities 1992–1996*, *Sixth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1992–93, ACHPR/RPT/6th, Annex VII at para. II.C.

[105] See above at section D.

tion the international system for violations of the rights of individuals of another state where the latter has breached its obligations under the international treaty.[106] Furthermore, "the existence of the right of third parties to take countermeasures in the wake of an 'internal' violation of human rights in another country can be derived from" the International Law Commission's work on State responsibility.[107]

2. The Ability of the African Commission to Provide Protection

At present, the African Commission is seen as a "quasi-judicial" organ, and, thus, it is still subject, although superficially, to the supervision of the Assembly of Heads of State and Government. If we follow the reasoning of Mushkat, who considers that humanitarian law looks at penal responsibility unlike human rights law which depends on "public opinion",[108] then international courts are only for states, "there is no forum for penal jurisdiction" and, as a result, human rights depend on political bodies. The enforcement of laws of war by a quasi-judicial/political body would, thus, be less effective than if the two subjects were kept separate.[109] Given that the strength of the African Commission's decisions have been questioned,[110] it is debatable whether its procedures offer sufficient protection in relation to situations of war, or whether they are, in fact, "of very little practical importance".[111] Although the Commission has envisaged a further role for itself in the development of a mechanism for response to emergencies,[112] it has acknowledged that there may be some difficulties for an organ such as itself to provide this type of protection and intervention:

> we have to realize that the Commission can work only in a country that has a minimum of peace. I do not bear weapons. You do not see me going out to stop people from fighting, there is a organ of the OAU for this, this organ is competent in this respect, since they are still fighting in Liberia what we can do is start a few actions so that there can be peace, only then shall we be able to start our action for the respect,

[106] E.g., the countries petitioning in the Greek case in the ECHR, against Greek defaulting on obligations under the ECHR: *Denmark, Norway, Sweden and the Netherlands* v. *Greece* (1969) 12 Yearbook 1. See Provost, above n. 58 at 431–2.

[107] *Ibid*.

[108] Mushkat, above n. 42 at 160.

[109] "The law of peace and human rights is mainly declaratory and political while humanitarian law is mandatory, apolitical and peremptory", *ibid*., 160.

[110] Bello, above n. 71 at 115; W. Benedek, "The Role of International Law in the Protection and Promotion of Human Rights of Women in Africa" (1994) 5 *Review of the African Commission* 21–34 at 29; Bondzie-Simpson, above n. 20 at 662. Its "powers are less extensive by comparison with other Commissions"; Scoble, above n. 2 at 196; B. Weston, R. Lukes, K. Hnatt, "Regional Rights Regimes: Comparison and Appraisal" (1989) 20 *Vanderbilt Journal of Transnational Law* 585–637 at 613.

[111] Mushkat, above n. 42 at 166.

[112] "The Commission or its bureau should act promptly in cases of massive violations of human rights or emergency situations": *Mechanisms for Urgent Response to Human Rights Emergencies* under Art. 58 of the African Charter on Human and Peoples' Rights at para. 1. See Chap. 2.

> in favour of the respect of human rights. I'm satisfied with the situation in Angola, but for a long time it was difficult for the Commission to visit that country. The Commission will try and do its best to study measures that need to be started to improve the situation prevailing in those countries.[113]

This is particularly true in relation to serious or massive violations and could have an impact on the Commission's integrity:

> Experience has shown that the Commission is often powerless when faced with cases of massive and serious violations of human rights which require a rapid intervention. Currently the Commission has neither the means nor any power under its rules to deal with such situations. This adversely affects the Commission's credibility and efficiency.[114]

Indeed the Commission is unwilling to put its members in danger[115] or get involved in controversial political issues:

> I couldn't see how the Commission could intervene in war, we could look at the Charter and they would laugh at you or probably shoot at you . . . we are not insured in the Commission when we go into the field . . . I don't think that we should go as far as that. I believe the voice of the Commission should be heard, we should also alert the Council of the OAU, without waiting for them to react, if they do, all the better, if not, we must continue to work as the Commission.[116]

It is arguable that an amicable, more than a judicial, approach is an appropriate method to use when deciding issues of war.[117] Obradovic notes that the human-

[113] 20th Session Transcripts, 47.

[114] *Mauritius Plan of Action*, (1996–2001) at paras. 41–42. In relation to a communication before the Inter-American Commission the Colombian government argued that "the case is not admissible as presented because it relates to a broad phenomenon and therefore is excessively general. The State asserts that the Commission does not have the competence to address 'generic complaints' but rather may only review cases which have been 'adequately individualized' ". The Inter-American Commission held that it "did not determine that the claims could not be processed on an individual case basis on the grounds that the petition was generic or collective". Rather, the Commission believed at the time that the large number of victims and claims made the petition inappropriate for processing as a single case under the individual petition system: *Report No. 5/97 on Admissibility Case 11.227 against Colombia of 12 March 1997*, paras. 43 and 48.

[115] E.g., the Commission has on several occasions raised concern over insurance for members on their travels, "Commissioners are required to undertake missions on behalf of the Commission which may expose them to certain risks . . . there was an urgent need to take up the matter again with the Secretary General of the OAU, given the climate of insecurity prevailing in several countries that the Commissioners have to visit on official assignments for the Commission": *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–95, ACHPR/RPT/8th at para. 29; see also *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th at para. 29.

[116] 21st Session Transcripts, 68. Another Commissioner noted on a previous occasion the importance of involving the OAU, "we know these massive violations are a result of ethnic and civil wars, political problems that we can do very little about at this stage, but this does not prevent us from doing our work, with a view to requesting the conference of Assembly of Heads of State and Government to give our organisation and other organisations a means of putting pressure on concerned parties in case of massive human rights violations . . . but the main thing is that we cannot do much about what we are discussing if we are not able to convince the Assembly of Heads of State and Government to adopt the dynamic interpretation of Article 58": 20th Session Transcripts, 64.

[117] See Chap. 6.

itarian enforcement systems have preventive control and *ex post facto* control.[118] The latter includes "conciliation procedures" and "enquiry procedures and the international fact-finding commission". However, he concludes that "it lacks one essential element: it is not obligatory".[119] As a result, both human rights law and humanitarian law result in requiring the willingness of the State to ensure implementation.

3. Remedies

Although the two disciplines may be combined, it is debatable whether the type of remedy that the Commission could offer is appropriate. As one Commissioner pointed out in respect of emergency situations:

> we are talking about emergency situations, not intervention. These issues directly relate to humanitarian issues . . . we would be very specific and say an early intervention mechanism in case of human rights situation, but we are not planning any humanitarian relief.[120]

This has led the Commission to stress the "usefulness of a close cooperation in the dissemination of international humanitarian law and human and peoples' rights"[121] with bodies such as the ICRC which is competent in the field[122] and the OAU Conflict Resolution Mechanism.[123] Such action could include the "regular exchange of information between the African Commission on Human and Peoples' Rights, the ICRC and human rights NGOs on the teaching and dissemination activities undertaken on the principles of human and peoples' rights and international humanitarian law, in the schools, universities and all other institutions"[124] and its participation "as much as possible in the seminars, conferences or technical sessions organised by the ICRC on questions of mutual interest and urges the ICRC to reciprocate for the activities of the Commission".[125] It also envisages the ICRC being involved in the Commission's own work, by granting it observer status[126] and has reminded the OAU of its support to the ICRC.[127]

[118] Obradovic, "Enquiry Mechanisms and Violations of Humanitarian Law" in Independent Commission on Humanitarian Issues, above n. 101 at 121–41, 128–30.

[119] *Ibid*., 132.

[120] 21st Session Transcripts, 62.

[121] Resolution on Anti-Personnel Mines, above n. 53. See also Resolution on the Promotion and the Respect of International Humanitarian Law and Human and Peoples' Rights, above n. 55.

[122] "Noting the competence of the International Committee of the Red Cross (ICRC) to promote the respect of the international humanitarian law": *ibid*.

[123] Mushkat, above n. 42 at 167, warns against this as he believes that this is bringing the independent ICRC into political issues.

[124] Resolution on the Promotion and the Respect of International Humanitarian Law and Human and Peoples' Rights, above n. 55 at para. 3.

[125] *Ibid*., para. 4.

[126] Final Communiqué of the 11th Ordinary Session, Tunis, Tunisia, 2–9 March 1992, ACHPR/COMM/FIN(XI) Rev.1, at para. 20.

[127] "Recalling the Resolution CM/Res 1059 (XLIV) adopted at the 44th Ordinary Session of the

G. RESERVATIONS

Relevant to the ability of states to limit rights is also the issue of reservations to the Charter.[128] Some international instruments expressly permit reservations[129] which must relate to the particular Article of the instrument and to a particular law in force at the time.[130] Although there is no express provision in the African Charter permitting states to make reservations, two states have done so, Zambia and Egypt.[131] The International Court of Justice has held, in relation to other international instruments which do not explicitly provide for reservations, that states were still permitted to enter them,[132] although they must be compatible with the object and purpose of the instrument.[133] It is thus necessary to consider the legitimacy of the reservations to the Charter.

The African Commission has made no comments on the reservations of Egypt and Zambia and did not make reference to such in the examination of the state report of Egypt.[134] Neither has it given any indication that it has the jurisdiction to do so. Given the African Commission's statements in relation to interpretation of the Charter under Article 45(3) there is a convincing argument that it

Council of Ministers of the OAU, which reaffirmed the determination of the OAU to support the ICRC in its activities and to grant it the necessary facilities to carry out its mandates": Resolution on the Promotion and the Respect of International Humanitarian Law and Human and Peoples' Rights, above n. 55.

[128] Art. 2(1)d of the Vienna Convention on the Law of Treaties gives the definition of a reservation as a "unilateral statement . . . made by a State when signing, ratifying, accepting approving acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

[129] E.g. ECHR, Art. 64.

[130] E.g. see, in relation to the ECHR, Jacobs and White, above n. 7 at 325.

[131] See App. III. South Africa submitted a statement which is not classed as a reservation, see Chap. 2 n. 13. A number of states also expressed reservations to the Draft Charter, but not at the time of ratification: Burundi, to Art. 45(3); Ghana to Art. 58; Kenya to Arts. 45(3) and 68; Tanzania to Arts. 45(3), 53 and 58 and "all other Articles of the Charter relating to the African Commission . . . with the Assembly of Heads of State and Government"; Zambia, to Arts. 58 and 63; Angola, Cape-Verde, Guinea-Bissau and Mozambique, to Art. 4: see *Report of Rapporteur on Ministerial Conference on Draft African Charter on Human and Peoples' Rights*, Doc.CM/1149 (XXXVII) Annex I, 28, paras. 121–125; 8, para. 38. See also M. A. Abdul-Razaq, *The OAU and the Protection of Human Rights in Africa*, (Thesis, University of Hull, 1988), at 575.

[132] E.g. *Advisory Opinion. Reservations to the Convention on Genocide Case* [1951] ICJ Rep. 15; Harris, O'Boyle and Warbrick, above n. 6 at 754.

[133] Art. 19 of the Vienna Convention on the Law of Treaties provides that "[a] State may formulate a reservation unless, (a) the reservation is prohibited by treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; (c) in cases not falling under sub paragraphs (a) and (b) the reservation is incompatible with the object and purpose of the treaty". Although there is not an explicitly provision in the ICCPR for reservations, thus they should be interpreted subject to principles of general international law: D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon, oxford, 1994) at 16. Many reservations have in fact been made to both the Covenant and the Optional Protocol: *ibid*., 184.

[134] See Reports of the Sessions, Danish Centre, *Examination of State Reports, 11th Session: Egypt, Tanzania, March 1992* (Danish Centre for Human Rights, Copenhagen, 1995). Zambia has not yet submitted a periodic report under Art. 62.

does have jurisdiction.[135] In this respect, the Human Rights Committee of the UN was not given formal power but has interpreted the Covenant as giving it jurisdiction.[136] This Committee has also requested information from the state on the extent of the reservation and decided issues relating to them.[137]

The Inter-American Court has been willing to interpret reservations and potential reservations in its advisory capacity[138] and held that they should conform to the Vienna Convention on the Law of Treaties.

Given that the African Commission has made no comment on the reservations made by Egypt and Zambia, it is questionable whether its silence is indicative of its acceptance. One commissioner noted:

> Sudan ratified the Charter on the 8 February 1982 and as since that date, this ratification did not receive any reservation, the Sudan is thus bound by all the provisions of this Charter.[139]

However, the Inter-American Court of Human Rights has linked the rights which are non-derogable in cases of emergency in the Convention with the lack of ability to make reservations against them,[140] and that they should be interpreted "by reference to the relevant principles of general international law and the special rules set out in the Convention itself".[141] Given the African

[135] The Commission made it clear when Nigeria complained that it was acting outside its capacity in pronouncing on violations of the Charter that "by promulgating the Charter, the OAU has indirectly 'requested' the Commission's interpretation": *Account of Internal Legislation*, above n. 11 at 6.

[136] "The Committee's role under the Covenant, whether under Art. 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of the treaty": Consensus Statement, see McGoldrick, above n. 133 at 270.

[137] McGoldrick, above n. 133 at 34. e.g. see *A.M.* v. *Denmark*, Doc.A/37/40 212, Selected Decisions 32.

[138] See S. Davidson, *The Inter-American Court of Human Rights* (Dartmouth, Aldershot, 1992) at 143–4.

[139] 21st Session Transcripts, 42.

[140] Inter-American Court of Human Rights, *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC–3/83 of 8 Sept. 1983, Series A and B, No. 3, at 341, where Guatemala made a reservation relating to the right to life where it refused to prohibit the death penalty for common crimes relating to political offences: see Harris, O'Boyle and Warbrick, above n. 6 at 756. The Inter-American Court held, "[i]t would follow [from Article 27 and non-derogable rights] that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and consequently not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose."

[141] *Ibid.*, at 341. The Human Rights Committee has stated in its General Comment no. 24 of the Human Rights Committee, CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994, that a state could not make reservations on provisions that represent customary international law and listed these as: slavery, torture, inhuman or degrading treatment or punishment, arbitrary deprivation of life, arbitrary arrest and detention, freedom of thought conscience and religion, presumption of innocence, execution of pregnant women, advocating national, racial or religious hatred, rights to marry, minority rights to culture, religion or language. In addition, general reservations to the right to fair trial were also not permitted, as were those against the self determination, non discrimination or State obligation clause. The general test of the HRC seems to be "whether the reservation is compatible with the object and purpose of the Covenant": *ibid.*, para. 17.

Commission's approach to derogation and limitation clauses, it would be surprising if the Commission permitted the use of these reservations to limit the rights in the Charter.

H. THE MAINTENANCE OF AN INTERNATIONAL ORDER

1. Introduction

It is argued that limitation and derogation clauses permit states a margin of appreciation, particularly in situations where "there is no universally applicable common standard".[142] Given that the African Commission has not permitted any derogations or limitations, one could argue that it views the Charter as representing the applicable standard for Africa.

The Commission justifies the requirement that human rights obligations be observed in times of war on the basis that it has become a matter of international interest, in that it affects those states and individuals outside of the particular country's borders:

> The Commission . . . Exhorts the government of Rwanda to ensure the rapid deployment of national and international human rights monitors as well as the strengthening of the interceding peace-keeping forces throughout Rwanda.[143]

This increased interdependence of African states and Africa with the rest of the world supports the idea that such matters are now of international concern.[144] Applying the provisions set out in the Charter to all African states at all times promotes a standard that is universal.

In this sense it is thus questionable whether the Commission is in fact aiming at creating an international public order.[145] In fact, its non-derogation policy "reinforces the concept that peace is a fundamental realization of all [other] rights".[146] It is contended that the necessity of protecting rights in times of war and peace relates to the common occurrence of internal conflicts on the continent so any true protection of human rights in Africa can only be effective if it offers the same protection in situations of war. Indeed, it has been noted that

[142] The Human Rights Committee has stated in relation to issues of public morals, "[c]onsequently this responsibility on a certain margin of discretion must be accorded to the responsible national authorities": *Hertzberg and others* v. *Finland* Doc.A/37/40 161, SD 124 at para. 10.3; McGoldrick, above n. 133 at 160.

[143] Resolution on Rwanda, above n. 52.

[144] Schindler, above n. 40 at 255.

[145] International law prohibits the use of force in international relations, UN Charter, Art. 2(4). It is interesting to note that the Commission in its Resolution on an International Criminal Court, *Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1997–98, ACHPR/RPT/11th, Annex III, affirms the right of all peoples to national and international peace and security.

[146] Mushkat, above n. 42 at 151.

both the previous European Commission of Human Rights[147] and the Inter-American bodies have advocated the idea of an international public order.[148]

As a result, it is arguable that without peace, international as well as internal, there cannot be protection of human rights. As states become increasingly interconnected occurrences in one country may affect the rights of individuals and groups in another. In Africa, given its historical background involving the imposition of arbitrary boundaries, disputes relating to traditional groupings continue. But, peace has to be an international, not a national concern, as has been emphasised by international treaties.[149]

2. Article 23 of the African Charter

It is arguable that the African Commission is unable to adopt any other approach than prohibiting restrictions on rights, given Article 23 of the Charter which protects international peace and security.[150] This notion is also

[147] It has stated that the purpose of the ECHR was for a "common public order": Provost, above n. 58 at 388; *Austria* v. *Italy*, App. No. 788/60 [1961] Yearbook 116, at 138–40.

[148] In its Advisory Opinion, *The Effect of Reservations on the Entry into Force of the American Convention* (Arts. 74 and 75), Advisory Opinion OC–2/82 of 24 Sept. 1982, Series A and B, No. 2, the Inter-American Court held, at para. 27, that "only paragraph 1 or paragraph 4 of Article 29 of the Vienna Convention can be deemed to be relevant in applying Articles 74 and 75 of the Convention. Paragraph 2 of Article 20 is inapplicable . . . because the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality". However, further, at para. 29, the Court held that "modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can been deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction".

[149] "An analysis of the instruments of international law serves to highlight one international obligation in particular: it is the duty of governments to ensure peace in close collaboration with the measures to be taken by States for the implementation of human rights and freedoms. These days, the right to life cannot be considered to be merely the right to remain alive; the right to life entails the development of man in society under peaceful conditions. This close interdependence between the obligation of States to maintain peace and security among Nations on the one hand, and human rights and freedoms on the other, constitutes the obligation to attain economic and social progress": Blishchenko, above n. 101 at 148, and further, at 149, "The fundamental relationship between maintaining peace and attaining the protection of human rights is, once again, confirmed in the first subparagraph of the Preamble to the UDHR and in the two International Covenants on Human Rights, as follows, 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Likewise the preamble to the Proclamation by the International Conference on Human Rights at Teheran in 1968 recognises that 'peace is the universal aspiration of mankind' and that 'peace and justice are indispensable to the full realisation of human rights and fundamental freedoms'."

[150] J. Crawford, "The Rights of Peoples—'Peoples' or 'Governments'?" in J. Crawford, *The Rights of Peoples* (Oxford University Press, Oxford, 1988) chap. 4 at 61–3 notes "there is a practical relationship between the maintenance of general human rights, individual or collective, and the existence of a state of peace, if not friendly relations between States . . . But to treat rights to

proclaimed in the preamble to the UN Charter, which seems to place human rights on the same level as maintaining international peace.[151]

The African Commission has interpreted this provision as requiring that states should "work for international and national peace and security in accordance with the principles of solidarity and friendly relations affirmed by the Organization of African Unity Charter and that of the United Nations".[152] The existence of Article 23 is seen as particularly relevant to the African continent given the fear of civil wars and external invasions.[153]

In addition, the African Commission has required states to restrain "refugees allowed into the country under Article 12 from engaging in subversive activities against their country of origin or any other State party to this Charter. Prohibition of subversive or terrorist activities against other States parties to this Charter being organised or launched from their territories".[154]

international peace and security as distinct and independent, as it were 'foreground' rights, whether individual or collective, raises questions of an altogether different kind . . . to say, as Article 23 of the African Charter does, that 'peoples' have that right, even if in this context 'peoples' means the populations of States as a whole, might appear to make a wide range of sensitive policy questions justiciable in the African Commission, particularly since Article 23 makes no distinction between actions . . . which themselves breach the peace, and actions, policies or attitudes which have a more diffuse disruptive tendancy". Furthermore, at 63, he says "the UN Charter . . . placed a considerable priority upon avoiding outright conflict between States . . . requiring disputes to be settled by other means. Provisions such as Art. 23, in avoiding these distinctions and in conflating respect for human or peoples' rights and international peace and security, tend further to blur or confuse the basic premisses upon which the Charter order was to be based". See also E. McWhinney, "The 'New' Countries and the 'New' International Law" (1966) 60 *AJIL* 1–33.

[151] Almond, above n. 41 at 25–7. Note also the argument that the concept of security is inherent in human rights: see R. Cranston, *What Are Human Rights?* (The Bodley Head, London, 1973), 85: "security is not something which is at odds with human rights, because it is itself a human right". See also UDHR, Art. 28: "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

[152] *Guidelines on National Periodic Reports*, above n. 11 at para. III.9. Crawford, above n. 150 at 62, states that Art. 23 of the Charter reveals "the interplay, or perhaps one should say the confusion, between notions of 'people' and 'State' ". In addition, Art. 23 makes no distinction between actions which themselves breach the peace and actions and policies which have more diffuse disruptive tendency. The African Commission has also stated that women have the right to promote and maintain peace and to live in peace: Dakar Draft Protocol on the Rights of Women, above n. 16, Art. 11.

[153] W. Benedek, "Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights" in P. Kunig, W. Benedek and C. R. Mahalu, *Regional Protection of Human Rights in International Law: The Emerging African System* (Nomos Vergesgesellschaft, Baden-Baden, 1985) at 83.

[154] In line with Art. 23(2)a and b: *Guidelines for National Periodic Reports*, above n. 11 at para. III.10. It is worth noting that Arts. 29 and 30 of the UDHR safeguard the interests of state security by linking duties of the individual with the security of the state. See also M. MacDougal, H. Lasswell and L. Chen, "The Aggregate Interest in Shared Respect and Human Rights as Harmonization of Public Order and Civic Order" (1977) 23 *New York Law School Law Review* 183.

3. Self-determination

The notion of an international public order is particularly relevant in relation to the right of self-determination, which, as indicated above, is often the cause of many conflicts. Blishchenko argues that the right to self-determination:

> should be taken in a much broader context and as such takes the form of a fundamental principle of contemporary international law and international relations . . . The rights of nations and peoples to self-determination necessarily presupposes the obligation of cooperation among States and peoples in creating conditions for the broadest and most complete fulfilment of this right . . . The obligation to cooperate which exists in international law stems so much from the universally accepted principles of international law . . . that it constitutes an independent principle of international law in its own right . . . Cooperation of this kind will ensure the protection of peace and international security as being the most important conditions for the universal respect for, and the implementation of, human rights and fundamental freedoms for all, and for the elimination of all forms of racial discrimination and religious intolerance, especially in the case of the developing countries.[155]

I. CONCLUSION

There are a number of rights in other international instruments from which no derogations or limitations are permitted[156] and which are now viewed as having *jus cogens* character, thus imposing obligations on states which are not party to those instruments.[157] On the same reasoning, it could, radically, be suggested that the whole African Charter has gained customary status for African countries, given the strong stance taken by the Commission in prohibiting derogations from any provision of the Charter at any time,[158] given its acceptance now

[155] Blishchenko, above n. 101 at 152.

[156] In general no human rights instrument permits derogations from the right to life, freedom from slavery or torture or inhuman or degrading treatment, or prohibition of imposing a retroactive criminal offence. Art. 15 of the ECHR permits other rights in the Convention to be derogated from "in time of war or other public emergency threatening the life of the nation". Neither the ECHR nor the ACHR seem to allow derogations from the right to life in times of war. This is in contrast to the ICCPR which does not mention war because it "is an instrument of the UN . . . because the Charter of the UN outlawed war": Daes, above n. 18 at paras. 167–168. Other rights which are non-derogable include: prohibition of torture or inhuman treatment; prohibition of slavery; prohibition of retrospective criminal laws; as well as prohibition of imprisonment for debt; recognition as person before the law; right to freedom, thought and religion. In the Inter-American Convention derogations are not permitted from "judicial guarantees essential for the protection of such rights".

[157] Although it has been argued that the derogation provision has gained the status of a principle of general international law: J. Oràa, *Human Rights in States of Emergency in International Law* (Clarendon, Oxford, 1992), chap. 10, and although he questions whether the lack of a derogation provision in the African Charter actually prevents states from limiting their obligations, at 210, the jurisprudence of the African Commission is neglected in his analysis.

[158] I. Brownlie, *Principles of Public International Law* (Clarendon Press, Oxford, 1990), notes at 7, there is an argument that *jus cogens* does not just require the States to have indicated the approval in law but to have carried this out in practice as well, in which case the continuing conflicts in Africa

by all African States[159] and the fact that the African Commission has directed obligations towards "all OAU States"[160] and "all African countries".[161] The Inter-American Court has also indicated that the number of *jus cogens* norms could be widened.[162] It is extremely unlikely, however, that all the provisions in the Charter, particularly the more unique ones, have reached this hallowed status.[163] Rules can be customary without being *jus cogens*.

However, the approach of the African system has been used to support the notion of community responsibility for the protection of rights, as well as the interdependence of states worldwide in the maintenance of peace and thus protection of human rights internally in the country. Although peace may be increasingly accepted, it has been argued that this is contrary to the attitude of Western states.[164]

The requirement of the African Commission that peace is upheld in order to protect rights and thus maintain international order advocates the amicable nature of settling disputes. This will be considered in the next chapter. This lies with an "obligation to strengthen world peace to be indispensable to the survival of mankind".[165]

would negate any *jus cogens* character of the Charter. This disparity between the law and the practice of states "raises important questions for the validification of the [organ]": McGoldrick, above n. 133 at 39 n. 219 as well as for the customary nature of the laws. See L. Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law" [1979] *University of Illinois Law Forum* 609–41. However, if this were indeed the legal situation then none of the traditional *jus cogens* norms would have gained this status given the violations that occur throughout the world.

[159] See Chap. 2.A above. The ICCPR has been ratified only by half of those of the UN thus not giving any customary character to its provisions: Meron (1983), above n. 30 at 604.

[160] See Chap. 4.F.

[161] Thus assuming that ratification is merely a formality, being already involved in the system. E.g., the African Commission "[c]alls upon African countries to: . . . refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates": Resolution on the Role of Lawyers and Judges in Integration of the Charter and Enhancement of the Commission's Work in National and Sub-Regional Systems, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th, Annex VII at para. 1. Also, the Commission "[r]ecommends . . . that African Government adopt legislation and take measures to prohibit all forms of slavery": Resolution on Contemporary Forms of Slavery, 16th Session, reprinted in the International Commission of Jurists, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996) at 163–4, para. 3.

[162] *Advisory Opinion, Interpretation of the American Declaration of the Rights and Duties of Man*, Advisory Opinion OC–10/89 of 14 July 1989, Series A, No. 10; (1990) 29 ILM 379, (1990) 11 *HRLJ* 118. "The judgment in *Interpretation of the American Declaration* comes close to suggesting implicity that the Declaration itself is a species of *ius cogens* although the Court did not take the steps of making such an explicitly ruling to this effect": Davidson, above n. 138 at 191.

[163] See in general, Oràa, above n. 157. Brownlie, above n. 158 at 512–15.

[164] "The right to life is only considered by Western countries in an abstract fashion, thereby alienating it from the context of protection and its implementation. Western publication . . . fail to stress one of the most important conditions of the right to life and one which guarantees peace and development—that of disarmament": Blishchenko, above n. 101 at 149.

[165] Mushkat, above n. 42 at 151.

6

The Amicable/Judicial Dichotomy

A. INTRODUCTION

The aim of this chapter is to consider the contribution of the African Commission to the amicable/judicial debate.

Because amicable and judicial practices appear to be seen as opposing and mutually exclusive, a full exploration of the relationship between them is neglected. Given that imposed upon traditional African approaches, viewed as "amicable", were colonial, "judicial" structures, the African system again presents ripe ground for research of the relationship between the two.

B. SETTLEMENT OF DISPUTES IN OTHER INTERNATIONAL BODIES

There is an assumption that the African system is amicable and not judicial, the latter reflecting a more Western approach.[1] However, it is worth noting that there are many instances in non-African instruments and procedures where a non-judicial method of settlement is apparent, indeed, "it is a principle of international law that States 'shall settle their international disputes by peaceful means' and not by resort to force".[2] This is supported by the 1982 Manila Declaration on the Peaceful Settlement of International Disputes[3] and reflected in the OAU Charter.[4]

[1] "The traditional concept of justice is one of conciliation": B. O. Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6 *HRQ* 141–59 at 145. "The African concept of law is averse to third party adjudication which is considered as confrontational, but alternatively, is traditionally based on reconciliation reached through consensus": G. Naldi and E. Maglieveras, "The Proposed African Court on Human and Peoples' Rights—Evaluation and Comparison" (1996) 8 *AJICL* 944–69 at 944. See also P. Amoah, above "The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?" (1992) 4 *AJICL* 226–40 at 237; R. M. D'Sa, "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Actions" [1987] *Australian Yearbook of International Law* 101–30 at 126; U. O. Umozurike, "The African Charter on Human and Peoples' Rights" (1983) 77 *AJIL* 902–12 at 909.

[2] D. J. Harris, *Cases and Materials on International Law* (5th edn., Sweet and Maxwell, London, 1998), at 985. See also, UN Charter, Arts. 2(4) and 33.

[3] GA Resolution 37/10, GAOR, 27 Sess, Supp. 51, 261 (1982). In addition, the notion of *comitas gentium* in international law depicts "neighbourliness, mutual respect": I. Brownlie, *Principles of Public International Law* (Clarendon Press, Oxford, 1999) at 29, citing Art. 36 of the Vienna Convention on Diplomatic Relations, 1961. In general, the "rules of politeness, convenience and good will [are] observed by States in their mutual intercourse without being legally bound by them": L. Oppenheim, *International Law—A Treatise*, Vol. I *Peace*, Vol. II *Disputes War Neutrality* (8th edn., Longman Green, London, 1995) at 34.

[4] "The Member States . . . solemnly affirm and declare their adherence to the following principles: . . . [peaceful] settlement of disputes by negotiation, mediation, conciliation or arbitration",

Indeed, amicable resolution is often seen to be a feature of human rights and humanitarian instruments generally.[5] In this respect, Article 48(1)f of the ACHR requires that the Inter-American Commission "shall place itself at the disposal of the parties concerned with the view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognised in this Convention". A report will be drawn up if a settlement is reached,[6] and submitted to the Secretary General of the OAS for publication. If no settlement is reached, then a report will state the facts and conclusion of the Inter-American Commission and be sent to the state within three months,[7] with any recommendations or proposals as the Inter-American Commission considers necessary.[8] Thus, "the main focus of the procedure is the friendly settlement of the dispute between the complaining person, whether it be an individual or a State, and the alleged delinquent State".[9]

An amicable procedure is also available under the European Convention on Human Rights. Under Article 38(1)b the Registrar, acting on the Court's instructions, shall put himself at the disposal of the parties with a view to obtaining a friendly settlement. A formal friendly settlement was reached in only a small number of cases before the previous European Commission,[10] but these have included: requirements for direct provisions to be made in legislation[11]; a circular to schools against the use of corporal punishment;[12] and issues relating to prisoners' correspondence and to contempt of court, among others.[13]

and "Member States pledge to settle all disputes themselves by peaceful means": Charter of the Organization of African Unity, adopted 25 May 1963, 47 UNTS 39, (1963) 2 ILM 766, Arts. 3(4) and 19 respectively.

[5] "The exercise of good offices with respect to human rights or humanitarian matters is quite extensive in present-day international organizations, such as the UN, the UN High Commissioner for Refugees, ILO, UNESCO and the International Committee of the Red Cross": B. G. Ramcharan, *Humanitarian Good Offices in International Law* (Martinus Nijhoff, The Hague, 1983), at 35.

[6] ACHR, Art. 49.

[7] ACHR, Art. 50(1).

[8] ACHR, Arts. 50(1) and (2). Parties have 30 days from notification of the report containing the Commission's recommendations, in which to comment on the possibility of an amicable settlement: e.g. see *Report no. 12/97 on Admissibility, Case 11.427 Ecuador, 12 March 1996*, para. 55.

[9] S. Davidson, *The Inter-American Court of Human Rights* (Dartmouth, Aldershot, 1992) at 26. Friendly settlements have been reached in a number of cases: *Report No. 36/96, Case 10.843 Against Chile, 15 October 1996, 1996 Annual Report of the Inter-American Commission*, paras. 15–16, the Inter-American Commission stated that it was "obliged to put itself at the disposal of the parties" to reach a settlement, under Art. 48(f), but the representatives of the victims refused to accept such. This was also the case in *Report no. 34/96 Cases 11.228, 11.229, 11.231 and 11.182 against Chile, October 15 1996*, in *1996 Report of the Inter-American Commission*, at paras. 12–13.

[10] F. G. Jacobs and R. C. A. White, *The European Convention on Human Rights* (Clarendon, Oxford, 1996) at 377. However, "friendly settlements remain an important feature of the Convention system". This is not just in relation to decisions against the UK. Most decisions related to Arts. 5, 6 and 8 of the Convention.

[11] *Hodgson and Others* v. *UK*, App. No. 11553/85 (1988) 10 EHRR 503 and *Channel 4* v. *UK* App. No. 14132/88 (1989) 61 Decisions and Reports 285. See A. Clapham, *Human Rights in the Private Sphere* (Clarendon, Oxford, 1993) at 65.

[12] *X* v. *UK*, App. No. 7907/77, 14 Decisions and Reports 205.

[13] *Alam* v. *United Kingdom*, App. No. 2991/66 (1967) 10 Yearbook 788; *Knechtl* v. *United Kingdom*, App. No. 4115/69 1970 13 Yearbook 730; *Harman* v. *United Kingdom*, App. No. 10038/82

There have also been cases which have resulted in "some type of settlement not amounting to a settlement under [the Convention]".[14]

Good offices are also exercised by the UN Human Rights Committee under Articles 41(1)e and 42(1)a of the International Covenant on Civil and Political Rights,[15] and this is followed, in the event of failure, by the appointment of a conciliation commission with the consent of the parties.[16] No such provision is available under the Optional Protocol in respect of individual communications.[17]

International environmental law has also been characterised by its friendly settlements,[18] for example, the Convention on the Law of the Sea 1982[19] enables states to choose, on ratifying, signing or adhering to it, which means of settlement they wish to use, including an International Tribunal for the Law of the Sea, submission to the International Court of Justice or arbitral tribunals set up under the treaty.[20]

C. THE FEATURES OF AMICABLE AND JUDICIAL APPROACHES

There is a need to define the features of "amicable" and "judicial" settlements, which are themselves seen as converse. These will be presented, drawing on literature from African traditional methods as well as other international instruments and the practices of their respective organs.

38 Decisions and Reports 53, 46 Decisions and Reports 57, (1985) 7 EHRR 146. Clapham notes that some of these include only minimal changes: above n. 11 at 65.

[14] Jacobs and White, above n. 10 at 376–7. They note at 377 that *Televizier* v. *The Netherlands*, App. No. 2690/65, 15 Dec. 1966 (1966) 9 Yearbook 512, "was settled following an agreement between the parties which paid scant regard to the general interest".

[15] In relation to inter-state communications, this procedure was mandatory in earlier drafts of the Covenant: see D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon, Oxford, 1994) at 9, and Doc.A/2929, 10 GAOR Annexes, Agenda item 28, Part II (1955), chap. 7, paras. 59–98.

[16] ICCPR, Art. 42.

[17] "There is no intermediate stage between admissibility and merits from any attempt to reach a friendly settlement or for the exercise of good offices by the Human Rights Committee": McGoldrick, above n. 15 at 141.

[18] It is "no longer primarily concerned with reparation for environmental injury, but now requires measures to ensure the control and prevention of environmental harm. . . . A preventative or regulatory regime of this comprehensive character requires a more sophisticated approach to the enforcement and implementation of international law than one based primarily on the third-party adjudication of claims to resources or the award of damages . . . Reliance on institutional machinery in the form of intergovernmental commissions and meetings of treaty parties as a means of coordinating policy, developing the law, supervising its implementation, putting community pressure on individual States, and resolving conflicts of interests, meets these needs much more flexibly and effectively than traditional bilateral forms of dispute settlement, including adjudication": P. Birnie and A. Boyle, *International Law and the Environment* (Clarendon Press, Oxford, 1992), at 137–8. It is notable that the proposed African Court will be able to adopt provisional measures, but only "in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons", (Addis) Protocol, Art. 27(2).

[19] UN Doc.A/CONF.62/122; (1982) 21 ILM 1261.

[20] *Ibid*., Art. 287.

1. Informality/Formality

A feature of amicable settlements is said to be the informality in procedures and in the application of rules. Formality is said to indicate elements of a more judicial system.[21]

(a) The Use of Precedents

The use of precedents is believed to be more of a "judicial" approach, in contrast to an amicable settlement which would proceed on a case-by-case basis.[22] However, the use of precedents was also evident in traditional African societies.[23] Other international bodies have shown that they are willing to follow previous decisions.[24]

The African Commission has referred to its own decisions on some occasions but does not appear to view itself as bound by them,[25] although it has made some attempts at justifying why they should not be followed:

> We have a precedent, in 1990, we had a similar report, with a constitution attached, but we asked the State to resubmit. I don't see how we can get out of that precedent.[26]

[21] In court and judicial systems, "the rules themselves tend to become more precisely defined": P. Stein, *Legal Institutions. The Development of Dispute Settlement* (Butterworths, London, 1984), at 14; J. Rifkin, "Mediation from a Feminist Perspective: Promise and Problems" [1984] 2 *Law and Inequality* 21–31, at 26.

[22] See e.g. A. Allott, "The Future of African Law" in H. Kuper and L. Kuper (eds.), *African Law Adaptation and Development* (University of California Press, Berkeley and Los Angeles, Cal., 1965), 216–42, at 233. Also, "the whole law is declared in a set of known rules of reasonable precision . . . they will be applied to any conceivable set of facts so as to produce decisions that can be predicated with confidence . . . that those decisions will be based exclusively on the application of rules to the 'relevant' facts and will be totally insulated from 'irrelevant' circumstances that may affect the parties": Stein, above n. 21 at 14.

[23] "It is not clear to what extent African judges can be said to make use of previous decisions in determining current cases before them . . . African customary law is no doubt more like English common law, at least until the establishment of the principle of binding judicial settlements . . . than any system of codified law. But it suffers from the absence of written records on which alone a proper system of judicial precedent can develop in the sense in which the theory is commonly understood in English law. In preliterate African societies, the living and flexible character of indigenous law makes it constantly necessary for the adjudicating chief . . . to refer to previous cases decided by themselves, by their predecessors . . . especially if such cases have been notorious . . . the precedents are comparatively recent": T. O. Elias, *The Nature of African Customary Law* (Manchester University Press, Manchester, 1956), at 256. Note the problem caused by oral proceedings: see below at section 2.

[24] E.g. see cases reported in Annual Report of the Inter-American Commission on Human Rights, 1996, OEA/Ser.L/V/II.95, Doc. 7 rev. e.g., Report No. 30/96 Case 10.897, Guatemala, 16 Oct. 1996, paras. 32, 35, 38, etc., which refers to the decision in *Velasquez Rodriguez*, Inter-American Court of Human Rights, Series C, No. 4 (1988). The International Court of Justice does not formally recognise precedent: Statute of the ICJ, Art. 59, but does try to be consistent in its judgments.

[25] E.g. see communications No. 25/89, 47/90, 56/91, 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah* v. *Zaire* at para. 40; communication No. 74/92, *Commission Nationale des Droits de l'Homme et des Libertés* v. *Chad* at para. 25.

[26] 19th Session Transcripts, 108. See also "the Commission has a clear precedent that communications must contain a certain degree of specificity": No. 65/92, *Ligue Camerounaise des Droits de*

(b) Correct Procedure

It is assumed that amicable settlements are not overly concerned with the correct procedure to be followed and adopt a more informal approach. This is in contrast to the judicial settlement which presents a range of procedural rules and regulations.

However, it has been pointed out that at the international level strict application of procedural rules may not be appropriate. When, in the *Godínez Cruz* case,[27] the government objected to the lack of procedures followed by the Inter-American Commission, the Inter-American Court held that "failure to observe certain formalities is not necessarily relevant when dealing on the international plane. What is essential is that the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced, and that the objectives of the different procedures be met".[28] In addition, in the *Aegean Sea Continental Shelf* cases, the International Court of Justice held "the Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law".[29]

Although restricted by the provisions of the Charter, some Commissioners have stated that they may be willing to take a broad interpretation of the mandate of the African Commission in relation to the Charter's procedures:[30]

> I am happy to know that the Commission has gone farther and that today we are now talking about a situation in which the Commission now dares to transgress the letter of the Charter. That was the concern of the drafters of this Charter, who wanted to ensure that the maximum be squeezed out of the minimum in the Charter . . . we have been able to bring in flexibility, pragmatics, in terms of positive interpretation of legal texts which were initially considered to be very rigid . . . The Commission must

l'Homme v. *Cameroon*. The Commission has also referred to documents that it had produced: see references to the *Mauritius Plan of Action*, (1996–2001) and 23rd Session Transcripts. "African judges do not, as modern English judges do, regard themselves as bring under a legal obligation to follow previous cases, expect that they would be loath to disregard well-established ones for fear of seeming perverse or recalcitrant": Elias, above n. 23 at 258.

[27] *Godínez Cruz* case, Judgment of 20 Jan. 1989, Inter-American Court of Human Rights, Series C, No. 5.

[28] *Ibid*., para. 33. In addition, in *Fairén Garbi and Solís Corrales Case*, Judgment of 15 Mar. 1989, Series C, No. 6, at paras. 134–6, the Inter-American Court held, "since this Court is an international tribunal it has its own specialized procedures. All the elements of domestic legal procedures are therefore not automatically applicable. The above principle is generally valid in international proceedings, but is particularly applicable in human rights cases. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible". See also *Godinez Cruz*, above n. 27 at para. 140.

[29] [1978] ICJ Reports, para. 42. See also, *Mavrommatis Palestine Concessions* (PCIJ) Judgment No. 2 [1924] PCIJ, Series A, No. 2, 34. However, in communication No. 40/90, *Bob Ngozi Njoku* v. *Egypt*, the African Commission rejected the case on the grounds that it was not its task to consider issues of evidence.

[30] Rather than its substance.

> develop not in leaps and bounds by reaction, but in a consistent and harmonious manner . . . but at the same time we must be realistic . . . our action should be limited, because we do not have the resources for such policies, we must thus put our feet firmly on the ground.[31]

The African Commission has suggested that one reason for the need for strict adherence to procedures may, in fact, be to prevent adversarial approaches being implied:

> All that we've heard by way of information should not be interpreted to mean complaints before the Commission. The Charter has articles for complaints, so it should not be taken that once one has made a statement here it is considered as a complaint. If there could be any legal action, the Commission must be seized through the proper channels. The exercise we have undertaken is not to accuse the government or the victims . . . I think we needed to be more detailed and serious.[32]

Indeed, the African Commission seems also to have established some set procedures more as a result of time constraints, rather than a desire to appear "judicial":

> I should like to suggest that we agree on a procedure to deal with this item because we do not have enough time, we only have this afternoon and we should ensure that by the end of this afternoon we exhaust consideration of this issue.[33]

In one instance, the Nigerian government complained that the African Commission had failed to use Articles 60 and 61 and draw guidance from "the well-known procedural rules applied by various specialized Agencies of the OAU, the UN and other similar Committees".[34] The African Commission replied that it "reaffirms its commitment to the task of drawing from existing international law while interpreting the Charter in a way that reflects the unique and precious facets of African culture and tradition".[35]

Where Nigeria criticised the African Commission for not providing it with a fair hearing and due process,[36] the African Commission replied that the government had been given ample opportunity to submit its case and had failed to do so. To postpone until the state replied would be to hold the procedure hostage to the government.[37]

[31] 21st Session Transcripts, 65–6. This is in contrast to its earlier approach where it seemed to be unwilling to take any action without OAU approval, e.g. asking the Assembly of Heads of State and Government's approval to examine state reports: Recommendation on Periodic Reports, *First Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1987–88, ACHPR/RPT/1st, Annex IX.

[32] 21st Session Transcripts, 99 and 23rd Session Transcripts, 6. See also the position the Commission has taken against using insulting language contrary to Art. 56(5) in communications: see above Chap. 4.C.3a and below at 7.

[33] 22nd Session Transcripts, 2.

[34] *Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights, Second Extraordinary Session*, Doc. II/ES/ACHPR/4, at 7. It did not state exactly what procedures were not followed.

[35] *Ibid*.

[36] *Ibid*., 5. See later at C.

[37] *Ibid*.

(c) Reasoned Decisions

It is assumed that decisions taken by a judicial (western) settlement body would be reasoned, detailed and lengthy, again in contrast to the amicable (African) approach which would tend to be pragmatic and practical.[38]

Both the previous European Commission and Court of Human Rights and the two Inter-American bodies provide detailed reports and decisions on cases, although the Human Rights Committee has been criticised for its lack of reasoning.[39]

In the African Commission's case many of, at least, its earlier decisions, were very brief.[40] Even where violations of the Charter were implied, the African Commission was, at first, unwilling to pronounce on them:

> The Commission learnt with consternation of the death of Mr Orton Chirwa whilst in detention together with his wife for their political beliefs. The Commission recalls that this regrettable incident occurred whilst it had been seized with this case and one of its members was carrying out on-the-spot investigations. The Commission expresses to the family of the deceased its most profound sympathy and reiterates its grave concern about the fate of the spouse who is still in detention.[41]

However, in recent years the decisions provided by the Commission have been increasingly detailed and lengthy.[42] The (Addis) Protocol establishing the African Court expressly requires that it provide reasoned decisions.[43]

[38] "Whether the judgment pronounced is single or multiple, one can scarcely fail to be struck by its essentially practical aim and social purpose. Of course, African judges do not spin out theories or enunciate principles in as articulate a fashion as do English ones, but most of their intellectual and moral assumptions are implicit in the prevailing legal norms which are the common property of all and sundry. They do reason these out in their appropriate context, through never in abstraction from the social and cultural milieu of the particular community. Rather, their's is a pragmatic approach to the ideal of justice as conceived and accepted in the society of which the judges no less than the litigants form a part": Elias, above n. 23 at 259.

[39] E.g. McGoldrick, above n. 15 at 199; T. Opsahl, "The Human Rights Committee" in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (Clarendon, Oxford, 1995) at 369–443, 422 and 427, who notes that the Human Rights Committee provides less reasoning than the European system.

[40] E.g. "[c]ommunication on general political situation in Algeria. This communication provides a general information to the Commission and deals with no specific breaches of the Charter. The file is closed accordingly Art. 56": No. 104/93, 109–126/94, *Centre for the Independence of Judges and Lawyers* v. *Algeria and others*. In addition, "the Commission tried without success to resolve this communication amicably": No. 103/93, *Alhassan Abubakar* v. *Ghana*.

[41] Final Communiqué of the 12th Ordinary Session, Banjul, The Gambia, 12–21 October 1991, reprinted in International Commission of Jurists, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996) 23–6 at para. 18. Note that the African Commission did eventually take a decision on this case, but only after a new government was in power, communication No. 64/92, 68/92 and 78/92 (joined), Krischna Achuthan, Amnesty International, *Amnesty International* v. *Malawi*.

[42] E.g. see *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–96, ACHPR/RPT/9th; *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th.

[43] Art. 28(6), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ((Addis) Protocol), Addis Ababa,

When the Nigerian government criticised the African Commission for acting in a "judicial capacity" by interpreting provisions of the Charter, the latter replied that this was not beyond its mandate. It stated that "these actions of the Commission are clearly required by the stipulations of Articles 55–59 of the African Charter. Article 45(3), cited by the government, is inapposite, reflecting only that the Commission must interpret all provisions of the Charter when requested by States Parties or the OAU. While, by promulgating the Charter, the OAU has indirectly 'requested' the Commission's interpretation through the communication procedure, the procedure more properly falls under Article 45(2), 'ensure the protection of human and peoples' rights under conditions laid down by the present Charter'. This charge to ensure protection clearly refers to the African Commission's duties under Article 55 *et sec* to protect the rights in the Charter though the communications procedure. The Commission can therefore not accept the government's contention that in deciding communications, it has acted outside its capacity".[44]

In conclusion, the African Commission, as well as other international organs, reveals a mixture of approaches, being neither totally formal nor informal.

2. Oral/Written

It is assumed that amicable resolutions tend to adopt oral methods, as opposed to the written process of a judicial proceeding.[45]

The criticisms directed at the African Commission for failing to produce written documents including minutes of the sessions and detailed reports of the sessions[46] could be partly counteracted by pointing to the oral nature of its proceedings.[47]

December 1997, OAU/LEG/MIN/AFCHPR/PROT(I) Rev. 2. Art. 28(7) enables judges to give dissenting opinions if the judgment does not represent in whole or in part their view. It has been noted that if decisions are taken by consensus then this "deprives human rights advocates of useful knowledge that is relevant to understanding the evolution of the work of the Commission": A. Ngefa-Atondoko, "Recent Developments in Human Rights Advocacy within the African Commission on Human and Peoples' Rights" paper presented in relation to seminar on International Rights Advocacy, April 1996 at 14.

[44] *Account of Internal Legislation*, above n. 34 at 6.

[45] Stein, above n. 21 at 14.

[46] E.g. C. Odinkalu and A. An-Na'im, *Enhancing Procedures of the African Commission with Respect to Individual Communications* (Interights, London, 1995) at 6; Amoah, above n. 1 at 235–6; A. Danielson, *The State Reporting Procedure under the African Charter* (Danish Centre for Human Rights, Copenhagen, 1994) at 29; W. Benedek, "The African Charter on Human and Peoples' Rights: How to Make it More Effective" (1993) 11 *NQHR* 26 at 29.

[47] The requirement in the African Commission's Rules of Procedure that that written documents should be produced, suggests the failure may be less to do with the oral nature than with resource or other implications, e.g.Rule 27 relates to records on communications; Rule 33 enables the African Commission to issue communiqués of each session; Rule 39 requires the African Commission to produce and publish summary minutes of the sessions; Rule 87(3) requires that commissioners produce written reports on their promotional activities; Rule 108 relates to press releases. See also discussion on confidentiality, below at section 5.

Much of the African Commission's work emphasises the oral nature of the proceedings[48] and commissioners do not always see the need to produce reports in writing.[49] However, the African Commission itself has noted the problems that a focus on oral proceedings may cause[50] and has moved towards calling for proceedings to be written.[51]

Although it could be argued that where the focus is on an oral dialogue it would include an element of honesty,[52] on the other hand this decreases the possible sanction of publicity that written material provides.[53] As a result, oral rather than written methods may decrease the effectiveness of the African Commission by giving "unnecessary protection to States".[54]

3. Dialogue/Adversarial Hearings

A "dialogue" is said to be an important part of an amicable procedure. A "constructive dialogue" is a feature of the state reporting mechanism and found in relation to reporting procedures in several international instruments.[55] This contrasts with the adversarial approach of judicial settlements.[56] The African

[48] E.g. "[i]t would be most appreciated if you strive to answer all the questions here because what the Commission wishes to do is engage in a constructive dialogue. Answers sent in by writing might resemble some diplomatic transition and we wouldn't understand that you should travel so far only to ask us to expect answers in writing": 21st Session Transcripts, 73.

[49] "I apologize for not having done this in writing. I will do so when I am asked to": 19th Session Transcripts, 60. Under the ICERD inter-state reports are not required to be written: Art. 11, see K. F. Partsch, "The Commitee on the Elimination of Racial Discrimination" in Alston, above Chap. 4.D n. 1 at 339–68, 362, perhaps because of a desire not to be accusatory.

[50] "The need to have written report . . . more and more this has become our tradition because people tend to say anything when they are not making written statements": 20th Session Transcripts, 116–17.

[51] E.g. states are required to send written responses to questions posed during the examination of their reports under Art. 62. See 21st Session Transcripts, 58. See also Final Communiqué of the 13th Ordinary Session, Banjul, The Gambia, 29 March–13 April 1993, FIN.COMM/XIII, para. 14. It is arguable that the lack of written records may be more to do with a lack of money than other motives.

[52] "The Chair of Pan African movement . . . talking about the situation of human rights in Africa . . . insisted on the necessity of holding frank and open discussions concerning the sovereignty of States and peoples' freedom", Final Communiqué of the Second Extraordinary Session of the African Commission on Human and Peoples' Rights, Kampala, Uganda, 18–19 December 1995, ACHPR/RFINCOMM/2nd EXTRAORDINARY/XX.

[53] Benedek, above n. 46 at 29; Okere, above n. 1 at 159. Ankumah, *The African Commission on Human and Peoples' Rights: Practices and Procedures* (Martinus Nijhoff, The Hague, 1996) at 25; although O. Ojo and A. Sesay, "The OAU and Human Rights: Prospects for the 1980s and Beyond" (1989) 8 *HRQ* 89–103 at 99 question the apparent deterrent effect of publicity.

[54] E. Bello, "The African Charter on Human and Peoples' Rights" (1985/6) 194 *Hague Recueil* 13–268 at 114.

[55] E.g. this phrase has been used by the United Nations Human Rights Committee: "Statement on the Duties of the Committee under Article 40 of the Covenant" Doc.A/36/40, Ax IV.

[56] The procedure under the ICCPR aimed at being "neither inquisitorial nor accusative and its end was to be neither condemnation nor approbation. Rather the dialogue was to be constructive and instructive, pointing to situations in which a State's domestic provisions were at variance with the Covenant or made insufficient provisions for the rights protected": McGoldrick, above n. 15 at

Commission has taken this idea of a "constructive dialogue" and applied it in the case of the Charter,[57] emphasising an amicable strategy.[58]

In general, the African Commission has implied through all of its procedures that any exchange should be honest,[59] include an element of co-operation[60] and that both sides should respond to criticisms.[61] Indeed, there is the sense of bringing the parties together in a forum to air their grievances and to discuss problems:[62]

> the essential thinking is that we be able to ply the role of mediation. We should have all the apostles of human rights around the table. We should bring out the will to work together, as opposed to confrontation and lack of good results.[63]

89–90. The "legalistic way" in which the former European Commission of Human Rights dealt with matters of legal representation has been noted: R. Clark, "Legal Representation" in B. G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights* (Martinus Nijhoff, Dodrecht, 1982), 104–36, at 107.

[57] E.g. "[t]he urgent desire of the Commission is that this system of periodic reports would create a constructive dialogue between the State and itself on human and peoples' rights", *Guidelines for National Periodic Reports*, *Second Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1988–89, ACHPR/RPT/2nd, Annex XII at para. 2.

[58] "We are not a tribunal or a court, we are not here to judge you, we don't have the means or competence to . . . act as a court to deliver a judgment for or against Mauritius, what we want is a constructive dialogue. So, it would be advisable for . . . the Mauritian delegation to tell us what has been done, what they plan to do, what are the possible problems which are an obstacle to the implementation of their policies of human and peoples' rights, and it's after such presentation that members of the Commission could ask questions or make suggestions in such a manner that we could reach . . . satisfying results at the end of this presentation . . . We are not against your being eloquent but this is not a university forum. We are trying to be practical and concrete": 20th Session Transcripts, 65 (examination of report of Mauritius). In addition, "what is important is the facts": 21st Session Transcripts, 72. One Commissioner at the 23rd session stated that "what is important for the Commission is dialogue—the desire to pursue this dialogue is the main thing. I think there's a need to talk to one another when there's a problem": 23rd Session Transcripts, 2.

[59] "The quest for information requests an effort, frank and open collaboration which is not an easy thing", 20th Session Transcripts, 102.

[60] "The Commission hailed the usefulness and the appropriateness of the constructive dialogue which had developed between the Commission and the States concerned, and thanked the governments . . . for their reports and for their willingness to cooperate with the Commission", Final Communiqué of the 11th Ordinary Session, Tunis, Tunisia, 2–9 March 1992, ACHPR/COMM. FIN(XI)Rev.1, (1992) *Review of the African Commission* 126–20 at para. 15; also Final Communiqué of the 12th Ordinary Session, above n. 41 at para. 13.

[61] "The government's response goes on to criticize several aspects of the Commission's procedure and decisions. Many of these criticisms have already been answered above, but as the Commission wants to give full weight to the government's objections and to further its dialogue with the government, all arguments are discussed and reiterated below": *Account of Internal Legislation*, above n. 34 at 5.

[62] "Regulation and supervision by international institutions has been identified as part of a general trend away from the solution of problems by strictly judicial means and towards the resolution of conflicts through an equitable balancing of interests and *ad hoc* political compromise. Used in this way international institutions become a forum for dispute settlement and treaty compliance through discussion and negotiation rather than by adjudication of questions of law or interpretation. Moreover, community pressure and the scrutiny of other States in an intergovernmental forum may often be more effective than other more confrontational methods": Birnie and Boyle, above n. 18 at 162.

[63] 21st Session Transcripts, 107.

The sessions and the way they are conducted is evidence of this, with open discussion between commissioners, NGOs and governments and others present. Although the African Commission has on some occasions limited the time permitted for interventions, in general, whoever is present has been permitted to make comments.[64]

However, the effectiveness and application of the "dialogue" in practice could be questioned if one considers the procedure by which the examination of state reports take place.[65] Rather than asking questions and having them answered by the delegate one by one, the Commissioners pose all their questions at once before giving the delegate sometimes only a few minutes in which to respond.[66] This is also the approach of the UN Human Rights Committee.[67] Whilst this may detract from any accusatory stance it also lessens the impact that any questions may have and prevents the precise responses of the delegate from being scrutinised. Questions may be forgotten and issues avoided. It seems to leave more discretion to both the individual delegate and the individual Commissioners as to whether they notice unsatisfactory matters, which they will not always do,[68] even though

[64] See general discussion on the Court at the 22nd session, 22nd Session Transcripts. However, it was emphasised at the 23rd session that these should not be adversarial. After discussion of the human rights situation in Africa during which a presentation was made by NGOs on the situation in Mauritania, the government of that country attempted to make a comment in defence. The Chairman of the Commission, refusing him permission to speak at that stage, stated that "I'd like to insist on the fact that we are not a court. Human rights activists and representatives of States should remember that we can discuss in a civilised manner. We allow people to express their views and we should be polite and serene and calm and those who wish to respond should respond in a dignified manner. We will not get into conflicts or polemics if you follow this rule. If you are going to point fingers at each other, I refuse": 23rd Session Transcripts, 7–8.

[65] In addition to the fact that few states submit their reports or send representatives to the session and the Commission has not been quick to react; Chap. 4 and Resolution Concerning the Republic of Seychelles Refusal to Present its Initial Report, 25th Session. *F. Viljoen, The Realisation of Human Rights in Africa through Intergovernmental Institutions*, Thesis (University of Pretoria, 1997) 3.3.4.

[66] E.g. Final Communiqué of the 16th Ordinary Session, Banjul, The Gambia, 25 October–3 November 1994, reported in International Commission of Jurists, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996) 143–54 at para. 29. See also *Examination of State Reports: Egypt, Tanzania, 11th session, March 1992* (Danish Centre for Human Rights, Copenhagen, 1995); Danielson, above n. 46. At the 11th session during the examination of the state report of Egypt, and similarly during the examination of Nigeria's report at the 13th session, the procedure was more in the form of a one question/one answer approach: see *Examination of State Reports*, *ibid.*, at 29 ff. See also R. Murray, "Report of the 1996 Sessions of the African Charter on Human and Peoples' Rights" (1997) 18 *HRLJ* 16–27 at 25 and R. Murray, "Report on the 1997 Sessions of the African Commission on Human and Peoples' Rights" (1998) 19 *HRLJ* 169–87.

[67] See McGoldrick, above n. 15 at 80, although the process with the Human Rights Committee takes a number of days, rather than hours. A similar procedure is also apparent in the Committee under ICERD: see Partsch, above n. 49 at 355. The dialogue process has been criticised in relation to the Committee under CEDAW, for its repetitive questions and congratulatory remarks to state representatives: see R. Jacobson, "The Committee on the Elimination of Discrimination Against Women" in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (Clarendon, Oxford, 1995) at 444–472, 461.

[68] E.g. at the 21st session the Sudanese delegate was asked whether he considered religious practice to be free in his country. His lack of response to this particular question was not pointed out by commissioners.

the latter are usually given the opportunity to ask further questions after the presentation of the delegate. Constraints of time also suggest that the procedure was not chosen for its ability to produce a good dialogue but for more practical reasons.

4. Personal Contact/Independence

Personal contact is said to be a necessary feature of the successful amicable settlement of a dispute, in contrast to the judicial approach which gains its legitimacy from the independence of the judges/individuals deciding the issues. Thus, the characteristics of the individual authorities are essential.[69]

By maintaining this close connection to the actors involved, the amicable method could be said to ensure an advantage over the detachment and objectivity required from an adversarial procedure:

> because the negotiators will usually have to live with their settlement . . . they may also be more sensitive to implementation concerns than would be a judge whose involvement with the case typically ends with the issuance of the final decree. Moveover, because the outcome of a bargaining process usually represents a meeting of the minds, negotiation is more likely to produce results that accurately reflect the preferences of the parties.[70]

If contact is lost with the community, however, then this informality and personal contact, and thus the effectiveness of this approach, may diminish.[71] Thus, once authority is more centralised, "relations between that authority and

[69] "A body of trained lawyers which has the facilities either to hear witnesses or to visit the scene of the alleged violation itself, has an excellent opportunity not only of discovering whether a violation has taken place, but also of attaining a just and amicable solution between the parties, a solution which, in all probability, could not be reached in a court": R. Beddard, *Human Rights and Europe* (3rd edn., Grotius, Cambridge, 1993), at 55. In addition, "courts and arbitral tribunals are fully capable of resolving technical and scientific environmental cases. Judges, arbitrators and lawyers are fully capable of comprehending the types of cases that will be presented. Yet part of the hesitancy to seek legal solutions to many of the factual and political problems posed by disputes . . . are frequently of the opinion that the legal profession is incapable of resolving certain cases of controversy": P. Gormley, *Human Rights and Environment: The Need for International Cooperation* (Sijthoff, Leyden, 1976), at 219.

[70] L. Bacow and M. Wheeler, *Environmental Dispute Settlement* (Plenum Press, New York and London, 1984), at 18–19. "A consensual approach . . . brings to the bargaining table a much deeper understanding of the technical and institutional dimensions of . . . problems than is generally possessed by judges. Often, they are in a better position to explore different solutions and analyze their consequences".

[71] "The informality of local courts may not continue to be effective in securing justice when the judges are no longer selected from among the local community and are no longer conversant with the people, with customary law and daily practice and with what litigants expect from their courts. If other types of persons, less knowledgable and thus less interested in reconciling the parties, are appointed to these courts, the same looseness of procedure may not be conducive to justice and it may be necessary to lay down strict procedural rules": M. Gluckman, *Ideas and Procedures in African Customary Law* (International African Institute, Oxford University Press, London, 1969), at 25.

the ordinary members of the community become more formal and impersonal than the relations between the people and the unofficial local leaders had been".[72] Thus "a court set up by the central authority, with community force behind it, does not have to reconcile the parties. To a greater or lesser degree it can impose a decision on them and enforce it whether they accept it or not".[73] In such court structures, adopting a procedure which advocates the close relationship of the settlers and the parties involved may be viewed as bias for one party over the other, and jeopardise the abilities of the authorities to reach a conclusion that is fair for both.[74] However, this does not mean that an "amicable" method of settling disputes does not have other aspects that are important and should be maintained.[75]

There is some element of personal contact from the African Commission which seems to be favoured in order to prompt action from governments.[76] In the same vein contact between the state and the OAU and its Secretary General is encouraged.[77] This personal approach has been encouraged in urgent situations[78] and contact that is "impersonal" has been rebuffed.[79]

[72] Stein, above n. 21 at 13.

[73] *Ibid*., 14.

[74] However, during the examination of the state report of Egypt at the 11th session, one Commissioner said "definitely being Egyptian, I will not take part in the consideration of the Report": *Examination of State Reports: Egypt, Tanzania, 11th session*, above n. 66 at 9. In contrast, at the 12th session during examination of The Gambia's Report, one Commissioner stated, "although I am a Gambian, I would like to make an intervention as an independent member of this Commission": *Examination of State Reports: Gambia, Zimbabwe, Senegal, 12th session* (Danish Centre for Human Rights, Copenhagen, 1995) at 36.

[75] "With the divorce between the traditional authority and court membership . . . and with the present trend of change in African society which cannot be said to be strengthening family ties, it would appear that there is urgent need for some definite steps to be taken to ensure the preservation of the very useful, convenient, and less acrimonious process of settling disputes upon the merits and for giving encouragement to continuance of procedure in local courts, on links similar to those of the customary law": O. Ollenu, "The Structure of African Judicial Authority and Problems of Evidence and Proof in Traditional Courts" in Gluckman, above n. 71 at 110–22, 118–19.

[76] "The Chairman addressed a letter to President . . . on the occasion of Namibia's independence": *Intersession Activity Report of the Chairman of the African Commission on Human and Peoples' Rights, November 1989–April 1990*, *Third Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1989–90, ACHPR/RPT/3rd, Annex VI, at para. 10. In addition, "the Chairman paid a courtesy call on the Nigerian president. The Chairman attended the ministerial council of African foreign ministers . . . He and the Secretary held discussions with the Secretary General of the OAU . . . and addressed letters to States which had not yet ratified the Charter": *ibid*., paras. 6 and 7. Also, The African Commission "approved the messages of support and solidarity issued on these occasions (release of Nelson Mandela and the independence of Namibia) by the Chair of the Commission": *Third Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1989–90, ACHPR/RPT/3rd, at para. 13.

[77] "Regarding the mission to Sudan, it is true that a decision was taken even before I got to the Commission. Since I got to the Commission I have attempted to make contact with Sudan. We have had problems as you are not doubt aware, we had to resort to the good offices of the Secretary General to accept the Commission's mission. Two months ago, contacts made by the Secretary-General bore some fruit and the Sudan government had written to say they are ready to receive the Commissioners at any time. It is now left to us to prepare to go to Sudan and the obstacles that had opposed the mission seem to have been removed": 19th Session Transcripts, 127.

[78] "The Commission should conduct on-site visits, make diplomatic approaches and contact national and international organisations concerned with human rights": *Mechanisms for Urgent*

The African Commission has been known to meet with members of the government personally,[80] especially during the sessions hosted by a particular state.[81] Members of the African Commission often meet with the Head of State and with government officials to discuss issues of concern[82] and when undertaking promotional activities direct contact is encouraged.[83]

Indeed, personal contact from a member of the African Commission has been suggested as a way to ensure compliance with obligations by the state.[84] So,

Response to Human Rights Emergencies under Article 58 of the African Charter on Human and Peoples' Rights, 21st Session, at para. 2.

[79] "*Les conflits se réglent en effet non en fonction de normes préétablies et impersonnelles mais par la dialogue permament . . . et le frottement continu résultant du contact direct entre les intéressés, l'homme africain étant réfractaire à l'effet devitalisant et mortifère des lois et des décrets. En Afrique, l'homme assume sa propre responsabilité, sa propre securité, sa propre liberté, sa propre souveraineté*": *Allocation du Nguema*, Président de la Commission Africaine des Droits de l'Homme et des Peuples à la Séance Ouverture de la 19ème Session Ordinarie de la Commission Africaine des Droits de l'Homme et des Peuples Ouagadougou, 26 March 1996.

[80] "During the session, a delegation consisting of a Chairperson and Vice Chair of the Commission was received in audience by the Head of State of the Gambia. The delegation expressed the Commission's concern about the miliary take-over in the Gambia and the headquarters of the Commission": Final Communiqué of the 16th Ordinary Session, above n. 66 at para. 50. See also *Inter Sessional Activities of Professor U. O. Umozurike, October 1995–March 1996*, 19th session (no reference), para. 5: "[t]he human rights situation in Nigeria engaged my attention in a series of meetings with officials of the Nigerian Presidency, the Foreign Office and the Office of the Attorney General and Minister of Justice. The basic aim was to facilitate the Commission's proposed visit to Nigeria": *ibid*., para. 2. The Commission also wished to send its Special *Rapporteur* on extrajudicial executions to Sierra Leone, *Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach*, DOC/OS/50(b)(XXIV) at para. 13.

[81] "Outside the regular session the Commission was received by the President", Final Communiqué 19th Ordinary Session of the African Commission on Human and Peoples' Rights, Grand Bay, Mauritius, 21–31 October 1996, ACHPR/FIN.COMM/XIX at para. 24. Also, "the Commissioners were invited by the President of Cape Verde to lunch at the State House. The Commissioners were also invited to dinner by the Minister of Justice": Final Communiqué of the 18th Ordinary Session, Praia, Cape Verde, 2–11 October 1995, ACHPR/FIN/COMM/XVIII, para. 33; "[d]uring this session the Commission was received in audience by the President of the Republic of Togo . . . as well as the Prime Minister": Final Communiqué of the 17th Ordinary Session, Lamé, Togo, 12–22 March 1995, ACHPR/COM.FIN/XVII/Rev.3 at para. 36.

[82] "A fruitful exchange was established between members of the African Commission and Nigeria's government representatives on major preoccupations of which the forthcoming trial of the 19 Ogoni people and the compatibility of the African Charter on Human and Peoples' Rights were the major issues discussed": Final Communiqué of the Second Extraordinary Session, above n. 52 at para. 16.

[83] "The Commissioners agreed to a reorganisation of the list of countries for each member for the purpose of their direct promotion and protection activities in these countries": Final Communiqué of the 10th Ordinary Session, Banjul, The Gambia, 8–15 October 1991, reprinted in International Commission of Jurists, *Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996) 79–88 at para. 15. In addition, "Promotional Activities by Commissioners. Commissioners are entrusted to promote human rights in Africa. The promotional activities include among other things, contacts with officials, media and local NGOs as well as giving public lectures and attending relevant seminars and workshops", *Programme of Activities 1992–1996*, *Sixth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1992–93, ACHPR/RPT/6th, Annex VII at para. III.

[84] "If a State is uncooperative the Commission should organise meetings near the State or at its headquarters": *Mechanisms for Urgent Response to Human Rights Emergencies under Article 58*,

Commissioners have attempted to settle communications, sometimes successfully,[85] by directly contacting the state concerned.[86] They have sometimes given some information on these visits in their promotional reports.[87]

A close relationship of commissioners with the parties could ensure that information reaches the African Commission quickly and that measures be taken accordingly:

> I keep in constant touch with Secretariat and offered many suggestions, including responding that we invoked provisional measures on behalf of someone who was about to be executed and I am happy to report that he was not executed.[88]

However, whilst the Commissioners may be in touch with those who are in power, given the increased centralisation of the system, they may have lost contact with those on the ground.[89] Although the Commissioners also maintain some contact with NGO representatives who can ensure that the former are able to carry out their functions by being provided with the relevant information and kept up-to-date with matters,[90] this relationship is volatile.[91] In addition, the

above n. 78 at para. 3. In addition, it stated in its *Non-Compliance*, above n. 80 at para. 9, that commissioners be assigned states which had failed to comply with its recommendations and conduct "explanatory and consultative mission" there. It has been noted that the ILO has developed a procedure of "direct contacts", namely personal visits by its officials or someone independent, to a member state to assist it where it is facing difficulties in the application of the Conventions or other areas of its responsibility. The ILO then makes follow-up recommendations and examines complaints. V. Leary, "Lessons from the Experience of the International Labour Organization" in P. Alston, above n. 67, 580–619 at 611–12, notes that "the success of such contacts is due to the rapidity with which they can be arranged and to the low-key discreet manner in which they are carried out. They are primarily informal means of entering into negotiations with government representatives . . . and have become an important component to the other more formal ILO procedures."

[85] "We commenced the procedure in respect of 16 complaints made against Member States and in some respects our mere intervention was enough to secure the human rights of the persons affected": *Presentation of the Third Activity Report by the Chairman of the Commission Professor U. O. Umozurike to the 26th Session of the Assembly of Heads of State and Government of the Organization of African Utility (9–11 July 1990)*, *Third Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1989–90, ACHPR/RPT/3rd, 83. In addition, in communication No. 40/90, above n. 29, where although the Commission closed the case on grounds of evidence it still "gave mandate to [a commissioner] to pursue good offices . . . on purely humanitarian grounds".

[86] "I spent quite some time following up on a communication against a State Party. The latter responded to the Commission's inquiry": *19th Session. Promotional Activities of Professor E. V. O. Dankwa, October 1995–March 1996* (no reference), para. 6. In addition, "[a]t the 17th session the communication was declared admissible. It was found to be a fit subject for settlement by the Commissioner responsible for Botswana. The parties were notified of this decision. The government of Botswana was invited to consider the possibility of an amicable resolution": No. 97/93, *John K. Modise* v. *Botswana*. "I have made several interventions to obtain the liberation of trade unionists who were arrested during a strike which was a legal one. This is also the case for a few journalists who had published articles considered of a defamatory nature", 20th Session Transcripts, p. 92.

[87] E.g. 20th Session Transcripts, 91.

[88] 22nd Session Transcripts, 7.

[89] There is some attempt to maintain this with, e.g. the addresses of commissioners being given out at the 22nd session with the draft agenda to participants. They include home and work addresses. It is argued that this will not be sufficient without greater publicity.

[90] "I am in contact with Mr Motala [of Amnesty International] very often with whom I was supposed to meet . . . I just received two days ago a report from Amnesty International, talking of the role of the Special Rapporteur on Extrajudicial Executions": 22nd Session Transcripts, 1–2.

[91] Chap. 4.D.

possibility in reality of personal contact is diminished, given the tremendous number of problems which face individuals in Africa and the inability of each commissioner to visit the government in relation to each one. As a result, the ones which are contacted may be done on an *ad hoc* basis:

> It is envisaged that more thought will be given to the possibility of conducting enquiries in a more diligent and efficient way to enable reported cases to be considered in as short a period as possible. Fact-finding missions will be sent to countries concerned by communications in order to try and settle matters amicably.[92]

The personal element is seen particularly in relation to the examination of state reports where the African Commission has adopted implicitly this policy of not examining the report until the state representative is present.[93] The Commission decided at the twenty-third session that reports which had been delayed due to lack of a representative would be considered in their absence, although this has not yet been carried out.[94]

Given the above, the criticism directed at some Commissioners for their lack of independence of their home governments,[95] may not necessarily be totally negative,[96] enabling Commissioners to have a considerable impact on the situation in their particular state. As has been pointed out in relation to other international bodies, the effectiveness will, however, depend on the motivation of the individual member, which may be difficult to ensure and enforce.[97]

These personal contacts however, arguably contradict the express requirement in Article 31 of the Charter that the members of the African Commission

[92] *Mauritius Plan of Action*, above n. 26 at para. 38.

[93] "During its deliberations the Commission noted with regret that it could not consider the periodic report . . . as scheduled because the leader of the delegation . . . who had the mandate to present the report could not turn up, although two members of the said delegation were in attendance": Final Communiqué of the 15th Ordinary Session, Banjul, The Gambia, 18–27 April 1994, ACHPR/FIN/COM(XV) at para. 16; similarly Final Communiqué of the 16th Ordinary Session, above n. 66 at para. 40; similarly, Final Communiqué of the 17th Ordinary Session, above n. 81 at para. 23; similarly, Final Communiqué of the 18th Ordinary Session, above n. 81 at para. 19. Note in relation to the postponed examination of the report of Benin, Final Communiqué of the 16th Ordinary Session, above Chap. 4.B n. 60 at para. 26; similarly, para. 32. This is also the approach of the Human Rights Committee, see McGoldrick, above n. 15.

[94] See Chap. 2.D.2.

[95] This has been an item on the agenda of the sessions, e.g. Agenda of the 24th Ordinary Session, DOC/OS/46(XXIV), item 11, which was scheduled for public discussion but may have been dealt with in private.

[96] In a Resolution it noted that "the members of the African Commission on Human and Peoples' Rights are elected by the OAU", Draft Resolution on Ratification of the African Charter, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1991–92 ACHPR/RPT/5th, Annex VIII.

[97] E.g. membership of the UN Human Rights Committee has included ex-government ministers and ambassadors and McGoldrick, above n. 15 at 44–5 notes that payments from the UN are low, meaning that only those receiving regular salaries, such as government employees, are likely to be able to sit on the Committee; "the continued contact of members with high level political and legal activity within their respective national systems brings critically important practical knowledge and expertise to the HRC's considerations. It is submitted that the HRC remain a part time body but that its members should be properly remunerated 'having regard to the importance of the Committee's responsibilities' (Article 35)".

act in their "personal capacity", and not as representatives of their governments. Thus, although it may have recognised the importance of this requirement, the African Commission has noted the practical difficulties in ensuring it:

> I should like to underscore the difficulties encountered by members of the Commission on those missions . . . independent would mean that we come into the country, move around with our own vehicles and means, we get our own accommodation and food but unfortunately that is impossible . . . When it comes to going into the hinterland we will have to use the resources that are provided to us. It is really something that the States have accepted our mission because in the past they did not accept and we must be able to make headway in that direction and ensure that our work is carried out in the supreme interest of human rights in Africa.[98]

Given that the African Commission has noted that practicalities prevent it from being independent, it is arguable that this personal contact is less to do with a choice between or portrayal of elements of the amicable or judicial approach, but more to do with inadequate resources or a lack of confidence to ignore government pressure. The inability to be truly independent is then used as an excuse for its failing to be "judicial":

> missions should be undertaken in all transparency with all the open mindedness necessary on the part of one and all . . . We should understand . . . the position of the Commission. The Commission does not have the means to be able to carry out on the precise mandate the mission entrusted to it. Once the mission is decided upon the Commission begins looking around for funds . . . I do agree with RADDHO that the OAU must make money available to the Commission . . . but the money is not forthcoming . . . As far as we are concerned we carried out the mission, we had to go around Senegal. In Dakar we need vehicles, we had to go to Casamance to take the plane and in Casamance we had to move around. Do we turn to the OAU for all this? If the local authorities put these vehicles at our disposal do we say no? I cannot pay from my own pocket the transportation costs. If the NGOs want to solve this problem I don't object except then we put ourselves under the wings of the NGOs, so to speak. My friend Professor Tine had the impression that when we went to Casamance we were accompanied by government officials, but how do you want us to move around in a foreign country without being accompanied? We wouldn't mind being accompanied by NGOs, it was natural under the circumstances the Head of State assigned officers to accompany us. These officials guided us but we did say who we wanted to see . . . I believe all these persons spoke freely, we put the questions we thought we should put to them.[99]

5. Openness/Confidentiality

Openness is often seen to be a feature of the judicial approach, aiming, as it does, for a decision that can be applied to a number of situations, viewing it in

[98] 21st Session Transcripts, 120–1.
[99] *Ibid.*, at 117–18.

its wider context.[100] This is in contrast to the confidentiality which is seen as a feature of an amicable resolution, whereby the case is settled for the parties alone, from the point of view of their position, with no intention of applying it in a broader context.

The African Commission has been criticised for its excessive confidentiality and, although its reasons for keeping the issue private are not known,[101] one commissioner has stated that it may be more effective if it does not have to conduct its affairs "in the glare of publicity".[102] In effect, it is often only publicity that may ensure effective protection of human rights, to coerce states to comply with decisions, whether they be legally binding or not.

Confidentiality, however, provides states with increased power and removes any sanction for failure to comply with the resolution or settle the issue. Indeed, "it is exactly in order to avoid embarrassment and adverse publicity that governments opt for a friendly settlement.[103]

Despite the criticism directed towards the African system,[104] other international bodies have displayed similar restrictive practices. "[I]t is the normal practice of the [European] Commission [of Human Rights] to indicate to the government in confidence, and very tentatively, its provisional opinion on the question of the violation. If this is affirmative, it is in the clear interest of the government to achieve a settlement, since it will thus avoid the possibility of a formal finding of a violation, which might in any event necessitate both compensating the victim and making any requisite change in the law".[105] The European Commission encouraged the state to come to a friendly settlement[106]

[100] There is often an assumption that proceedings cannot be fair unless they are public, e.g. "[e]ven if it is conceded . . . that publicity is not in itself an essential element of fairness . . . nevertheless it is doubtless an important safeguard of fairness, inasmuch as a public trial, open as it is to public scrutiny and particularly to that of the press, is more likely to be also a fair one than a secret trial. Publicity also helps to maintain public confidence in the administration of justice by removing any doubt as to the manner in which it is actually conducted": J. Cremona, "The Public Character of Trial and Judgment in the Jurisprudence of the European Court of Human Rights" in F. Matscher and H. Petzold, *Protecting Human Rights: The European Dimension: Studies in Honour of Gerald J. Wiarda* (Carl Heymanns Verlag KG, Cologne, 1990) at 107–13, 107. Rifkin, above n. 21 at 26.

[101] It was argued that respect for confidentiality was seen as necessary by African states to maintain control of the Commission: H. Scoble, "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter" in C. Welch and R. Meltzer (eds.), *Human Rights and Development in Africa* (University of New York Press, Albany, 1984) at 196. In addition, the promise of confidentiality was an encouragement to states to ratify the Charter, offering them the same level of protection of national sovereignty which "was not easily negotiated away without sufficient guarantees to a government that its national integrity would be duly protected": Bello, above n. 54 at 115; Danielson, above n. 46 at 29; Okere, above n. 1 at 159.

[102] U. O. Umozurike, "The African Commission on Human and Peoples' Rights" (1991) *Review of the African Commission* 5 at 11.

[103] Clapham, above n. 11 at 65–6.

[104] See Chap. 2, above.

[105] Jacobs and White, above n. 10 at 374.

[106] "Even if the majority of the [European] Commission is provisionally of the opinion that there has not been a breach of the Convention, the government may wish to avoid further proceedings in the case, resulting in a detailed report containing the full facts and the [European] Commission's reasoning, with the possibility of minority opinions to the effect that there has been a violation, and the possibility also of public proceedings before the [European] Court . . . From this point of view

and in all its cases "the proceedings will . . . have been *in camera* and the names of all applicants will have been kept in secret . . . the procedure before the Commission is always in secret".[107]

In this respect, Beddard notes a comment made by a former President of the European Commission of Human Rights, "the [European] Convention was clearly right . . . to make the [European] Commission's task of conciliation the central feature of the remedies which it provides. Investigation of the shortcomings of a State in regard to human rights is a very delicate form of intervention in its internal affairs. The primary duty of the Commission is to conduct confidential negotiations with the parties and to try and set right unobtrusively any breach of human rights that may have occurred. It was not primarily established for the purpose of putting States in the dock and registering convictions against them".[108]

The UN Human Rights Committee holds all of its sessions in public, except for the individual communication procedure,[109] unlike the Inter-American Commission whose sessions are all in private.[110] It is interesting that the coming into force of Protocol 11 to the ECHR ensures that proceedings are "more open and transparent" with hearings in public.[111]

The African Commission encourages openness in its public proceedings and in its state reporting mechanism[112] and has stated on several occasions that the

the great advantage of a friendly settlement to a respondent government is that no position will be taken on the question of violation": *ibid*.

[107] Beddard, above n. 69 at 54. As Waldock comments, "the Convention was clearly right to make the Commission's task of conciliation the central feature of the remedies which it provides. Investigation of the shortcoming of a State in regard to human rights is a very delicate form of intervention in its internal affairs. The primary duty of the Commission is to conduct confidential negotiations with the parties and to try to set right unobtrusively any breach . . . It is not primarily established for the purpose of putting States in the dock and registering convictions against them", in sending a report to the Committee of Ministers who decide if it should be published it can be seen that "the Commission's role is diplomatic as well as judicial": H. Waldock, "The European Convention for the Protection of Human Rights and Fundamental Freedoms" (1958) 24 *BYIL* 356–63, at 362.

[108] Sir Humphrey Waldock as cited in Beddard, above n. 69 at 54.

[109] Art. 5(3), Optional Protocol. McGoldrick, above n. 15 at 48, who notes that although a small number of NGOs attend the open sessions there are rarely any members of the public there. Its "views" have been made public and "despite the confidentiality of the proceedings under the Optional Protocol, ample material is now available": at 422. Opsahl, above n. 39 at 421.

[110] Regulations of the Inter-American Commission on Human Rights, approved by the Commission at its 660th meeting, 49th Session, 8 Apr. 1980. Art. 16(3) states that "the meetings shall be closed unless the Commission decides otherwise".

[111] Art. 40. "The principle of confidentiality that governs the Commission's proceedings and those of the Committee of Ministers has, apart from friendly settlement proceedings, been abandoned. This will undoubtedly lead to greater media coverage of the system and in turn greater public awareness and an increase in the number of cases": D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995) at 712.

[112] E.g. "[t]he Commission considered . . . the periodic reports of the following countries . . . These documents are public documents and are available at the Secretariat of the Commission", *Fourth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1990–1991*, ACHPR/RPT/4th at para. 12.

answers given by the representatives would be published.[113] It does seem to consider communications to be a private issue between the parties and any decision thus perhaps applicable to them alone.[114] This is particularly the case with communications which are said to have been resolved amicably yet about which no further information is given.[115]

When the Nigerian government claimed that the African Commission had violated the confidentiality requirements under Articles 58 and 59 by publishing a resolution on the country, the African Commission responded that this resolution was "not a 'measure taken' within the meaning of this Article [59]. The 'present chapter' refers to Chapter III of the Charter, dealing with communications. The resolution does not refer to communications in any way. There is no bar on resolutions of the Commission being disseminated however the Commission sees fit".[116] The African Commission stated further that "the decisions taken on communications were conveyed to the government of Nigeria and to the complainants soon after they were taken. However, they were not disseminated publicly by the African Commission in any way until they were approved by the Assembly of Heads of State and Government as part of the African Commission's 8th Activity Report, a public document. This fully complies with the requirement for a decision of the Heads of State and Government. Indeed Article 59(3) goes further and stipulates that the Activity Report should be published after it is considered by the Assembly. This has not yet been done, although the Activity Report has been made available to the public. Thus, the Commission cannot agree that it has committed any breach of the Charter's requirements of confidentiality".[117]

The new African Court marks some move away from a confidential approach with the presumption that hearings will be in public,[118] as do amendments made to the Rules of Procedure of the African Commission.[119] In addition, greater

[113] E.g. "I'd like to tell you as you may already know, your answers will be published. We have a newsletter of the African Commission": 21st Session Transcripts, 57. This has not yet been done.

[114] These proceedings are held in private.

[115] "Regarding cases already declared admissible, the Commission considered seven communications which have been settled in a satisfactory manner and closed the dossiers": Final Communiqué of the 10th Ordinary Session, above n. 83 at para. 21. Also, one commissioner "met with authorities in Botswana on a communication which will be reported in closed session", 20th Session Transcripts, 93. One commissioner noted that "the atmosphere of confidentiality which has characterised our work to date should be avoided and left out", 23rd Session Transcripts, 6.

[116] *Account of Internal Legislation*, above n. 34 at 7.

[117] *Ibid*., 7. In an interesting move at the 23rd session, after an intervention by the representative of Amnesty International, the Commission agreed to send a fax to the Rwandan authorities requesting that executions be postponed, and this fax was read out in the public meeting: 23rd Session Transcripts. See Chap. 2.D.3i above.

[118] "The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera as may be provided in the Rules of Procedure": (Addis) Protocol, above n. 43, Art. 10(1).

[119] E.g. the amended Rule 32 reads: "[t]he sittings of the Commission and its subsidiary bodies shall be held in public unless the Commission decides otherwise or its appears from the relevant provisions of the Charter that the meeting shall be held in private". The previous Rule stated "the sittings of the Commission and its subsidiary bodies shall be private and shall be heard in camera". This has had no apparent effect in practice.

detail has increasingly been provided on decisions on communications.[120] It has noted the importance of publicity in increasing the effectiveness of a human rights mechanism[121] and has seen the drawbacks of confidentiality.[122]

Indeed, more open procedures permit international scrutiny of the actions of a State[123] and in this respect, the African Commission has recognised that an overly confidential approach can enable states to evade their obligations:

> we know the States want to keep those responses as confidential as possible, but also they cannot be [respected] without putting in jeopardy the lives of the witnesses.[124]

6. Recommendations/Binding Decisions

Amicable solutions tend to give recommendations, rather than the binding decisions that are a feature of judicial settlements.[125] Thus, it is believed that with an amicable approach the real concern of non-performance of obligations is not addressed.[126]

[120] In its *Seventh Annual Activity Report* the African Commission, for the first time, gave details of decisions on communications and this practice has been continued in the last three Reports, although not in the *Eleventh Activity Report*. In addition, in relation to emergency situations, "the Commission should exercise its competence under Article 45(1) to report on and make public its views on an emergency given that Article 59 on confidentiality relates to Chapter 3 of the Charter": *Mechanisms for Urgent Response to Human Rights Emergencies under Article 58*, above n. 78 at paras. 4 and 5.

[121] "The impact of such publicity on public opinion is a weapon that cannot be underestimated in the protection of human rights. The Commission should render interim reports to half-yearly ministerial conferences on emergency situations": *ibid*., paras. 8–9.

[122] "It is unknown to more than half of the people it is supposed to be working for and even those who know it, approach it with scepticism. Most of this can be attributed to the secret nature of the Commission's work": *One Decade of Challenge*, 2 November 1987–2 November 1997, 22nd Session at 20.

[123] "The Trusteeship Council and the Mandates Commission are important precedents because they represent a model of accountability to the whole international community, made more effective by a structure which facilitates open scrutiny and publicity for States failing to meet their obligations": Birnie and Boyle, above n. 18 at 164.

[124] 20th Session Transcripts, 101. There is some argument, however, for keeping the results of a failed settlement confidential, "it is impossible to draw correct conclusions from abortive settlement discussions and the deciding organs should entirely disregard such pleadings. It is also for this reason that documents relating to friendly settlements remain in the [European] Commission's confidential archives": H. Kruger and C. A. Norgaard, "Reflections Concerning Friendly Settlements under the European Convention on Human Rights" in F. Matscher and H. Petzold (eds.), above n. 100 at 329–34, 334.

[125] Stein, above n. 21 at 14; Rifkin, above n. 21 at 26. The legal nature of recommendations of international bodies, and the important influence they have on international law has been commented upon: see C. C. Schreuer, *Decisions of International Institutions Before Domestic Courts* (Oceana Publications, New York, 1981), at 51–63.

[126] C. Chinkin, "Alternative Dispute Resolution under International Law", paper given at Bristol EU Law Forum, 1997 at 7.

The decisions of the African Commission have been criticised for not binding states[127] yet the Commission itself has claimed that they do,[128] even though at present there is no regular procedure for following them up.[129]

7. Reconciliation/Punishment and Condemnation

(a) Introduction

An amicable approach, reflected in traditional African settlements, is seen as aiming to reconcile the parties[130] and the wider community,[131] and not to punish,[132] the latter apparently being the goal of a judicial procedure.[133]

The African Commission has on some occasions adopted the former approach:

[127] S. K. C. Mumba, "Prospects for Regional Protection of Human Rights in Africa" [1982] *Holdsworth Law Review* 101 at 109; Scoble, above n. 101 at 195, Ankumah, above n. 53 at 25.

[128] E.g. the Nigerian government objected to the decision in communication 101/93 where the African Commission called on it to annul legislation which violated the Charter. The African Commission held, in response, that "Nigeria is bound by the African Charter . . . When the Commission concludes that a communication describes a real violation of the Charter's provisions, its duty is to make that clear and indicate what action the government must take to remedy the situation . . . in ratifying the African Charter without reservation, Nigeria voluntarily submitted itself to the Commission's authority in this regard": *Account of Internal Legislation*, above n. 34 at 6.

[129] However, see recent moves to consider this in the Commission's document, *Non-Compliance*, above n. 80 and see in general Chap. 2.D.3c. It has stated in relation to one communication against Nigeria, that it would consider the results of case on a mission to the country: No. 87/93, *Constitutional Rights Project (in respect of Zamani Lakwot and 6 others)* v. *Nigeria*. No report has been produced on the mission as yet. Decisions were postponed pending the missions being taken and even where they have gone ahead, the decisions have not yet been published separately: see *Report on Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights (1–7 June 1996)*, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th, Annex VIII, and *Report of the Mission to Mauritania of the African Commission on Human and Peoples' Rights, Nouakchott, 19-27 June 1996*, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th, Annex IX, and reports on the missions to Sudan and Nigeria are not yet available, see Chap. 2. It is not clear whether any of these decisions have been carried out by governments although responses have been given by them on the Commission's recommendations.

[130] "Before the courts existed, the informal procedures aimed at reconciling the parties with a view to reaching a compromise acceptable to both sides. In such circumstances the traditional rules are not expected to be applied rigidly. They provide a framework of guidelines within which negotiation can take place": Stein, above n. 21 at 13.

[131] See below, at point 10.

[132] Elias, above n. 23 at 269–300; J. C. Smith and D. N. Weisstub, *The Western Idea of Law* (Butterworths, London, 1983), at 88: "the object of the elders was not punishment but settlement of the dispute; not a declaration of strict legal rules but reconciliation. The tender of amends (*mpatse*) by the wrongdoer implied an apology for the wrong done; its acceptance meant forgiveness and forgetting." "The native method would tend to adjust disturbances of the social equilibrium, to restore peace and goodwill, and to bind or rebind the two disputing groups together in a give and take reciprocity . . . Running through all this is (the African judge's) transparent duty to reconcile the disputants with each other . . . all technicality [in the law] is eschewed in his earnest endeavour to do justice, fair play and equity": Elias, above n. 23 at 90.

[133] Rifkin, above n. 21 at 26.

> The Commission studies the communication, investigates and makes recommendations to reconcile the parties . . . Experience has shown that States are not eager to point accusing fingers against other States unless their vital interests are involved, and in order to avoid a similar censure against themselves in the event of an aberration.[134]

It will therefore emphasise assisting the state rather than reprimanding it.[135] In relation to the examination of state reports under Article 62 the African Commission has stated:

> I stress you are not standing before a court . . . There cannot be any ruling or sentence on your report—we should simply like to establish a dialogue. This is translated in terms of advice from Commissioners if need be.[136]

Thus, it is aiming at the collection of information,[137] rather than the imposition of sanctions or condemnation of the State.[138]

The African Commission has yet to make any comments on states' reports after examination under the Article 62 procedure, perhaps because, at present, it has neither the time, resources, or perhaps inclination to do so. As a result, it might appear that the African Commission is following what McGoldrick terms the "second school of thought".[139] This is that:

> the only duty on States was to report and the 'dialogue' between the HRC and the States parties was purely voluntary in nature . . . The purpose . . . was . . . to exchange information, to promote cooperation among States, to maintain a steady dialogue and to assist States to overcome difficulties . . . The Committee was not called upon to make an appraisal or to indicate whether or not a given State had failed to fulfil its obligations . . . It was for the States parties to draw their own conclusions from the Committee's Annual Report and any General Comments . . . Through those mediums the Committee could promote the observance of human rights in a constructive way with the voluntary assistance of States. Any other approach would be an unjustified interference in the internal affairs of States.[140]

[134] Submission of the 4th Activity Report by the Chairman of the Commission, Professor U. O. Umozurike, to the 27th Summit of the Organization of African Unity, Abuja, Nigeria (3–5 June 1991) (1991) 12 HLRJ 277–8.

[135] E.g. "[t]he Commission also requested that a mission consisting of two members of the Commission be received in that country with the objective of discovering the extent and cause of human rights violations and endeavouring to help the government to ensure full respect for the African Charter. The government of Zaire has never responded to these requests for a mission": Communication No. 25/89, 47/90, 56/91, 100/93 (joined), above n. 25 at para. 6.

[136] 19th Session Transcripts, 74.

[137] "At its 17th, 18th and 19th ordinary sessions, the African Commission decided to send a mission of good offices to Senegal, with a view to contributing to the amicable resolution of the conflict. With the aim of attaining this objective by the appropriate ways and means, the mission went to Senegal, collected all useful information and interviewed the principle parties likely to bring significant clarification to the events of Casamance": *Report on Mission of Good Offices to Senegal*, above n. 129.

[138] E.g. in the protective mechanism, the African Commission does hold a hearing between the parties, but it does not allow them to question each other, thus arguably avoiding an adversarial approach. See also the recent decision taken by the Commission against the use of insulting language in communications, above n. 32 and Chap. 4.C.3a.

[139] As applicable to the Human Rights Committee in the ICCPR: McGoldrick, above n. 15 at 91.

[140] *Ibid*. In relation to the wording of "its reports" in Art. 40(4).

The Human Rights Committee adopted a compromise position on general comments.[141]

In this regard, the African Commission has not been totally unwilling to point out problems with the human rights situation of some countries or to ask pertinent questions[142] and in a number of cases taken under its protective mandate, the African Commission has found violations of the Charter.[143] In one communication[144] despite the failure of the government to respond to the allegations,[145] the African Commission held that although some of the rights in the Charter had been violated, in respect of other provisions of the Charter there was insufficient information to find violations.[146]

(b) Amicable Resolutions can Imply Violations have Occurred

Given the focus on the obtaining of information rather than the punishment of violations, amicable solutions have often been criticised for failure to hold states liable for violations that have occurred.[147] It is submitted, however, that the amicable approach may actually facilitate the international body in its finding of violations.[148] Thus, the adoption of violations does not have to be contrary

[141] See *ibid.*, 93 ff.

[142] "The Commission asked several questions and made certain comments concerning the report. In particular it found that some of the assertions made were contradictory and inconsistent with the present situation in the Gambia. The Commission also noted that the oral presentation addressed issues which were not dealt with in the report. Accordingly the representative was requested to put those statements in writing as a supplement to the report. The Commission also expressed concern about the suspension of various parts of the Constitution by the military regime. In the meantime, the government was requested to ensure the respect for human rights with special reference to the rights of arrested and detained persons", Final Communiqué of the 16th Ordinary Session, above n. 66 at para. 38.

[143] E.g. see communications No. 59/91, *Embga Mekongo Louis* v. *Cameroon*; No. 60/91, *Constitutional Rights Project* v. *Nigeria (in respect of Wahab Akamu, G. Adega and others)*; No. 87/93, above n. 129; No. 64/92, 68/92 and 78/92 (joined), above n. 41; No. 101/93, *Civil Liberties Organisation in respect of the Nigerian Bar Association* v. *Nigeria*; No. 25/89, 47/90, 56/91, 100/93 (joined), above n. 25; No. 74/92, above n. 25; No. 129/94, *Civil Liberties Organisation* v. *Nigeria*; No. 27/89, 46/91, 49/91, 99/93 (joined), Organisation Mondiale Contre la Torture and Association Internationale des Juristes Démocrates, Commission Internationale des Juristes (CIJ), Union Interafricaine des Droits de l'Homme.

[144] No. 103/93, above n. 40.

[145] The Government failed to provide further details of the relevant laws on request, merely stating that "if the complainant has violated some laws, he must stand trial for them in the national courts. It is by now well-settled law before the Commission that where no substantive information is forthcoming from the government concerned, the Commission will decide on the facts as alleged by the complainant (see, e.g., decisions on communications No. 25/89, 59/91, 60/91, 64/92, 87/93 and 101/93)": *ibid.*

[146] "The facts provided are insufficient to find that the complainant's right to return to his country has been violated": *ibid.*

[147] They are " 'nothing more than a stylistic exercise' whereby 'human rights would suffer by an excess of diplomacy' ": McGoldrick, above n. 15 at 90.

[148] As has been stated in relation to the UN HRC, "the development of this dialogue has enabled members of the HRC to indicate clearly whether they are of the view that violations of the Covenant have occurred or that domestic legislation or provisions are inconsistent with the Covenant. It can be argued that the dialogue with the State party, through its representative, has pre-empted any necessity for the HRC to adopt formal determinations of non-compliance": *ibid.* at 100.

to an amicable approach. In fact, it can be argued that an amicable resolution *implies* violations have occurred and the state has a responsibility to remedy them. There is a strong argument that the international body would not encourage the state to reach an amicable resolution where the latter had not violated any of its obligations. Thus, an amicable solution does not necessarily mean that state responsibility itself has been extinguished. This has been recognised by the African commissioners:

> extrajudicial executions, impunity and reconciliation are three aspects that have to be looked at in their proper aspects . . . we should not allow the African penchant for dialogue to permit impunity or weaken our will to render justice.[149]

In addition, the African Commission in one case was willing to hold that an amicable resolution could be pursued, "given that the process of arriving at an amicable resolution can take a substantial period of time, the Commission believes it is important to make a statement on the question of law raised by this communication".[150] The African Commission held that there had been violations of the Charter[151] and concluded that the African Commission itself "resolves to continue efforts to pursue an amicable resolution in this case".[152] This suggests that whilst some aspects raised by the case may be settled by the judicial decision, others remain to be considered.

8. Equality between the Parties/Imbalance of Power

An amicable solution assumes the parties are of equal strength. In contrast, an imbalance of bargaining power seems to be more a feature of a judicial approach.[153]

It has been said that the UN Human Rights Committee takes the relative powers of the parties into account in its procedures.[154] Similarly, the relative strengths of the African Commission itself and the state have been noted in the state reporting procedure, where each has a role and responsibilities:

[149] 20th Session Transcripts, 108.

[150] Communication No. 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme* v. *Zambia*. The complainant, an NGO, alleged the illegal expulsion of a large number of West Africans. The Commission stated that it "decided to pursue an amicable resolution to the communication, which would involve further details being given to the Zambian government so that reparations might be effected". It gave no further reasons for this decision. It then informed the government of its intentions to do so.

[151] *Ibid*.

[152] *Ibid*.

[153] E.g. M. Freeman, *Alternative Dispute Resolution*, International Library of Essays in International and Legal Theory (Dartmouth, Aldershot, 1995), at 190.

[154] E.g. although no oral hearings have yet been held in the HRC in relation to the Optional Protocol, "if the HRC were to develop such a practice with the consent of the State party, it is submitted that the alleged victim's legal representative, and the alleged victim, should be permitted to address the HRC on whatever terms the State party is heard. This would seem to be demanded by the principle of 'equality of arms' which the HRC seeks to uphold": McGoldrick, above n. 15 at 134.

> The States being invited to report on the measures they have adopted and the progress made in achieving the objectives of the Charter as well as indicating any factors and difficulties affecting the degree of fulfilment. The Commission, on the other hand, furnishing suggestions, advice and other assistance on satisfying the requirements of the Charter.[155]

In addition, when attempting to reach an amicable resolution in a communication, it is not just the government that has a responsibility to find a settlement, but the African Commission as well:

> At the 18th session a delegation of [the government] appeared . . . The complainant also appeared and presented a reply to the government's arguments. The Commission decided to pursue an amicable resolution to the communication, which would involve further details being given to the . . . government so that reparations might be effected . . . the Commission informed the government of its intention to continue the efforts towards an amicable resolution of the case.[156]

This approach may not be appropriate between an individual complainant and the state whose respective strengths vary dramatically. If this inequality of the parties is not taken into account, the protection which the system could afford may be removed.[157]

However, where the complainant is in a stronger position a certain degree of equality is assumed. So, for example, where a group was attempting to secede from a state, the African Commission seems to have imposed duties on the non-government party[158] as well as on the government, to find a solution to the situation.[159]

[155] *Guidelines for National Periodic Reports*, above n. 57 at para. 2.

[156] No. 71/92, above n. 150.

[157] "The concept of amicable solution, reached through compromise and negotiation suggests a bilateralism that might not satisfy others' perceptions of what those obligations entail, resurrecting the concern about private ordering that has been forcibly expressed in the context of domestic Alternative Dispute Resolution and legitimated by the institutional framework. Koskoniemmi has warned of the danger that the desire to maintain the treaty and its institutions intact allow the procedures to become ineffective for achieving their objectives and the parties to conceal real differences while apparently dealing with them to the detriment of upholding collective obligations. This apprehension has been expressed within the context of the constructive dialogue between human rights treaty bodies and States parties where real concerns about non-compliance may not be adequately addressed": Chinkin, above n. 126 at 6–7.

[158] E.g. "[t]he present situation is characterised by four principal elements: 1. The will affirmed by both sides to sit down at the negotiation table. 2. This will is manifested by the departure abroad of elements of the separatist movement following the decision of the Senegalese government to grant their passports so that they might go meet with their activists exiled in Europe, in order to determine the object and place of the negotiations to be undertaken with the government": *Report of Mission of Good Offices to Senegal*, above n. 129.

[159] See Chap. 4, above. Also, in relation to the Senegal issue the African Commission explicitly imposed detailed conditions on each party to the conflict, "[w]ith the goal of bringing about a constructive dialogue". The Commission thus recommended "1. The Government should. . . . 2. The separatists should . . . ; Both parties should . . . ; The Commission recommends that each of the parties put all in place to realise the following objectives . . .": *ibid*.

9. Long-term/Short-term Relationship

An amicable solution would be suitable where the parties are in a long-term relationship that needs to continue after resolution of the particular dispute. This is not a requirement for a situation which results in a judicial settlement.[160]

The African Commission itself has noted the long-term relationship of the actors in its system:

> The intention is to develop a constructive dialogue between States and the Commission in regard to the implementation and thereby contribute to mutual understanding, friendly and peaceful relations between States.[161]

The community nature, close connection and interdependence envisaged with other countries on the continent and with other actors is emphasised.[162] Viewing this relationship as long-term is a necessary condition for a human rights system.[163] In this regard the following feature is pertinent.

10. Community Involvement/Only Parties to the Case

(a) Preliminary Considerations

An amicable resolution would seem to require that all the community are involved in the process, in contrast to the judicial procedure which includes only the parties to the case.[164]

Amicable resolutions at least offer the possibility of wider community interest and thus supervision,[165] rather than primarily for the interests of the parties

[160] "Conciliatory aims and efforts to 'make the balance' are more evident when the parties live close together and the restoration of relations between them would serve the peace in their neighbourhood . . . Such efforts would be negligible in disputes involving comparative strangers unlikely to face each other again": J. F. Holleman, *Issues in African Law* (Mouton, The Hague and Paris, 1974), at 83.

[161] *Guidelines for National Periodic Reports*, above n. 57 at para. I.6.

[162] "We have to get together and work for human rights . . . to coordinate our acts and do something good for human rights . . . Our relations must be improved so that we can better perform our duties in a world that is more and more demanding": 22nd Session Transcripts, 5.

[163] E.g. it has been stated that the non-compliance procedure under the Montreal Protocol "was essentially adversarial and dependent on the activity of individual State parties. This raised the questions of who were 'Parties involved' with respect to a treaty designed to protect the global atmosphere; and whether 'amicable resolution' did not suggest a bilateralism difficult to reconcile with an environmental treaty designed to protect collective interest": M. Koskonniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol" (1992) 3 *Yearbook of International Environmental Law* 123, at 129–30.

[164] "A court tends to define the issue between the paries more narrowly than the informal procedures allowed. The identity of the parties, their status in the community and their previous relations with each other are no longer relevant factors to be taken into account. Judgment should now be based solely on the application of the rules to the facts relevant to the legal issue which separates the parties": Stein, above n. 21 at 14; Rifkin, above n. 21 at 26.

[165] "Regulation and supervision by international institutions has been identified as part of a general trend away from the solution of problems by strictly judicial means and towards the resolution

to the case, "these [amicable] techniques should not be seen as an inferior substitute for judicial control, but as a potentially more effective means of exercising a limited form of international trusteeship . . . Moreover, effective multilateral supervision also makes unilateral responses less likely and ensures greater consistency and continuing in the development of State practice".[166]

In some respects the African Commission has taken a more community-oriented approach and allowed there to be an involvement of various entities. This is certainly the case at the public sittings:[167]

> We would like to build a strong solidarity network, so that our objectives would become a reality, if you are waiting for Heads of State to give you human rights on a platter of gold, you will wait for a long time. But if the Heads of State receive assistance from the community of human rights activists, things will move much more easily and this is why I want to emphasize the harmonious relations . . . between NGOs and the Commission.[168]

In contrast, however, at the hearings before the African Commission, the procedure is highly confidential with no-one but the parties and members of the Secretariat being permitted access,[169] even if this may be in relation to a general situation which is occurring in a particular state.[170]

The exclusion of those other than the parties, however, may be for the very purpose of preventing an adversarial stance from occurring between the parties to the case:

> I think . . . we cannot allow an individual or NGO to directly seize the court when it comes to these violations because we will arrive at a situation in which a State will be put on the bench of an accused for its systematic violations of human rights and I think this is the exclusive jurisdiction of the Commission in conditions specified by [Articles] 56 and 59 of the Charter and . . . I'd like to draw our attention on the important distinction to be made between the individual cases brought before the Court and the various situation or events where only the Commission has the jurisdiction.[171]

of conflicts through an equitable balancing of interests and *ad hoc* political compromise. Used in this way international institutions become a forum for dispute settlement and treaty compliance through discussion and negotiation rather than by adjudication of questions of law or interpretation. Moreover, community pressure and the scrutiny of other States in an intergovernmental forum may often be more effective than other more confrontational methods": Birnie and Boyle, above n. 18 at 162.

[166] *Ibid*., 186. Jacobs and White, above n. 10 at 373, say of conciliation that "it is surprising that such a method should be expressly recognised in a human rights convention. But this may provide a more effective remedy than judicial determination of the case; and it was therefore to be expected that a virtually identical provision should be included in the ACHR, Article 48(1)f".

[167] Chap. 4, and section 3, above.

[168] 19th Session Transcripts, 7.

[169] See e.g. No. 71/92, above n. 150.

[170] E.g. No. 74/92, above n. 25 at para. 15, where serious and massive violations of the Charter were found.

[171] 21st Session Transcripts, 92. See Government Legal Experts Meeting on the Question of the Establishment of an African Court on Human and Peoples' Rights, 6–12 September 1995, Cape Town, South Africa, Report, OAU/LEG/EXP/HPR(I); (1996) 8 *AJICL* 493–500; Second Government Legal Experts Meeting on the Establishment of an African Court on Human and

When investigating communications under the Charter the African Commission will visit not just those specific parties to the case, but a wider range of interested persons and groups as well. On the mission to Senegal, the African Commission met members of the government and army, regional governors, as well as leaders of the rebel movement, bishops and members of the clergy.[172] In addition, on the mission to Mauritania the African Commission met government ministers and officials, a member of the university, NGOs, members of the Bar, media, widows, detainees and victims.[173] This was the case even though communications had not been submitted by some of these groups.

The African Commission has thus shown elements of attempting to reconcile not just the parties to the case but the wider community as well:

> The Commission deplores all the tragic events that have occurred in Mauritania and their consequences. It recommends that all might be implemented so that the effects of these events might be repaired with a view to the reconciliation of all elements of the Mauritanian society.[174]

This community focus is said to be crucial to a society which is not based on centralised power.[175] So, "where there is no State organisation to remind him that he is a 'citizen', the individual's membership of subgroups within the community becomes especially important to him. For it is on their help and support that he will call when he is in need".[176] As a result:

> when an individual is involved in a dispute with other members of his group, it will normally be settled within the group without any appeal to outside agencies. A wrong done by one member of the kin against another will be settled by the senior members of the group . . . For the ultimate sanction for behaviour which is disruptive of the group is expulsion.[177]

(b) The Notion of a General Interest

There is evidence from the European system that an amicable settlement must not just resolve the conflict between the particular parties to the case, but should be for the "general interest", although there are a few cases where a wider perspective does not appear to have been taken in the European system.[178]

Peoples' Rights, 11–14 April 1997, Nouakchott, Mauritania, Report, OAU/LEG/EXP/ACHPR/RPT(2); (1997) 2 *AJICL* 423–39; *Report of the Experts' Meeting, Third Government Legal Experts Meeting (Enlarged to include Diplomats) on the Establishment of the African Court on Human and Peoples' Rights, 8–11 December 1997, Addis Ababa, Ethiopia*, OAU/LEG/EXP/AFCHPR/RPT.(III) Rev.1.

[172] *Report on Mission of Good Offices to Senegal*, above n. 29.

[173] *Report of the Mission to Mauritania*, above n. 129.

[174] *Ibid*., Conclusions, para. 3.

[175] Stein, above n. 21 at 3 contrasts the "classical model" of legal process with "dispute settlement in Stateless societies".

[176] *Ibid*., 4.

[177] *Ibid*.

[178] The case of *Karnell and Hardt* v. *Sweden*, App. No. 4733/71, (1971) 14 Yearbook 676 concerned violations of Art. 2 of the First Protocol to the ECHR and "was settled to the satisfaction of the complainants. The ambit of the Art. was not clarified": Jacobs and White, above n. 10 at 377.

It appears in general, however, that where amicable resolutions are reached, the African Commission has used the satisfaction of the specific complainant with the settlement as a yardstick to measure the suitability of the settlement,[179] in contrast to the European system which goes "beyond the interest of the individual applicant".[180]

However, although the African Commission has not mentioned a "general interest", it has required that settlements reached, including amicable resolutions, be compatible with the provisions of the Charter.[181] This condition infers that the solution has a wider application than just to the parties to the present case.[182] However, it is not clear whether the African Commission has rejected any proposed settlements on the basis that they do not fulfil this requirement.[183]

[179] "On 1 March 1995, the Secretariat informed the complainant that the Commission takes note of the release of Mr. Mazou. The complainant was advised to inform the Commission whether or not his release was satisfactory reparation for Mr. Mazou no later than July 1, 1995. On 8 June 1995, a fax was received from the complainant stating that although the victim, Mr. Abdoulaye Mazou, had been released he had not been reinstated in his position as a magistrate, to which he is legally entitled. At the 19th session, in March 1996, the communication was declared admissible. The parties were notified of this decision": No. 39/90, *Annette Pagnoule* v. *Cameroon*. The African Commission remains open if the situation is not acceptable to the complainant: "[t]he Commission received a letter from the Attorney General's Chambers and Ministry of Justice of The Gambia, conceding that the grievances expressed by the complainants are valid and logical, and that the present electoral law is being reviewed with the objective of curing the present anomalies. On 20 December 1995, the complainant was informed of this response with the specification that if the Secretariat does not receive arguments to the contrary before the 1 February 1996, the Commission would consider the communication to have been resolved amicably": No. 44/90, *Peoples' Democratic Organisation for Independence and Socialism* v. *The Gambia*. "The communication . . . complained of being arbitrarily detained for two years . . . Notices of hearing were sent to the parties but only the representative of the government of Benin appeared. The government representative was duly given the opportunity to present his case at the end of which the Commission after due consideration decided that the government of Benin had settled the complainant's claim administratively. This decision was communicated to the complaints and in the absence of response the Commission confirms its decision": No. 16/88, 17/88 (joined), above Comité Culturel par la Démocratie au Bénin, *Badjogoume Hilaire, El Hadj Boubacar Diawara* v. *Bénin* at para. 3.

[180] See Jacobs and White, above n. 10 at 375.

[181] E.g. "The Commission . . . Takes note of the granting of Botswana citizenship to Mr. Modise; calls upon the Government of Botswana to continue with its efforts to amicably resolve this communication in compliance with national laws and with the provisions of the African Charter on Human and Peoples' Rights", No. 97/93, above n. 86. "The Commission . . . Appeals to the government of Sudan to support negotiations for a settlement to the conflict and ensure that any agreement includes strong guarantees for the protection of human rights", Resolution on Sudan, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–95, ACHPR/RPT/8th, Annex VIII at para. 6. Also, "the Commission rejoices in the total willingness of the Mauritanian government to cooperate with it in conformity with the principles of the African Charter on Human and Peoples' Rights", *Report of the Mission to Mauritania*, above n. 129, Conclusions, para. 1.

[182] Kruger and Norgaard, above n. 124 at 332 state that the "legal basis for the [previous European] Commission's jurisdiction in this context [in the general interest] is the requirement in Article 38(1)b that the settlement must have been secured 'on the basis of respect for Human Rights as defined in this Convention' ". "It follows that such a settlement must not only be acceptable to the parties; it must also satisfy this requirement in the opinion of the Commission", Jacobs and White, above n. 10 at 373.

[183] Kruger and Norgaard, above n. 124 at 332, state in relation to the previous European Commission of Human Rights that "it is obvious that where the settlement has been secured in collaboration with the Commission, no problem would normally arise. Here the Commission will have

Under the previous provisions of the ECHR, "Article 28(1), the applicant may be the victim of a law or administrative practice which the Commission considers, at least provisionally, incompatible with the Convention. In such a case a settlement by way of compensation to the applicant, even if acceptable to them, would not satisfy the requirements of Article 28; only a change in the law or practice concerned would meet the general interest".[184] In this respect, the organ may in fact need to take a decision on the violations of the Charter. As Jacobs and White point out "it may be necessary for the [European] Commission to form a provisional view of the merits of the case before friendly settlement discussions can usefully start".[185] For example, in Application No. 1727/62, *Boeckmans* v. *Belgium*[186] "there appears to be no question of a general law or practice being inconsistent with the Convention; it was a complaint concerning an isolated incident"[187] and related to remarks made on an appeal case by one of the judges. The government paid the complainant money. In addition, the settlement reached in *Knechtl* v. *United Kingdom*[188] which dealt with the system of granting the right of access to courts while in detention in relation to Article 6(1) of the European Convention, required that the system was modified and this was approved by the European Commission of Human Rights.[189]

The African Commission's approach, in contrast, is not consistent, in some cases finding violations and calling for wider action to be taken,[190] in others only calling for the situation to be remedied in the case of that particular victim,[191] in others making no comment on the action required at all.[192]

defended the general interest at an early stage, making it a feature of the settlement negotiations from the very beginning. It is not so obvious where the parties have negotiated the settlement themselves . . . It goes without saying that there are cases where no general interest exists or where provision is made for it elsewhere, for instance in a parallel case which is still pending."

[184] Jacobs and White, above n. 10 at 373–4.

[185] *Ibid*., 374.

[186] (1961) 4 Yearbook 370, Jacobs and White, aboven. 10 at 374–5.

[187] *Ibid*., 374.

[188] Above n. 13.

[189] See Jacobs and White, above n. 10 at 376.

[190] E.g. in No. 101/93, above n. 143, the Commission stated that "the Decree should therefore be annulled". In No. 27/89, 46/91, 49/91, 99/93 (joined), above n. 143, finding serious and massive violations of the Charter, the Commission urged "the government of Rwanda to adopt measures in conformity with this decision".

[191] E.g. although violations were found of Art. 7 in Nos. 60/91, above n. 143, and No. 87/93, above n. 127, the Commission called for the government to free the complainants. In addition, in No. 39/90, above n. 179, the Commission recommended, after finding violations of Arts. 6, 7 and 15, that the government "draw all the necessary legal conclusions to reinstate the victim in his rights".

[192] E.g. serious or massive violations were found in Nos. 25/89, 47/90, 56/91, 100/93 (joined), above n. 25, but no express requirements were made. Noting that the government had accepted the complaint's allegations and had stated its "determination to review the current electoral law, in order to ensure that elections are regular, free and fair", the Commission held that the case had "reached an amicable resolution": No. 44/90, above n. 179.

(c) Withdrawal and Closure of the Case

Where the complainant withdraws his or her case, the European Court of Human Rights will still consider the "general interest".[193] Thus, the previous European Commission struck out a case "where the circumstances lead to the conclusion that the applicant does not intend to pursue the application, or the matter has been resolved, or for some other reason further examination of the matter is no longer justified, at the same time the Commission must have regard to the requirement that human rights be respected".[194]

In contrast, the African Commission does not seem to take any wider interest into account in such circumstances. The fact that the African Commission does not feel the need to continue with cases once withdrawn by the complainant,[195] could suggest that it is not concerned with the broader issues, punishing the state for violations that may have occurred, or finding judicially against it.[196]

D. EFFECTIVENESS

1. Introduction

Some have argued that an amicable approach is less effective than a judicial procedure in the protection of rights.[197] As a result, the lack of a Court in the presumed amicable African procedure thus renders it an incomplete system.[198]

Contrary to this argument, however, it appears from the above discussion that both the "successful" (European) and "unsuccessful" (African) systems

[193] As was stated in relation to the previous European Commission of Human Rights: "In some cases applicants may lose interest in their applications and not respond to letters from the [European] Commission. If repeated efforts fail to secure any response, the Commission will use its power in Article 30(1)a to strike the case from its list, though it can easily be reinstated if subsequently the applicant makes contact with the Commission": Jacobs and White, above n. 10 at 378.

[194] "Where applicants consider that their interests have been fully satisfied, they may seek to withdraw their application. Before accepting such withdrawal, the Commission will consider whether the general interest is satisfied by the outcome of the case; only then will it strike the case off its list": *Rebitzer* v. *Austria*, App. No. 3245/67, (1971) 14 Yearbook 160; see Jacobs and White, above n. 10 at 377.

[195] E.g. No. 93/93, *International Pen* v. *Ghana*, alleging denial of freedom of expression.

[196] "Communication on alleged false imprisonment . . . Following the withdrawal of the communication following the release or the death of the prisoner concerned, the Commission closes the case, Art. 56, Rule 114": No. 55/91, *International Pen* v. *Chad*. Alternatively, this could be a way in which the Commission copes with an impossible workload, given its resource and staff constraints, see Chap. 2.

[197] It has been pointed out by one commissioner in his academic capacity, "it is . . . doubtful whether traditional reconciliatory methods can be a substitute for modern judicial settlement": U. O. Umozurike, "The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights" (1988) 1 *African Journal of International Law* 65 at 92.

[198] Chinkin, above n. 126 at 10, notes "an 'obsessive concentration' upon international dispute resolution processes that obscures the continuance of real substantive conflict. It is easier to insert a dispute resolution provision into a treaty than to reach agreement over the substantive issues involved but its inclusion creates the illusion of agreement".

include both "amicable" and "judicial" features. As a result, it would seem inappropriate to continue to measure the effectiveness of the organ in terms of its "amicability" or "judicial" nature. What is more pertinent, however, in an analysis of effectiveness, is not only the context in which the methods are to be adopted, but also the voluntary consent of the states to comply with their obligations, and the respect accorded to the international body itself.

2. Consent of the State

The protection accorded by a legally binding decision is little different from a recommendation reached in an amicable resolution if the state decides to ignore it. Thus, both judicial and amicable resolutions are dependant on the will of the states. The importance of consent has been recognised by the African Commission[199] and pointed out by judicial organs. For example, the International Court of Justice faces problems where the defendant state does not appear,[200] thus presenting "difficulties in ensuring that the Court has all of the evidence it needs in order to decide a case".[201]

The criticism that an amicable settlement, unlike the judicial one, relies too much on parties' consent to be enforced[202] does not stand, when one considers

[199] "The protective activities of the Commission are predicated on the ascertainment of facts and the making of recommendations . . . In the absence of replies to inquiries from States or from complainants, the Commission is incapacitated in ascertaining the facts": Submission of the 4th Activity Report by the Chairman of the Commission, above n. 134. In addition, "[o]n-site visits can only take place with the agreement of the governments concerned": *Report on Extrajudicial, Summary or Arbitrary Executions*, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–97, ACHPR/RPT/10th, Annex VI.

[200] See Harris, above n. 2 at 988, Iceland did not come in the *Fisheries Jurisdiction* cases [1974] ICJ Reports 3, 47, 56–8, 81–8, 119–20, 135 and 161, 55 ILR 238; and the defendant State did not appear in the *Nuclear Test* cases [1974] ICJ Reports 253, 58 ILR 350; *Pakistani Prisoners of War* case [1973] ICJ Reports 328, 57 ILR 606; *Aegean Sea Continental Shelf* case, above n. 29; *US Diplomatic and Consular Staff in Teheran* case [1980] ICJ Reports 3, 61 ILR 502. See M. Shaw, *International Law* (Grotius, Cambridge, 1998), 768–9; G. G. Fitzmaurice, "The Problem of the 'Non-Appearing' Defendant Government" (1980) 51 *BYIL* 89.

[201] *Ibid*. Harris notes at 988–9 that judgments have not been respected and orders for interim measures not followed. The *Case Concerning East Timor (Portugal* v. *Austria)*, Judgment of 30 June 1995 [1995] ICJ Reports 90, restates this principle of consent where the ICJ held, at 102, that "Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the 'well established principle of international law embodied in the Court's Statute, namely that the Court can only exercise jurisdiction over a State with its consent' . . . it cannot, in this case, exercise the jurisdiction . . . because in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent". This was even if the rights in question were *erga omnes*. See also *Monetary Gold Removed from Rome in 1943* case [1954] ICJ Reports, 32.

[202] It is hoped that the proposed African Court will solve all the problems; "the Africa-wide system rests on shaky foundations. The Commission has generally proved unable to act as a strong guardian of human and peoples' rights. Consequently, continued opposition to a court could no longer be credibly maintained as compatible with respect for human and peoples' rights": Naldi and Maglieveras, above n. 1 at 945.

that both can be ignored by the state if it so wishes. In the European system, although states are more responsive to the decisions of the Court, it is not unknown for them to comply only with the minimum necessary.[203] Thus, it is not the binding or legal nature of the decisions *per se* which renders them effective in ensuring compliance, but the political force with which they are endowed.[204] This has been recognised by one African commissioner:

> I was trying to suggest . . . that our conclusions should take the form of recommendations . . . We felt that approach of the bureau of the Commission should be done in a diplomatic manner. We cannot set strict rules to say if a State does not cooperate we must do this and that, we have to be very careful with how we proceed, to be diplomatic and tactful, and this will be the responsibility of the team in place . . . generally diplomats do not use law to solve their problems.[205]

The African Commission has no powers of coercion, but then neither have other international instruments which provide for courts,[206] such that "voluntary cooperation in the implementation of the [European] Convention is the surest guarantee of its success. Compliance might be less likely, more difficult to ensure, and less effective, where a final decision on the question of violation is necessary".[207] In this respect, an (amicable) settlement which has been concluded among the parties themselves, is less likely to fail in being enforced; no agreement would have been reached otherwise.[208]

[203] E.g. see S. Farran, *The UK Before the European Court of Human Rights. Case Law and Commentary* (Blackstone Press, London, 1996).

[204] In relation to the UN Human Rights Committee whose 'final views' are not technically legally binding: McGoldrick, above n. 15 at 203 has noted certain cases which indicate that such decisions "can be influential and given effect to", namely, *Lovelace* v. *Canada*, UN Doc. CCPR/C/DR(XII)/R6/24 (31 July 1983), (1981) 2 *HRLJ* 158, in which "there is at least a strong element of respect and cooperation with the HRC".

[205] 21st Session Transcripts, 60–1.

[206] "Submission to the jurisdiction of international courts . . . , universal or regional institutions, still depends on the voluntary cooperation of both parties . . . the importance and effectiveness of the judiciary have always been an indicator of the degree of integration reached by a social community . . . the jurisdiction of all international tribunals is still based on the voluntary submission of the parties. International judicial bodies derive their jurisdiction from treaties between States . . . The only modest contribution which the international judiciary can make by its own efforts to reduce the disastrous consequence of unsettled disputes to international cooperation, solidarity and peace, has been, and remains still today the attempt to extend the attractiveness of judicial settlement through inspiring confidence in the objectivity and the high juridical quality of its judgments and in its accelerated procedure": H. Mosler, "Political and Justiciable Legal Disputes: A Revival of An Old Controversy" in B. Cheng and E. D. Brown, *Contemporary Problems in International Law. Essays in Honour of Georg Schwarsenberger on his 80th Birthday* (Stevens and Sons Ltd., London, 1988), 216–30, at 220.

[207] *Ibid*.

[208] "The parties have been engaged for some time in difficult negotiations and it is simply not realistic to suppose that they might not fulfil their obligation . . . So in practice, the issue of how friendly settlements are to be supervised is a non-issue and need not concern us further": Kruger and Norgaard, above n. 124 at 333.

The emphasis in all international instruments is thus on the states to ensure that they carry out their own obligations.[209] This relies on the good faith of governments[210] and, as the African Commission has noted, states are not willing to complying with its decisions, even where it has made clear demands of the action required:

> Only five States have so far responded to communications on alleged breaches and only two have cooperated in releasing the detained persons that were the subject of communications.[211]

The effectiveness of the systems appear to be reliant on political force.[212]

3. Status of the International Organ

Also relevant is the respect accorded to the international body which delivers the decisions. In this regard, it is generally presumed that a judicial organ will engender more respect than an amicable one, "in essence all the international procedures concerned with protection of human rights in emergencies . . . are simply fact-finding mechanisms, because of the lack of direct enforcement . . . The most the implementation bodies can do is to adopt a scrupulous judicial attitude that will influence world opinion by its objectivity and thoroughness".[213] It thus appears that a non-court body will engender respect if it portrays "judicial" features.[214]

[209] "It would indeed be possible to argue that the friendly settlement and other informal solutions of the same type, represent a significant contribution which the [European] Convention can make to the securing of human rights . . . But from the point of view of the operation of the human rights system, also, there are advantages in securing the cooperation of governments in working voluntarily to achieve the standards of the Convention, and where necessary amending their existing law or practice, rather than awaiting a formal finding on the question of the violation": Jacobs and White, above n. 10 at 378.

[210] State reporting "is one area where the response has not been very encouraging. Many more States have not submitted their reports than those who have": 22nd Session Transcripts, 1.

[211] Submission of the 4th Activity Report by the Chairman of the Commission, above n. 134.

[212] As noted by the African Commission, "[t]aking note of the readiness and will of the Nigerian government's cooperation, the Commission decided to ask the current President of the OAU and the Secretary General to express to the Nigerian Authorities that no irreparable prejudice is caused to the nineteen Ogoni detainees whose trial is pending": Final Communiqué of the Second Extraordinary Session, above n. 52 at para. 17.1.

[213] L. Hartman, "Derogation from Human Rights Treaties in Public Emergencies" (1981) 22 *Harvard International Law Journal* 1, at 49.

[214] As has been stated in relation to the UN Human Rights Committee, "legally, the views formulated by the Human Rights Committee are not binding on the State party concerned which remains free to criticize them . . . The views of the Human Rights Committee gain their authority from their inner qualities of impartiality, objectiveness and soberness. If such requirements are met, the views of the Human Rights Committee can have a far-reaching impact, at least *vis-à-vis* such Governments which have not outrightly broken with the international community and ceased to care anymore for concern expressed by international bodies. If such a situation arose, however, even a legally binding decision would not be likely to be respected": Prof. Tomuschat, quoted in McGoldrick, above n. 15 at 151–2.

The African Commission does not appear to have gained this respect from either governments or other actors. This may relate to its attachment to the much-criticised OAU. For example, the Nigerian government criticised the African Commission for not conducting its proceedings in the appropriate judicial form. It argued that it had not been accorded a "fair hearing" and that "the requirements of due process were violated by the fact that the African Commission's decisions were taken without the Nigerian government ever appearing to state its case [and] in no legal tradition may an adverse finding be made against a party which has not had an opportunity to state its case".[215]

However, the very features of the "judicial" strategy which are often praised may actually deter some states from submitting their matters to objective and thus unpredictable arbitration.[216] Thus, where states are still protective of their national sovereignty, as many in Africa are, a more "amicable" and flexible procedure could be more effective.[217]

It is necessary to move away from a consideration of the international organ in terms of its "amicable" or "judicial" nature, and towards identifying the combination of specific methods and approaches which render it most effective.[218] In addition, the success or effectiveness of an international organ and its procedures is not based on any objective standard. Effectiveness is measured subjectively, based not only on the above factors, but also the context in which issues arise.

Until the body obtains some respect, however, it is likely to suffer from the existence of the opposing dichotomy which fails to see the advantages of an amicable procedure. Any conclusions that the body reaches will fail to gain the respect required, being assessed on "judicial" terms. As a result, any pressure that the status of the international organ could impose is diminished, thus depriving the victim of protection and avoiding the deterrent effect that may prevent others from falling victims in the future.[219]

[215] *Account of Internal Legislation*, above n. 34 at 5. See previously, C.1.b.

[216] Davidson, above n. 9 at 196, says that the Inter-American Court "suffers from another kind of resistance, and this is the resistance which is demonstrated towards the International Court of Justice also, namely, the unwillingness of States to submit legal issues to international adjudication . . . the problem may be attributed predominantly to the reluctance of States to consign matters of national interest to the hands of international judges whose decisions might not be predictable".

[217] "If government reluctance to make a commitment to effective human rights enforcement is an insuperable barrier to a rigorous interpretation of the derogation articles, it would be preferable simply to abandon the treaties and attempt to deal with major violators through *ad hoc* procedures or diplomatic pressures by concerned States": Hartman, above n. 213 at 52.

[218] It has been stated that if the amicable procedure available through the Inter-American Commission were omitted, this "might [*inter alia*] damage the institutional integrity of the Convention system": Davidson, above n. 9 at 200. This infers that a system for the protection of human rights will not be effective without a mixture of amicable and judicial procedures.

[219] The African Commission recognised in its *Eleventh Activity Report of the African Commission on Human and Peoples' Rights*, 1997–98, ACHPR/RPT/11th, CM/2084(LXVIII) at para. 34, that non-respect by states of its functioning affected its credibility. In addition, in its document on *Non-Compliance*, above n. 80, at para. 2 the Commission stated that non-compliance with its decisions was a "major factor in erosion of its credibility".

E. THE RELATIONSHIP BETWEEN AMICABLE AND JUDICIAL: OPPOSING DICHOTOMIES

1. Introduction

The treatment of amicable and judicial settlements as separate procedures has resulted not only in a lack of understanding of the merits of the amicable solution and a neglect of a consideration of the relationship between them, but could also be exploited by states eager to evade their international obligations. For example, the Nigerian state has criticised the African Commission on the one hand, for acting in a "judicial" manner[220] and objected to its failure to adopt "judicial" approaches, such as due process, on the other.[221]

As seen above, the African Commission, as do other international organs, employs elements of both "amicable" and "judicial" procedures.[222]

The relationship between the two approaches is particularly relevant to the African system at present, given the recent establishment of an African Court, and its relationship with the existing African Commission. The fact that this latter relationship is still not settled[223] is perhaps indicative of the unclear relationship between amicable and judicial resolution generally. In some situations amicable and judicial approaches are seen as mutually exclusive; in

[220] ". . . [T]he Commission has acted in a 'judicial role in pronouncing of the validity of domestic laws and interpreting various provisions of the Charter' ", *Account of Internal Legislation*, above n. 34 at 6. See part C.1c above.

[221] See Part C.1c, above.

[222] The Inter-American system offers interesting parallels in relation to the differences between its Court's advisory and contentious jurisdiction. In its *Advisory Opinion* the Inter-American Court held that "the line which divides the advisory jurisdiction from the contentious jurisdiction of international tribunals has often been the subject of heated debate. On the international law plane, States have voiced reservations and at times even opposition to the exercise of the advisory jurisdiction in certain specific cases on the ground that it served as a method for evading the application of the principle requiring the consent of all States parties to a legal dispute before judicial proceedings to adjudicate it may be instituted": Inter-American Court of Human Rights, "*Other Treaties" Subject to the Advisory Jurisdiction of the Court*, Art. 64 ACHR, Advisory Opinion OC–1/82 of 24 Sept. 1982, Series A and B, No. 2, at para. 21. Furthermore, at para. 24, "special problems arise in the human rights arena. Since it is the purpose of the human rights treaties to guarantee the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between States, the fear has been expressed that the exercise of the Court's advisory jurisdiction might be taken to be its contentious jurisdiction or worse still, that it might undermine the purpose of the latter, thus changing the system of protection provided for in the Convention to the detriment of the victim. That is . . . the Court's advisory jurisdiction might be invoked by States for the specific purpose of impairing the effectiveness of the proceedings in a case being dealt with by the Commission 'to avoid having to accept the contentious jurisdiction of the Court and the binding character of the Court's decision'."

[223] It has been pointed out that the although the (Addis) Protocol, above n. 43, gives the Court powers to give advisory opinions, under Art. 4, this conflicts with the Commission's current ability to interpret the Charter in Art. 45(3). As one commissioner has stated, the two organs "should not contradict each other or impinge on the work of each other", 22nd Session Transcripts, 3–4. See Chap. 2.

other circumstances the two methods are seen as able to exist in the same procedure.[224]

One way in which the relationship between them could be better understood is to consider the situations in which one may be more appropriate than the other. A number of examples can be given.

(a) Preventative

It has been noted that in some situations amicable methods should be used for preventive purposes and judicial procedures would be better suited to dealing with the situation after violations have occurred.[225] In situations of emergency members of the African Commission have noted their lack of effectiveness, being only able to intervene after, and not prior to, the incident:

> The observation often made, in this context is that the Commission's intervention is always *a posteriori* in relation to the event, notably when it involves situations comparable to real human catastrophes.[226]

(b) The Procedure Depends on the Rights Involved

The procedure adopted may vary depending on the rights involved. It has been mentioned in relation to the Inter-American system that resolution of disputes involving disappearances are not conducive to an amicable settlement[227] but rather a judicial approach would be more appropriate.[228] In addition, the Inter-American Commission has also held that "the questions that gave rise to the complaint: the irrecoverable right to life and the irreversible absolution of the

[224] "Different opinions were expressed on the relationship between non-compliance and dispute settlement. Many experts saw no problem in their parallel existence and thought parties could have the option to exercise either one": Koskonniemi, above n. 163 at 131. It has been noted that "far from minimizing the role of law in the settlement of disputes, [conciliation] may enhance it": D. Bowett, "Contemporary Developments in Legal Techniques. Conciliation: Its Relation to the Law and Legal Process" (1983) 180 *Hague Recueil* 185–90, at 187.

[225] E.g. "I assume that the main element which made the Compliance Regime under the Montreal Protocol not only successful and recognised, but also being considered as the perfect example for other environmental treaties, is mainly its preventive character and the readiness to assist rather than to sanction a Party which is considered not to comply with the provisions of the Protocol": I. Rummel-Bulska, *Administrative and Expert Monitoring of International Legal Norms* (New York University Press, New York, 1996), at 2. In addition, "litigation is geared to remedying the injustices of the past and present rather than to planning for some change to occur in the future. The very notion of planning is alien to adjudication": Bacow and Wheeler, above n. 70 at 16.

[226] The Commission was referring here to adopting resolutions on the general situations in states, K. Rezzag-Bara, *The African Charter on Human and Peoples' Rights 10 Years After its coming into force: Challenges and Prospects*, on file with the author.

[227] *Velasquez Rodriguez*, above n. 24 at paras. 44–6; see Davidson, above Chap. 4.B n. 81 at 202. In addition, see *Godínez Cruz*, above n. 27 at para. 45, where the Court held, "when the forced disappearance of a person at the hands of a State's authorities is reported and that State denies that such acts have taken place, it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment and to personal liberty".

[228] *Velasquez Rodriguez*, above n. 24. See also Davidson, above n. 9 at 202.

responsible parties in the face of evidence that forever denies the victims and their families the right to justice are not easily amenable to settlement by friendly solution".[229]

It has been suggested that where a solution can be reached with the "mere payment of a sum of money as opposed to, for instance, a change in an administrative practice or even legislative reform" then an amicable settlement may be more likely.[230]

(c) Serious or Massive Violations

An amicable method seems to have been favoured in dealing with serious or massive violations of human and peoples' rights.[231] As was pointed out by one member of the African Commission:

> we all know that a court usually deals with individual complaints. So how [is] the Court, which is being considered now, . . . going to look at the situation of cases of serious and systematic violations of human rights . . . from a legal and technical point of view.[232]

This separation into dealing with individual cases through a "judicial" approach and situational and serious violations through an "amicable"/political settlement, has also been implied by Egypt in its reservation to the Charter.[233]

Although the African Commission has suggested that in urgent circumstances it would be better using a "political" rather than a "judicial" approach,[234] it has noted its inability to deal with certain situations:

> Experience has shown that the Commission is often powerless when faced with cases of massive and serious violations of human rights which require a rapid intervention.

[229] *Report no. 15/95 on Case 11.010 against Colombia of 13 September 1995*, Annual Report of the Inter-American Commission on Human Rights, 1995, OEA/ser.L/V/11/91, doc.7 rev.

[230] See Kruger and Norgaard, above n. 124 at 330. In relation to the European system, there have been settlements where the government has amended legislation or administrative practices, e.g. *Peschke* v. *Austria*, 25 DR 182; *Reed* v. *United Kingdom* App. No. 7630/76 (1981) 3 EHRR 136.

[231] E.g. Ramcharan, above n. 5.

[232] 22nd Session Transcripts, 3–4. The Draft (Nouakchott) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Nouakchott, 1997, OAU/LEG/EXP/AFCHPR/PROT(2), referred only to the Court considering cases directly from individuals or NGOs if systematic, serious or massive violations had occurred. This was amended by the adopted Protocol.

[233] "As regards Article 6, the representative of Egypt based his reservation on two grounds, namely, the operation of the proposed Court should be rooted in an efficient Commission which therefore meant that the Commission should be bypassed by the Court. Furthermore, granting exceptional jurisdiction to the Court would risk opening a wider discussion on the interpretation of Article 55 of the Charter which, so far, had been interpreted by the Commission as allowing individual complaints and not just "situation" complaints": Government Legal Experts' Meeting on the Question of the Establishment of an African Court, above n. 171 at para. 23.

[234] "Communication on alleged wrongful detentions and denial of rights . . . The Commission finds that the State is in breach of Articles 4, 5 and 7 of the African Charter and decides to refer the situation to the Assembly of Heads of State and Government under Article 58(1)": No. 64/92, 68/92 and 78/92 (joined), above n. 41 at para. 38.

> Currently the Commission has neither the means nor any power under its rules to deal with such situations. This adversely affects the Commission's credibility and efficiency.[235]

In this event, it has noted that procedures available in the present international legal system may not be adequate or appropriate:

> Professor Nguema expressed that in order to resolve the crises in Africa new institutional structures should be established taking into account the present situation in Africa and the aspirations of the African people.[236]

Such a division between serious situations and individual cases, as well as between amicable and judicial, does not appear to be helpful in approaching the debate.

In addition, all of the above approaches still deal with the situations on the basis of the dichotomy between amicable and judicial procedures. An alternative view would be to see them as elements of the same system.

2. Amicable Resolutions as Part of a Wider Judicial Mechanism

It is often considered that recourse to a legal procedure, such as a court, is a last resort after attempts at amicable resolution have failed,[237] "as in municipal law, litigation in international law is very much a matter of last resort".[238]

[235] *Mauritius Plan of Action*, above n. 26 at paras. 41 and 42. In its nine point plan the Commission suggested that in the event of emergencies an urgent response would require it, among other things, to "act promptly", visit the country in question "make diplomatic approaches", "compile an appropriate report", "organise focal points", "collect information" and report the situation to the AHSG, *Mechanisms for Urgent Response to Human Rights Emergencies*, above n. 66.

[236] Final Communiqué of the 16th Ordinary Session, above Chap. 4.B n. 60 at para. 8.

[237] The International Convention on the Law of the Sea, e.g., allows for judicial or arbitration settlement of disputes if conciliation, etc. is not successful. "Use of the formal law is the culmination of the enforcement process in pollution control": K. Hawkins, *Environment and Enforcement. Regulation and the Social Definition of Pollution* (Clarendon Press, Oxford, 1984), at 177. "In a compliance system organizational outputs are vague and resist quantification and promotion is not contingent upon a display of successful enforcement . . . Law is familiar only as the backdrop against which all the field officer's activities are organized: the foundation of his authority and ultimate source of coercion over an unwilling polluter where gentler and more discreet forms of social control have failed": *ibid*., 178. Furthermore, "[t]he use of prosecution in a compliance system signals the collapse of a conciliatory approach . . . It is at once an admission that the strategy has broken down, a betrayal of the personal failure of their negotiating skills and a suggestion that a compliance strategy may have been based on faulty premises . . . the culmination of an approach based on incremental enforcement, is reached when dealing with persistent problems and that agency has to display its authority": *ibid*., 179. In addition, "[m]y intention has been to portray the formal process of prosecution as a kind of . . . shadowy entity lurking off-stage, often invoked, however, discreetly yet rarely revealed", *ibid*, p. 191. In addition, at *ibid*., 199–200, " '[w]e've tried everything with them: negotiation, discussion, etc. When we take them to court, it's like saying all the other methods have failed'. In these cases field staff have nothing more to lose. Where too ready a resort to the law would once have been counter-productive, the deviant now presents himself in a way recognisable to himself and others as deserving of legal sanction for his obduracy."

[238] Harris, above n. 2 at 985.

In the *Godínez Cruz* case, the Inter-American Court held "the procedures set forth in Articles 48 to 50 of the [American] Convention must be exhausted before an application can be filed with the Court. The purpose is to seek a solution acceptable to all parties before having recourse to a judicial body. Thus, the parties have an opportunity to resolve the conflict in a manner respecting the human rights recognised by the Convention before the application is filed with the Court and decided in a manner that does not require the consent of the parties".[239]

In this respect, both the ECHR and the ACHR "create a procedural first stage involving organs with functions of mediation and conciliation . . . and a possible second stage involving judicial organs".[240] It has been said that "these examples locate settlement within an institutional context that might resemble a return to the conception of such processes outside their *ad hoc*, one-off use in particular disputes, but now not an independent dispute resolution institution, but a bureaucratised body integral to the regulatory regime".[241] Protocol 11 to the ECHR introduced changes which also imply that an amicable method is part of a larger judicial process.[242]

The African Commission's approach could be seen as following the same line where it has held that although "the main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the State concerned, which remedies the prejudice complained of. A pre-requisite for amicable remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue".[243] Where the government does not respond to such requests, the African Commission will continue to take a decision on the merits.[244] Thus, it is assumed that the threat of adversarial procedures may induce parties to comply, "the two regimes complement each other: respect for the requirement of a non-compliance regime is strengthened by the knowledge that a dispute settlement procedure is waiting in the wings

[239] *Godínez Cruz*, above n. 27 at para. 58.

[240] Originally under both systems the applications or petitions, whether from states or individuals, "must always be referred in the first place to the Commission", UN, *Handbook on the Peaceful Settlement of Disputes between States* (United Nations, New York, 1992), at para. 259.

[241] Chinkin, above n. 126 at 5.

[242] Jacobs and White, above n. 10 at 379.

[243] No. 27/89, 46/91, 49/91, 99/93 (joined), above n. 143; see also No. 74/92, above n. 000.

[244] "In the present case there has been no substantive response from the government, despite the numerous notifications of the communications sent by the African Commission. The African Commission . . . has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given. This principle conforms with . . . the Commission's duty to protect human rights. Since the government of Zaire does not wish to participate in a dialogue, the Commission must, regrettably, continue its consideration of the case on the basis of facts and opinions submitted by the complainants alone": No. 27/89, *ibid*. See Chap. 4.B. above.

ready to be activated if necessary. When working smoothly, a non-compliance regime will be a dispute prevention tool".[245]

International human rights organs have recognised the interdependence of the two approaches. Thus, the Inter-American Court held in one Advisory Opinion that the Inter-American Commission's procedure in contentious proceedings, at least as far as individuals are concerned, "may not be waived by the State party to the proceedings and submitted directly to the Court. The proceedings before the Commission are an integral part of the protective system established by the Convention and must, in the case of petitions, be completed before the Court will exercise its contentious jurisdiction".[246]

In addition, in the *Viviana Gallardo* case which concerned whether the state could bypass the Inter-American Commission to petition the Inter-American Court directly, the latter held that:

> the Convention . . . in addition to giving the Commission . . . a quasi-judicial role . . . gives it other attributes . . . Thus, the Commission has, *inter alia*, the function of investigating allegations of violations of human rights guaranteed by the Convention that must be carried out in all cases that do not concern disputes relating to mere questions of law . . . The Commission also has a conciliatory function empowering it to propose friendly settlements as well as the appropriate recommendations to remedy the violations it has found to exist.[247]

The Inter-American Court felt that it did not have the:

> power to discharge the important function of promoting friendly settlements within a broad conciliatory framework, that the Convention assigns to the Commission precisely because it is not a judicial body. To the individual claimant this process has the advantage of ensuring that the agreement requires his consent to be effective. Any solution that denies access to these procedures before the Commission deprives individuals, especially victims, of the important right to negotiate and accept freely a friendly settlement arrived at with the help of the Commission and on the basis of the human rights recognised in (the) Convention.[248]

A similar decision was reached in the *Godínez Cruz* case.[249] Given the establishment of a Court in the African system, it appears the relationship with the African Commission in this respect has been kept open.[250]

[245] P. Széll, "The Development of Multilateral Mechanisms for Monitoring Compliance" in W. Lang, *Sustainable Development and International Law* (Graham Trotman/Martinus Nijhoff, London, 1995), 97–109, at 107.

[246] Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* [Arts. 13 and 29 American Convention on Human Rights], Advisory Opinion OC–5/85 of 13 November 1985, Series A, No. 5. See also Davidson, above n. 9 at 26.

[247] Inter-American Court of Human Rights, *In the Matter of Viviana Gallardo et al.*, No. 101/81, Series A and B, at para. 22.

[248] *Ibid.*, at para. 24. However, it did emphasise that the main issue was that the Commission was the body through which the individual can activate the international mechanisms: paras. 22–23.

[249] "The procedures of Articles 48 to 50 have a broader objective as regards the international protection of human rights; compliance by the States with their obligations and, more specifically, with their legal obligations to cooperate in the investigation and resolution of the violations of which they

It could be argued that, viewed in this way, where the failure of the amicable settlement leads to a judicial settlement, it is only the negative aspects of the amicable settlement which are emphasised and the positive role that it can play is neglected.

3. "Judicial" Methods as Part of an "Amicable" Process

Alternatively, it may be more profitable to see the court as merely one, albeit important, part of a negotiation process, which aims to reconcile the parties and, consequently, ensure peace in the long term by preventing further violations from occurring. As has been stated in relation to the International Court of Justice:

> the fact that the Court itself if not able to enforce its judgment means that the Court can only play a useful role if the parties themselves are seeking a settlement of the dispute. A cynical observer may regard this as a fact that prevents the Court from playing any meaningful role in the maintenance of peace . . . Submission of a dispute to Court gives the parties an opportunity to settle a dispute they may otherwise be unable to settle . . . Recourse to the Court allows for an authoritative and more palatable vindication of the position of one side over the other . . . The Court can often play a role *within* the negotiation process, either to support negotiations or to inspire the parties to negotiate.[251]

In this respect, the Inter-American Court has held that "the presentation of the case to the Court [by the Commission] implies *ipso jure*, the conclusion of proceedings before the Commission. Nevertheless, a friendly settlement between the parties under the terms of Article 42(2) of the Rules of Procedure could still, if approved by the Court, lead to the striking of the case from the Court's docket and the end of the judicial proceedings".[252]

may be accused. Within this general goal, Article 48(1)f provides for the possibility of a friendly settlement through the good offices of the Commission, while Article 50 stipulates that, if the matter has not been resolved, the Commission shall prepare a report which may, if the Commission so elects, include its recommendations and proposals for the satisfactory resolution of the case . . . the procedure . . . contains a mechanism designed, in stages of increasing intensity, to encourage the State to fulfil its obligation to cooperate in the resolution of the case. The State is thus offered the opportunity to settle the matter before it is brought to the Court, and the petitioner has the chance to obtain an appropriate remedy more quickly and simply": *Godínez Cruz*, above n. 27 at para. 59.

[250] Art. 8 of the (Addis) Protocol, above n. 43, states that the Rules of Procedure of the Court will lay down the conditions under which the Court will consider cases, "bearing in mind the complementarity between the Commission and the Court". See also Chap. 2.E. The Draft (Nouakchott) Protocol, above n. 232 and Draft (Cape Town) Protocol, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Cape Town, 1995, OAU/LEG/EXP/AFC/HPR(I), expressly provided for applications from NGOs and individuals to petition the Court directly, thus by-passing the Commission. This was not expressly stated in the final (Addis) Protocol.

[251] D. Akande, "The Role of the International Court of Justice in the Maintenance of International Peace" (1996) 8 AJICL 592–616, at 610–11.

[252] *Godínez Cruz*, above n. 27 at para. 75.

This may be more realistic given the requirement that national action be taken after the international body has pronounced on the violation. In this sense, the decision of any "judicial" body is only part of a longer procedure of negotiating and settlement between the government and the individual.[253] Indeed it may be more dangerous to see it as the end result, as this would enable international organs to evade follow-up of their decisions. This is something of which the African Commission at present is guilty.

Viewed in this way, a balancing of "amicable" and "judicial" attributes is possible. It should not be necessary to choose one or the other. In this respect, the international organ has the discretion to decide which method may be more likely to be effective at a particular moment.[254]

Although the Inter-American system has a Commission and a Court, with recourse to the latter being possible only after the Commission has been approached, the Commission existed prior to the introduction of a "judicial" body.[255] This suggests that the Inter-American system was less directed towards an ultimate "judicial" goal, the Court playing only one part in a wider process, rather than the deciding role.[256]

A procedure which thus combines the "amicable" and "judicial" elements noted above may prevent artificial distinctions from being made[257] and enable international organs to consider the process as one of on-going negotiation and

[253] Other international instruments require that the decision be passed by the judicial organ to a political body for the supervision of its execution, e.g. the Committee of Ministers under the European mechanism, AA. 46(2) of the ECHR. See H. J. Bartsch, "The Supervisory Functions of the Committee of Ministers under Article 54-A Postscript to Luedicke–Belkacem–Koç in F. Matscher and H. Petzold (eds.), n. 100 above, at 47–54.

[254] E.g. "[h]ighly selective use of the formal processes of law is implicit in regulatory control founded upon compliance since to use prosecution in any but the most serious cases is regarded as counter-productive. Negotiation is the effective way of achieving results . . . The thoroughly pragmatic approach to pollution control work shared by field men is expressed in the primacy accorded to 'getting the job done' through the maintenance of relationships with their client population. The high discretion each officer enjoys is operationally efficient . . . The field man's conception of effective work calls for the active cooperation of those whose behaviour he is regulating, and the cultivation of good relationships eases the task now and in the future": Hawkins, above n. 237 at 198.

[255] See Chap. 2.A.

[256] However, in relation to the ECHR, "under Protocol No. 11, the functions of fact finding in preparation for examining the merits of claims and of securing a friendly settlement will pass to the new permanent Court. It is a reflection of the strengths of friendly settlement that no attempt has been made in the amendments to the Convention secured by Protocol No. 11 to remove this aspect of dispute settlement": Jacobs and White, above n. 10 at 379.

[257] The "legal" and "political" distinction is one example of this approach. Akande, above n. 251 at 597; "the alleged dichotomy between legal and political disputes was the defining intellectual framework in the conception of the international judicial function . . . Though this distinction between justiciable and non-justiciable, legal and political disputes was well accepted by the prevailing doctrine, there were considerable problems in defining which disputes were political and thus excluded from the application of the judicial function . . . Any important dispute or any dispute affecting the vital interests of States was therefore thought unsuitable for judicial settlement. One reason for this position was that it was thought that governments would not be wiling to have important matters determined judicially. It is this view that important disputes are political and therefore non-justiciable that assigns to the judicial function a very small role in the maintenance of international peace": *ibid.*, 593–5.

reconciliation, adopting the most effective method, regardless of its "amicable" or "judicial" nature. Thus, in the *Gallardo* case one judge of the Inter-American Court noted that amicable procedures did not necessarily have to be in the domain of the Commission, the Court being capable of offering such methods as well.[258] The Protocol establishing an African Court provides that the Court itself may try to reach an amicable settlement in a case pending before it.[259]

Indeed, the aim of all settlements, be they "amicable" or "judicial" is the peaceful resolution of disputes.[260] In this respect, reconciliation "is not an 'ultimate almost mystical value' . . . to which legal norms are sacrificed".[261]

A more holistic approach, taking the procedures together as parts of the same system, would enable us to view the issues less in terms of opposing dichotomies, "if human rights analysts rid themselves both of spuriously dichotomous analytical categories and of spurious perceptions of homogeneity, in both 'traditional' and 'modern' . . . 'African' and 'Western' societies, then it will be easier to see both the pertinence of rights for all State societies, and the fact that in all societies some cultural trends . . . militate against rights-protection, while others . . . militate in its favour".[262] Some of the criticisms levelled at the African Commission could thus be explained if its operation were viewed on this basis. This may enable a more constructive and enlightened critical analysis to be conducted.[263]

In relation to the European mechanism it was said, "criticisms have sometimes been expressed of the system of friendly settlement. It may be said, for example, that it introduces an extrajudicial, or even a political element into what should be a purely legal process. The very notion of compromise, implied in the idea of settlement, may seem inconsistent with the concept of human rights. But the formulation of [Article 38(1)b], by requiring that the settlement

[258] "It cannot be disputed that there always exists the possibility, even with the intervention of the Commission, if not as part of, at least parallel to the procedure before the Court, that it also may result in a withdrawal, a friendly settlement or an extra-judicial agreement, with the advantage that it would have to be approved by the jurisdictional organ . . . On the other hand, except for the procedure of conciliation, I believe that nothing that the Commission may be able to do, within the procedures set forth in the Convention . . . the Court itself may not also be able to do during the proceedings": opinion of Judge Piza, *Viviana Gallardo*, above n. 247 at paras. 9 and 10.

[259] In accordance with the provisions of the Charter, (Addis) Protocol, Art. 9, above n. 43.

[260] "The purpose of judicial settlement is the peaceful settlement of disputes", Akande, above n. 251 at 593.

[261] "However, the majority of writers on this topic would appear to start from the assumption that 'judgment by agreement' and 'judgment by decree' are mutually exclusive alternatives. And by concentrating on the conciliatory aspects of African courts, they tend to ignore the judge's task of applying laws": J. van Velsen, "Procedural Informality, Reconciliation and False Comparisons" in M. Gluckman, *Ideas and Procedures in African Customary Law* (International African Institute, Oxford University Press, London, 1969) at 144.

[262] A. An-Na'im and F. Deng (eds.), *Human Rights in Africa: Cross Cultural Perspectives* (Brookings Institute, Washington, DC, 1990), 159–83 at 173.

[263] E.g., as has been said in relation to the UN Human Rights Committee, "it is submitted that to understand the true nature of the HRC it must be recognized that its nature may alter in accordance with its exercise of the various functions and roles it performs or could perform": McGoldrick, above n. 15 at 55.

be based on respect for human rights . . . seem to meet the objections. It may sometimes be possible to criticize a particular settlement, or other form of arrangement, on the basis of its terms. This would be, however, to criticize the working of the system, rather than the system itself. And of course such criticisms may also be made of final decisions or judgments based on purely legal consideration".[264]

4. Conclusion

The aim of any international human rights mechanism is the protection of rights. In this respect, the maintenance of the social equilibrium is essential.[265] This applies to the African as well as other systems.[266]

A better understanding of the relationship between the features of "amicable" and "judicial" mechanisms would enable a more consistent and coherent procedure to be developed. The African mechanism is not fully understood and suffers from criticisms from both sides. It lacks the confidence to be able to consider which action may be more effective. Viewed primarily as an "amicable" body, it also bears the criticism directed towards such non-judicial approaches, which are generally seen as being ineffective. If a comprehension of the usefulness of "amicable" features in certain situations were enhanced, the respect accorded to the African Commission and the mechanism as a whole might be improved. States, in turn, would thus feel greater pressure to comply with the decisions that it produced.

[264] Jacobs and White, above n. 10 at 378. Although, as seen above, it is questioned whether the African system at present neglects issues of wider considerations.

[265] "We may therefore say that the ultimate purpose of law in a society, be it African or European, is to secure order and regularity in the conduct of human affairs and to ensure the stability of the body politic. Where there is a divergence in the approach is that where as African law strives consciously to reconcile the disputants in a law suit, English law tends to limit itself to the bare resolution of the conflict by stopping at the mere apportionment of blame as between the disputants . . . But this is only a matter of emphasis in the judicial mechanism, and the degree to which a society can afford to arbitrate without at the same time feeling the necessity for calling a truce must depend on the extent of the intensity of social relations among its members": Elias, above n. 23 at 268–9.

[266] "Although the maintenance of the social equilibrium is the prime objective of African as indeed of any legal system, its judicial process is not best described as constituting mainly of arbitration, a much misused word in nearly all the contexts in which it is usually applied to African legal procedure", *ibid*., 214. Further, at 268, "the general opinion of writers is that the aim of African law is the maintenance of the social equilibrium. Whilst this is true enough as a statement of principle, the implied suggestion that 'European' law has a different aim is not valid. What African law strives to achieve is the solidarity of all those subject to its sway by repairing, as far as possible, all breaches that tend to disturb society."

7

Conclusion

Given the recurring criticism that international human rights law is Western-biased,[1] the arguments advanced in this book were influenced by feminist ideas to challenge the fundamental concepts on which the subject is based. A feminist critique was useful as it shared the concerns of developing world critics who argued that international law, being created largely by Western governments, was thus based on a Western (male) notion of a state which took a particular view of the developing world (and women) and neglected their experiences. The theory offered a challenge and approach which criticised the dichotomies assumed by international law. The discussions of particular dichotomies in the light of the experience of the African Commission and other international organs revealed that the fundamental concepts on which international law is based may not be appropriate to the African situation, but also to the situation in Europe, the Americas and universally.

Central to the applicability of the present structure of international law is the notion of the state. It has been argued that African states represent a mixture of traditional African structures, emphasising the notion of community, and Western arrangements, where the individual is separated from the state. As a result, the strict divides between opposing dichotomies, for example, the public and private, may not hold. This conclusion potentially undermines the sanctity of other traditional principles of international law where the state is central.

In relation to the notion of personality, the focus should be less on the rights and duties of each entity and its subjective/objective status and more on the varying position it occupies on the international stage in the context of its interdependence with other entities in their common aim towards achieving an international order. The approach of the African Commission specifically, which reflected trends in other international organs, was to recognise the role of not only states, but also individuals, NGOs, peoples and the wider international community in the promotion and protection of human and peoples' rights. In this way, it is more appropriate to consider a community focus at the international level, moving away from an emphasis on individual entities and, in particular, the state and its dominance as a subject of international law, towards a consideration of the community of actors as a whole.[2]

[1] See in general, A. An-Na'im and F. Deng, *Human Rights in Africa: Cross Cultural Perspectives* (Brookings Institute, Washington, DC, 1990).

[2] As Clapham concludes in his study on human rights in the private sphere, "an examination of the public/private issue in the application of the European Convention on Human Rights demonstrates how much the emphasis in international law is geared to actors, in particular State actors, at

Applied to other dichotomies, an analysis of the work of the African Commission and other organs concludes that the dichotomy between war and peace, in terms of the separate laws applicable to each, is neither theoretically necessary nor practically appropriate as humanitarian and human rights law have been shown to be based on similar aims. The African Commission has stated that the protection offered by human rights law should apply at all times: by not permitting derogations from any of the rights in the African Charter during war or other public emergencies, and by refusing to interpret reservations and clawback clauses to limit rights during times of peace.

The clear separation assumed through much of international law and the related literature on the dichotomy between amicable and judicial approaches to the settlement of disputes has also been contested. This questioned the presumption that approaches amicable was synonymous with African and ineffectiveness, and judicial with Western and effectiveness. This has a particular contemporary importance, given that the assumed impotence of the former has been one reason for the moves in the African system to establish a court and in the European mechanism to combine its organs into one judicial body. The dichotomous approach disregards the positive aspects of amicable methods and may deprive systems of opportunities to employ such in appropriate circumstances. Rather than the amicable approach being just an African one, aspects of amicable and judicial methods are evident in all regional and international mechanisms, including those deemed more "effective". Thus, in conclusion it is clear that the success of the organ in the promotion and protection of human rights depends more on its status and the political respect accorded to it, than its amicable or judicial nature. Consequently, a more holistic approach, which combines the relevant aspects of both, is required. What is necessary is an appreciation of the symbiotic relationship between the two methods, with the judicial being part of a wider amicable strategy to the settlement of disputes.

Resort to a mechanism composed solely of judicial methods would be destructive and deprive it of the much needed and more "friendly" techniques. Such an approach would neglect an understanding of the wider picture and the essential consensual nature of the successful settlement of disputes in international law. Indeed, many of the aspects of the African system that have been criticised in the past are now considered as positive, given their appearance in the changes produced by the Eleventh Protocol to the ECHR.[3]

In conclusion, it is thus submitted that international law, as framed at present in terms of opposing dichotomies, contributes to the continued exclusion of many from the debate, not only, but especially, non-Western countries and their experiences. The contribution of the African Commission to the development of

the expense of concern for victims": A. Clapham, *Human Rights in the Private Sphere* (Clarendon, Oxford, 1993) at 356.

[3] Including "the friendly settlement procedure has not been compromised", "the Convention now provides expressly for third party interventions": D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995) at 711–12.

international law is, thus, not to advocate the rejection of the existing system of international law, which would be unrealistic and, to most states, Western and African, undesirable.[4] Yet, the jurisprudence of the African Commission suggests an alternative, holistic perspective. This may be more profitable and realistic than viewing matters as fitting into distinct opposing categories.

The African system, however, contrary to what has been presumed, does not stand alone, but rather is merely illustrative of an approach which in part is applied universally. As this book indicated, through an examination of the practice and jurisprudence of not just the African but European, American and international systems, that, contrary to belief, there is clear evidence that all bodies have recognised a wider perspective of international law and moved away from strict dichotomies of state/individual, subject/object, war/peace and amicable/judicial.

Without a shift in focus, international law will continue to offer a restrictive explanation. What is necessary is, in the words of Charlesworth, "the promise of a fundamental restructuring of traditional international law discourse and methodology to accommodate alternative world views".[5]

This is not to deny, however, that the African Commission has engendered minimum respect internationally or nationally. Evaluating its success or effectiveness in terms of a traditional dichotomous approach neglects some of the positive aspects of the Commission's work. In turn, this lack of respect may have deprived the Commission of the status required to ensure states' compliance, and may have contributed to the Commission's peripheral, often neglected, position in the international arena in general. The general lack of awareness of its work restricts the possibility of its status being enhanced at any level. With increased publicity and reference to its jurisprudence, its decisions could affirm and further encourage the development of international law in the direction proposed. In turn, it is clear that the African Commission, although it may take the more holistic approach on paper, often fails to execute this in reality. Its contribution will be greatly enhanced if it acquires the confidence to carry out its statements in practice.

[4] African states have not rejected present international law: see R. P. Anand, "Attitude of the Asian-African States Towards Certain Problems of International Law" (1966) 15 *ICLQ* (1966) 56–75, at 70. In addition, these states "do not denigrate the role of law in international affairs. Their discontent arises out of their feeling that some of the norms of international law may be opposed to their interests and their desire that international law should incorporate in it certain principles which are dismissed by the Western States as political rather than legal": P. Sinha, "The Perspective of Newly Independent States and the Binding Quality of International Law" (1965) 14 *ICLQ* 121–31, at 122.

[5] H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law" (1991) 85 *AJIL* 613 at 644.

Appendix I—African Charter on Human and Peoples' Rights

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples Rights"

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing ***inter alia*** for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples' of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights;

Recognising on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination notably those based on race, ethnic group, colour, sex, language, religion of political opinion;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the

Organisation of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their **duty** to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS

PART I

RIGHTS AND DUTIES

CHAPTER I
HUMAN AND PEOPLES' RIGHTS

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

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.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
   a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
   b) the right to be presumed innocent until proven guilty by a competent court or tribunal;
   c) the right to defence, including the right to be defended by counsel of his choice;
   d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom on conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety of others, health, ethics and rights and freedoms of others.

Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health of morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

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.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, States Parties to the present Charter shall ensure that:
   a) any individual enjoying the right to asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present Charter;
   b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

Article 25

States Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as the corresponding duties are understood.

Article 26

States Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

CHAPTER II
DUTIES

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and the freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:
1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;

3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his its defence in according with the law;
6. To work to the best of his abilities and competences, and to pay taxes imposed by the law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity

PART II
MEASURES OF SAFEGUARD

CHAPTER I
ESTABLISHMENT AND ORGANISATION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

Article 32

The Commission shall not include more than one national of the same State.

Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States Parties to the present Charter.

Article 34

Each State Party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States Parties to the present

Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

Article 35

1. The Secretary General of the Organization of African Unity shall invite States Parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least on month before the elections.

Article 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

Article 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39

1. In the case of death or resignation of a member of the Commission the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear cost of the staff and services.

Article 42

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have the casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall neither participate in the deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic immunities provided for in the General Convention on the Privileges and Communities of the Organization of African Unity.

Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

CHAPTER II
MANDATE OF THE COMMISSION

Article 45

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:
   (a) to collect documents, undertake studies and researches in African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.
   (b) to formulate and lay down, principles and rules aimed at solving legal problems related to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.
   (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under the conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

CHAPTER III
PROCEDURE OF THE COMMISSION

Article 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

COMMUNICATIONS FROM STATES

Article 47

If a State Party to the present Charter has good reasons to believe that another State Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. The communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible, relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

Article 48

If within three months from the date on which the original communication is received by the State to which it was addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

Article 49

Notwithstanding the provisions of Article 47, if a State Party to the present Charter considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.

2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report to the States concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report of its activities.

OTHER COMMUNICATIONS

Article 55

1. Before each session, the Secretary of the Commission shall make a list of the Communications other than those of States Parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communication relating to Human and Peoples' Rights referred to in Article 55 received by the Commission, shall be considered if they:

1. indicate their authors even if the latter request anonymity,
2. are compatible with the Charter of the Organization of African Unity or with the present Charter.
3. are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity.
4. are not based exclusively on news disseminated through the mass media,
5. are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged,
6. are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter, and
7. do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of Human and Peoples' Rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.

CHAPTER IV
APPLICABLE PRINCIPLES

Article 60

The Commission shall draw inspiration from international law on Human and Peoples' Rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member states of the Organization of African Unity, African practices consistent with international norms of Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

Article 62

Each State Party shall undertake to submit every two years, form the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.

Article 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of member states of the Organization of African Unity.

PART III
GENERAL PROVISIONS

Article 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit of by that State of its instruments of ratification or adherence

Article 66

Special protocols may, if necessary, supplement the provisions of the present Charter.

Article 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be amended if a State Party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States Parties have been duly informed of it and the Commission has given its opinion on

it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States Parties. It shall come into force for each state which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

Adopted by the eighteenth Assembly of Heads of State and Government, June 1981—Nairobi, Kenya

Appendix II—Rules of Procedure of the African Commission on Human and Peoples' Rights

Adopted on 6 October 1995

The African Commission on Human and Peoples' Rights,
Having Considered the African Charter on Human and Peoples' Rights,
Acting in accordance with Article 42.2 of the Charter,
Has adopted the present revised Rules of Procedure:

GENERAL PROVISIONS
ORGANISATION OF THE COMMISSION
CHAPTER I—SESSIONS

Rule 1—Number of Sessions

The African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") shall hold the sessions which may be necessary to enable it to carry out satisfactorily its functions in conformity with the African Charter on Human and Peoples' Rights (hereinafter referred to as "The Charter").

Rule 2—Opening Date

1. The Commission shall normally hold two ordinary sessions a year each lasting for about two weeks.
2. The ordinary sessions of the Commission shall be convened on a date fixed by the Commission on the proposal of its Chairman and in consultation with the Secretary General of the Organization of African Unity (OAU) (hereinafter referred to as "The Secretary General").
3. The Secretary General may change under exceptional circumstances, the opening date of a session, in consultation with the Chairman of the Commission.

Rule 3—Extraordinary Session

1. The Commission may decide to hold extraordinary sessions, When the Commission is not in session, the Chairman may convene extraordinary sessions in consultation with the members of the Commission.
   The Chairman of the Commission shall also convene extraordinary sessions:
   a. At the request of the majority of the members of the Commission or
   b. At the request of the current Chairman of the Organization of African Unity.

2. Extraordinary sessions shall be convened as soon as possible on a date fixed by the Chairman, in consultation with the Secretary General and the other members of the Commission.

Rule 4—Place of Meetings

The sessions shall normally be held at the Headquarters of the Commission. The Commission, in consideration with the Secretary General decide to hold a Session elsewhere.

Rule 5—Notifications of the Opening Date of the Sessions

The Secretary of the commission (hereinafter referred to as the Secretary) shall inform members of the Commission of the date and venue of the first meeting of each session. This notification shall be sent, in the case of an Ordinary Session, at least eight (8) weeks, and, in the case of an Extraordinary Session, at least three (3) weeks, if possible, before the Session.

CHAPTER II—AGENDA

Rule 6—Drawing up the Provisional Agenda

1. The Provisional Agenda for each Ordinary Session shall be drawn up by the Secretary in consultation with the Chairman of the Commission in accordance with the provisions of the Charter and these Rules.
2. The Provisional Agenda shall include if necessary, items on: "Communications from States", and "Other Communications" in conformity with the provisions of Article 55 of the Charter. It should not contain any information relating to such communications.
3. Except as specified above on the communications, the Provisional Agenda shall include all the items listed by the present Rules of Procedure as well as the items proposed by.
   a) The Commission at a previous Session;
   b) The Chairman of the Commission or another member of the Commission;
   c) A State party to the Charter;
   d) The Assembly of Heads of State and Government or the Council of Ministers of the Organization of African Unity;
   e) The Secretary General of the Organization of African Unity on any issue relating to the functions assigned to him by the Charter;
   f) A national liberation movement recognized by the Organization of African Unity or by a non-governmental organization;
   g) A specialized institution of which the State parties to the Charter are members.
4. The items to be included in the provisional agenda under sub paragraphs b, c, f and g of paragraph 3 must be communicated to the Secretary, accompanied by essential documents, not later than eight (8) weeks before the Opening of the Session.
5. a) All national liberation movements, specialised institutions, intergovernmental or non-governmental organisations wishing to propose the inclusion of an item in the Provisional Agenda must inform the Secretary at least ten (10) weeks before

the opening of the meeting. Before formally proposing the inclusion of an item in the Provisional Agenda, the observations likely to be made by the Secretary must duly be taken into account;

b) All proposals made under the provisions of the present paragraph shall be included only in the Provisional Agenda of the Commission, if at least two thirds (2/3) of the members present and voting so decide.

6. The Provisional Agenda of the Extraordinary Session of the Commission shall include only the item proposed to be considered at that Extraordinary Session.

Rule 7—Transmission and Distribution of the Provisional Agenda

1. The Provisional Agenda and the essential documents relating to each item shall be distributed to the members of the Commission by the Secretary who shall endeavour to transmit them to the members at least six (6) weeks before the opening of the Session.
2. The Secretary shall communicate the Provisional Agenda of that session and have the essential documents relating to each Agenda item distributed at least six weeks before the opening of the session of the Commission to the members of the Commission, member States parties to the Charter, to the current Chairman of the Organization of African Unity and observers.
3. The draft agenda shall also be sent to the specialised agencies, to non governmental organisations and to the national liberation movements concerned with the agenda.
4. In exceptional cases the Secretary may, while giving his reasons in writing, have the essential documents relating to some items of the Provisional Agenda distributed at least four (4) weeks prior to the opening of the Session.

Rule 8—Adoption of the Agenda

At the beginning of each session, the Commission shall if necessary, after the election of officers in conformity with rule 17, adopt the agenda of the Session on the basis of the Provisional Agenda referred to in Rule 6.

Rule 9—Revision of the Agenda

The Commission may, during the Session, revise the Agenda if need be, adjourn, cancel or amend items. During the Session, only urgent and important issues may be added to the Agenda.

Rule 10—Draft Provisional Agenda for Next Session

The Secretary shall, at each session of the Commission, submit a Draft Provisional Agenda for the next session of the Commission, indicating with respect to each item, the documents to be submitted on that item and the decisions of the deliberative organ which authorized their preparation so as to enable the Commission to consider these documents as regards the contribution they make to its proceedings, as well as their urgency and relevance to the prevailing situation.

CHAPTER III—MEMBERS OF THE COMMISSION

Rule 11—Composition of the Commission

The Commission shall be composed of eleven (11) members elected by the Assembly of Heads of State and Government hereinafter referred to as "the Assembly", in conformity with the relevant provisions of the Charter.

Rule 12—Status of the Member

1. The members of the Commission shall be eleven (11) personalities appointed in conformity with the provisions of Article 31 of the Charter.
2. Each member of the Commission shall sit on the Commission in a personal capacity. No member may be represented by another person.

Rule 13—Term of Office of the Members

1. The term of office of the members of the Commission elected on 29 July 1987 shall begin from that date. The term of office of the members of the Commission elected at subsequent elections shall take effect the day following the expiry date of the term of office of the members of the

Commission they shall replace.

2. However, if a member is re-elected at the expiry of his or her term of office, or elected to replace a member whose term of office has expired or will expire, the term of office shall begin from that expiry date.
3. In conformity with Article 39 (3) of the Charter, the member elected to replace a member whose term has not expired, shall complete the term of office of his or her predecessor, unless the remaining term of office is less than six (6) months. In the latter case, there shall be no replacement.

Rule 14—Cessation of Functions

1. If in the unanimous opinion of the other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
2. In case of the death or resignation of a member of the Commission, the Chairman shall immediately inform the Secretary General who shall declare the seat vacant from the date of the death or from that on which the resignation took effect. The member of the Commission who resigns shall address a written notification of his or her resignation directly to the Chairman or to the Secretary General and steps to declare his or her seat vacant shall only be taken after receiving the said notification. The resignation shall make the seat vacant.

Rule 15—Vacant Seat

Every seat declared vacant in conformity with Rule 14 of the present Rules of Procedure shall be filled on the basis of Article 39 of the Charter.

Rule 16—Oath

Before coming into office, every member of the Commission shall make the following solemn commitment at a public sitting.
"I swear to carry to out my duties well and faithfully in all impartiality".

CHAPTER IV—OFFICERS

Rule 17—Election of Officers

1. The Commission shall elect among its members a Chairman and Vice-Chairman.
2. The elections referred to in the present Rule shall be held by secret ballot. Only the members present shall vote, the member who shall obtain the two-thirds majority of the votes of the members present and voting shall be elected.
3. If no member obtains this two-thirds majority in a second, third and fourth ballot, the member having the highest number of votes at the fifth ballot shall be elected.
4. The officers of the Commission shall be elected for a period of two (2) years. They shall be eligible for re-election. None of them, may, however, exercise his or her functions if he or she ceases to be a member of the Commission.

Rule 18—Power of the Chairman

The Chairman shall carry out the functions assigned to him by the Charter, the Rules of Procedure and the decisions of the Commission. In the exercise of his functions the Chairman shall be under the authority of the Commission.

Rule 19—Absence of the Chairman

1. The Vice Chairman shall replace the Chairman during a session if the latter is unable to attend a whole or part of a sitting of a session.
2. In the absence of both the Chairman and Vice Chairman, members shall elect an acting Chairman.

Rule 20—Functions of the Vice Chairman

The Vice Chairman, acting in the capacity of the Chairman, shall have the same rights and the same duties as the Chairman.

Rule 21—Cessation of the Functions of an Officer

If any of the officers ceases to carry out his or her functions or declares that he or she is no longer able to serve as an officer or exercise the functions of a member of the Commission, a new officer shall be elected for the remaining term of office of his or her predecessor.

CHAPTER V—SECRETARIAT

Rule 22—Function of the Secretary General

1. The Secretary General or his representative may attend the meeting of the Commission. He shall neither participate in the deliberations, nor in the voting. He may, however, be called upon by the Chairman of the Commission to make written or oral statements at the sittings of the Commission.
2. He shall appoint, in consultation with the Chairman of the Commission, a Secretary of the Commission.
3. He shall, in consultation with the Chairman provide the Commission with the necessary staff, means and services for it to carry out effectively the functions and missions assigned to it under the Charter.
4. The Secretary General acting through the Secretary shall take all the necessary steps for the meetings of the Commission.

Rule 23—Functions of the Secretary to the Commission

The Secretary of the Commission shall be responsible for the activities of the Secretariat under the general supervision of the Chairman, and particularly:

a) He/she shall assist the Commission and its members in the exercise of their functions;
b) He/she shall serve as an intermediary for all the communications concerning the Commission;
c) He/she shall be the custodian of the archives of the Commission;
d) The Secretary shall bring immediately to the knowledge of the members of the Commission all the issues that will be submitted to him/her.

Rule 24—Estimates

Before the Commission approves a proposal entailing expenses, the Secretary shall prepare and distribute, as soon as possible, to the members of the Commission, the financial implications to the proposal. It is incumbent on the Chairman to draw the attention of the members to those implications so that they discuss them when the proposal is considered by the Commission.

Rule 25—Financial Rules

The Financial Rules adopted pursuant to the provisions of Articles 41 and 44 of the Charter, shall be appended to the present Rules of Procedure.

Rule 26—Financial Responsibility

The Organisation of African Unity shall bear the expenses of the staff and the facilities and services placed at the disposal of the Commission to carry out its functions.

Rule 27—Records of Cases

A special record, with a reference number and initialed, in which shall be entered the date of registration of each petition and communication and that of the closure of the procedure relating to them before the Commission, shall be kept at the Secretariat.

CHAPTER VI—SUBSIDIARY BODIES

Rule 28—Establishment of Committees and Working Groups

1. The Commission may during a session, taking into account the provisions of the Charter establish, if it deems it necessary for the exercise of its functions, committees or working groups, composed of the members of the Commission and send them any agenda item for consideration and report.
2. These committees or working groups may, in consultation with the Secretary General, be authorized to sit when the Commission is not in session.
3. The members of the committees or working groups shall be appointed by the Chairman subject to the approval of the absolute majority of the other members of the Commission.

Rule 29—Establishment of Sub-Commissions

1. The Commission may establish Sub Commissions of experts after the prior approval of the Assembly.
2. Unless the Assembly decides otherwise, the Commission shall determine the functions and composition of each Sub Commission.

Rule 30—Offices of the Subsidiary Bodies

Unless the Commission decides otherwise, the subsidiary bodies of the Commission shall elect their own officers.

Rule 31—Rules of Procedure

The Rules of Procedure of the Commission shall apply, as far as possible to the proceedings of its subsidiary bodies.

CHAPTER VII—PUBLIC SESSIONS AND PRIVATE SESSIONS

Rule 32—General Principle

The sittings of the Commission and of its subsidiary bodies shall be held in public unless the Commission decides otherwise or it appears from the relevant provisions of the Charter that the meeting shall be held in private.

Rule 33—Publication of Proceedings

At the end of each private or public sitting, the Commission or its subsidiary bodies may issue a communiqué.

CHAPTER VIII—LANGUAGES

Rule 34—Working Languages

The working languages of the Commission and of all its institutions shall be those of the Organization of African Unity.

Rule 35—Interpretation

1. The address delivered in one of the working languages shall be interpreted in the other working languages.
2. Any person addressing the Commission in a language other than one of the working languages, shall, in principle, ensure the interpretation in one of the working languages. The interpreters of the Secretariat may take the interpretation of the original language as source language for their interpretation in the other working languages.

Rule 36—Languages to be used for Minutes of Proceedings

The summary minutes of the sittings of the Commission shall be drafted in the working languages.

Rule 37—Languages to be Used for Resolutions and Other Official Decisions

All the official decisions and documents of the Commission will be rendered in the working languages.

Rule 38—Tape recordings of the Session

The Secretariat shall record and preserve the tapes of the sessions of the Commission. It may also record and conserve the tapes of the sessions of the committees, working groups and sub-commissions if the Commission so decides.

Rule 39—Summary Minutes of the Sessions

The Secretariat shall draft the summary minutes of the public and private sessions of the Commission and of its subsidiary bodies. It shall distribute them as soon as possible in a draft form to the members of the Commission and to all other participants in the session. All those participants may, in the thirty (30) days following the receipt of the draft minutes of the session, submit corrections to the Secretariat. The Chairman may, under special circumstances, in consultation with the Secretary-General, extend the time for the submission of the corrections.

In case the corrections are contested, the Chairman of the Commission or the Chairman of the subsidiary body whose minutes they are, shall resolve the disagreement after having listened to, if necessary, the tape recordings of the discussions. If the disagreement persists, the Commission or the subsidiary body shall decide. The corrections shall be published in a distinct volume after the closure of the session.

Rule 40—Distribution of the Minutes of the Private Sessions and Public Sessions

1. The final summary minutes of the public and private sessions shall be the document intended for general distribution unless, the Commission decides otherwise.
2. The minutes of the private sessions of the Commission shall be distributed forthwith to all members of the Commission.

Rule 41—Reports to be Submitted after Each Session

The Commission shall submit to the current Chairman of the Organization of African Unity, a report on the deliberations of each session. This report shall contain a brief summary of the recommendations and statements on issues to which the Commission would like to draw the attention of the current Chairman and member States of the Organization of African Unity.

Rule 42—Submission of Official Decisions and Reports

The text of the decisions and reports officially adopted by the Commission shall be distributed to all members of the Commission as soon as possible.

CHAPTER X—CONDUCT OF THE DEBATES

Rule 43—Quorum

The quorum shall be constituted by seven (7) members of the Commission, as specified in Article 42(3) of the Charter.

Rule 44—Additional Powers of the Chairman

1. In addition to the powers entrusted to him/her under other provisions of the present Rules of Procedure, the Chairman shall have the responsibility to open and close each session; he/she shall direct the debates, ensure the application of the present Rules of Procedure, grant the use of floor, submit to a vote matters under discussion and announce the result of the vote taken.
2. Subject to the provisions of the present Rules of Procedure, the Chairman shall direct the discussions of the Commission and ensure order during meeting. The Chairman may during the discussion of an agenda item, propose to the Commission to limit the time allotted to speakers, as well as the number of interventions of each speaker on the same issue and close the list of speakers.
3. He/she shall rule on the points of order. He/she shall also have the power to propose the adjournment and the closure of debates as well as the adjournment and suspension of a sitting. The debates shall deal solely with the issues submitted to the Commission and the Chairman may call a speaker, whose remarks are irrelevant to the matter under discussion, to order.

Rule 45—Points of Order

1. During the debate of any matter a member may, at any time, raise a point of order and the point of order shall be immediately decided by the Chairman, in accordance

with the Rules of Procedure. If a member appeals against the decision, the appeal shall immediately be put to the vote and if the Chairman's ruling is not overruled by the majority of the members present, it shall be maintained.

2. A member raising a point of order cannot, in his or her comments, deal with the substance of the matter under discussion.

Rule 46—Adjournment of Debates

During the discussion on any matter, a member may move the adjournment of the debate on the matter under discussion. In addition to the proposer of the motion one member may speak in favour of and one against the motion after which the motion shall be immediately put to the vote.

Rule 47—Limit the Time Accorded to Speakers

The Commission may limit the time accorded to each speaker on any matter, when the time allotted for debates is limited and a speaker spends more time than the time accorded, the Chairman shall immediately call him to order.

Rule 48—Closing the List of Speakers

The Chairman may, during a debate, read out the list of speakers and with the approval of the Commission, declare the list closed. Where there are no more speakers, the Chairman shall, with the approval of the Commission, declare the debate closed.

Rule 49—Closure of Debate

A member may, at any time, move for the closure of the debate on the matter under discussion, even if the other members or representatives expressed the desire to take the floor. The authorisation to take the floor on the closure of the debate shall be given only to two speakers before the closure, after which the motion shall immediately be put to the vote.

Rule 50—Suspension or Adjournment of the Meeting

During the discussion of any matter, a member may move for the suspension or adjournment of the meeting. No discussion on any such motion shall be permitted and it shall be immediately put to the vote.

Rule 51—Order of the Motions

Subject to the provisions of Rule 45 of the present Rule of Procedure the following motions shall have precedence in the following order over all the other proposals or motions before the meeting.

a) To suspend the meeting
b) To adjourn the meeting
c) To adjourn the debate on the item under discussion
d) For the closure of the debate of the item under discussion.

Rule 52—Submission of Proposals and Amendment of Substance

Unless the Commission decides otherwise the proposals, amendments or motions of substance made by members shall be submitted in writing to the Secretariat; they shall be considered at the first sitting following their submission.

Rule 53—Decisions on Competence

Subject to the provisions of Rule 45 of the Procedure, any motion tabled by a member for a decision on the competence of the Commission to adopt a proposal submitted to it shall immediately be put to the vote.

Rule 54—Withdrawal of a Proposal or a Motion

The sponsor of a motion or a proposal may still withdraw it before it is put to the vote, provided that it has not been amended. A motion or a proposal thus withdrawn may be submitted again by another member.

Rule 55—New Consideration or a Motion

When a proposal is adopted or rejected, it shall not be considered again at the same session, unless the Commission decides otherwise. When a member moves the new consideration of a proposal, only one member may speak in favour of and one against the motion, after which it shall immediately be put to the vote.

Rule 56—Interventions

1. No member may take the floor at a meeting of the Commission without prior authorisation on the Chairman. Subject to Rules 45, 48, 49 and 50 the Chairman shall grant the use of the floor to the speakers in the order in which it has been requested.
2. The debates shall deal solely with the matter submitted to the Commission and the Chairman may call to order a speaker whose remarks are irrelevant to the matter under discussion.
3. The Chairman may limit the time accorded to speakers and the number of the interventions which each member may make on the same issue, in accordance with Rule 44 of the present Rules.
4. Only two members in favour and two against the motion of fixing such time limits shall be granted the use of the floor after which the motion shall immediately be put to the vote. For questions of procedure the time allotted to each speaker shall not exceed five minutes, unless the Chairman decides otherwise. When the time allotted discussions is limited and a speaker exceeds the time accorded the Chairman shall immediately call him to order.

Rule 57—Right to Reply

The right of reply shall be granted by the Chairman to any member requesting it. The member must, while exercising this right, be as brief as possible and take the floor preferably at the end of the sitting at which this right has been requested.

Rule 58—Congratulations

The congratulations addressed to the newly elected members to the commission shall only be presented by the Chairman or a member designated by the latter. Those addressed to the newly elected officers shall only be presented by the outgoing Chairman or a member designated by him.

Rule 59—Condolences

Condolences shall be exclusively presented by the Chairman on behalf of all the members. The Chairman may, with the consent of the Commission, send a message of condolence.

CHAPTER XI—VOTE AND ELECTIONS

Rule 60—Right to Vote

Each member of the Commission shall have one vote. In the case of equal number of votes the Chairman shall have a casting vote.

Rule 61—Asking for a Vote

A proposal or a motion submitted for the decision of the Commission shall be put to the vote if a member so requests. If no member asks for a vote, the Commission may adopt a proposal or a motion without a vote.

Rule 62—Required Majority

1. Except as otherwise provided by the Charter or other Rules of the present Rules of Procedure, decisions of the Commission shall be taken by a simple majority of the members present and voting.
2. For the purpose of the present Rules of Procedure, the expression "members present and voting" shall mean members voting for or against. The members who shall abstain from voting shall be considered as non-voting members.
3. Decisions may be taken by consensus, failing which, Commission shall resort to voting.

Rule 63—Method of Voting

1. Subject to the provisions of Rule 68, the commission, unless it otherwise decides, shall normally vote by show of hands, but any member may request the roll-call vote, which shall be taken in the alphabetical order of the names of the members of the Commission beginning with the member whose name is drawn by lot by the Chairman. In all the votes by roll-call each member shall reply "yes", "no" or "abstention". The Commission may decide to hold a secret ballot.
2. In case of vote by roll-call, the vote of each member participating in the ballot shall be recorded in the minutes.

Rule 64—Explanation of Vote

Members may make brief statements for the only purpose of explaining their vote, before the beginning of the vote or once the vote has been taken. The member who is the sponsor of a proposal or a motion cannot explain his vote on that proposal or notion except if it has been amended.

Rule 65—Rules to be Observed while Voting

A ballot shall not be interrupted except if a member raises a point of order relating to manner in which the ballot is held. The Chairman may allow members to intervene briefly, whether before the ballot beginning or when it is closed, but solely to explain their vote.

Rule 66—Division of Proposals and Amendments

Proposals and amendments may be separated if requested. The parts of the proposals or of the amendments which have been adopted shall later be put to the vote as a whole; if all the operative parts of a proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

Rule 67—Amendment

An amendment to a proposal is an addition to, deletion from or revision of part of that proposal.

Rule 68—Order of Vote on Amendments

When an amendment is moved to a proposal, the amendment shall be voted on first. When two or more amendments are moved to a proposal, the Commission shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all the amendments have been put to the vote. Nevertheless when the adoption of an amendment implies the rejection of another amendment, the latter shall not be put to the vote. If one or several amendments are adopted, the amended proposal shall then be put to the vote.

Rule 69—Order of Vote on the Proposals

1. If two or more proposals are made on the same matter, the Commission, unless it decides otherwise, shall vote on these proposals in the order in which they were submitted.
2. After each vote the Commission may decide whether it shall put the next proposal to the vote.
3. However, the motions which are not on the substance of the proposals shall be voted upon before the said proposals.

Rule 70—Elections

Elections shall be held by secret ballot unless the election is for a post for which only one candidate has been proposed and that candidate has been agreed upon by the members of the Commission.

CHAPTER XII—PARTICIPATION OF NON-MEMBERS OF THE COMMISSION

Rule 71—Participation of States in the Deliberations

1. The Commission or its subsidiary bodies may invite any State to participate in the discussion of any issue that shall be of particular interest to that State.
2. A State thus invited shall have no voting right, but may submit proposals which may be put to the vote at the request of any member of the Commission or of the subsidiary body concerned.

Rule 72—Participation of other Persons or Organisations

The Commission may invite any organisation or persons capable of enlightening it to participate in its deliberations without voting rights.

Rule 73—Participation of Specialised Institutions and Consultation with the Latter

1. Pursuant to the agreements concluded between the Organization of African Unity and the Specialised Institutions, the latter shall have the right to:
   a) Be represented in the public sessions of the Commission and its subsidiary bodies;
   b) Participate, without voting rights, through their representatives in deliberations on issues which shall be of interest to them and to submit, on these issues, proposals which may be put to vote at the request of any member of the Commission or the interested subsidiary body.
2. Before placing on the provisional agenda an issues submitted by a Specialised Institution, the Secretary General should initiate such preliminary consultations as may be necessary, with this institution.
3. When an issue proposed for inclusion in the provisional agenda of a session, or which has been added to the agenda of a session pursuant to Rule 5 of the present Rules of Procedure, contains a proposal requesting the Organization of African Unity to undertake additional activities relating to issues concerning directly one or more specialised institutions, the Secretary General should enter in to consultation with the institutions concerned and inform the Commission of the ways and means of ensuring coordinated utilisation of the resources of the various institutions.
4. When at a meeting of the Commission, a proposal calling upon the Organization of African Unity to undertake additional activities relating to issues directly concerning one or several specialised institutions, the Secretary General, after consulting as far as possible, the representatives of the interested institutions, should draw the attention of the Commission to the effects of that proposal.

5. Before taking a decision on the proposals mentioned above, the Commission shall make sure that the institutions concerned have been duly consulted.

Rule 74—Participation of other Inter-Governmental Organisations

1. The Secretary shall inform, not later that 4 weeks before a session, non-governmental organisations with observer status of the days and agenda of a forthcoming session.

2. Representatives of Inter-Governmental Organisations to which the Organization of African Unity has granted permanent observer status and other Organisations recognised by the Commission, may participate, without voting rights, in the deliberations of the Commission on issues falling within the framework of the activities of these organisations.

CHAPTER XIII—RELATIONS WITH AND REPRESENTATION OF NON-GOVERNMENTAL ORGANISATIONS

Rule 75—Representation

Non-governmental organisations, granted observer status by the Commission, may appoint authorised observers to participate in the public sessions of the Commission and of its subsidiary bodies.

Rule 76—Consultation

The Commission may consult the non-governmental organisations either directly or through one or several committees set up for this purpose. These consultations may be held at the invitation of the Commission or at the request of the organisation.

CHAPTER XIV—PUBLICATION AND DISTRIBUTION OF THE REPORTS AND OTHER OFFICIAL DOCUMENTS OF THE COMMISSION

Rule 77—Report of the Commission

Within the framework of the procedure of communication among States parties to the Charter, referred to in Articles 47 and 49 of the Charter, the Commission shall submit to the Assembly a report containing, where possible, recommendations it shall deem necessary.
The report shall be confidential. However, it shall be published by the Chairman of the Commission after reporting unless the Assembly directs otherwise.

Rule 78—Periodical Reports of Member States

Periodical Reports and other information submitted by States parties to the Charter as requested under Article 62 of the Charter, shall be documents for general distribution. The same thing shall apply to other information supplied by a State party to the Charter, unless the Commission decides
otherwise.

Rule 79—Reports on the Activities of the Commission

1. As stipulated in Article 54 of the Charter, the Commission shall each year submit to the Assembly, a report on its deliberations, in which it shall include a summary of the activities.
2. The report shall be published by the Chairman after the Assembly has considered it.

Rule 80—Translation of Reports and Other Documents

The Secretary shall endeavour to translate all reports and other document of the Commission into the working languages.

PART TWO
PROVISIONS RELATING TO THE FUNCTIONS OF THE COMMISSION

CHAPTER XV—PROMOTIONAL ACTIVITIES REPORT SUBMITTED BY STATES PARTIES TO THE CHARTER UNDER ARTICLE 62 OF THE CHARTER

Rule 81—Contents of Reports

1. States parties to the Charter shall submit reports in the form required by the Commission on measures they have taken to give effect to the rights recognised by the Charter and on the progress made with regard to the enjoyment of these rights. The reports should indicate, where possible, the factors and difficulties impeding the implementation of the provisions of the Charter.
2. If a State party fails to comply with Article 62 of the Charter, the Commission shall fix the date for the submission of that State party's report.
3. The Commission may, through the Secretary-General, inform State parties to the Charter of its wishes regarding the form and contents of the reports to be submitted under Article 62 of the Charter.

Rule 82—Transmission of the Reports

1. The Secretary may, after consultation with the Commission, communicate to the specialised institutions concerned, copies of all parts of the reports which may relate to their areas of competence, produced by member States of these institutions.
2. The Commission may invite the specialised institutions to which the Secretary has communicated parts of the report, to submit observations relating to these parts within a time limit that it may specify.

Rule 83—Submission of Reports

The Commission shall inform, as early as possible, member States parties to the Charter, through the Secretary, of the opening date, duration and venue of the Session at which their respective reports shall be considered.

Representatives of the States parties to the Charter may participate in the sessions of the Commission at which their reports shall be considered. The Commission may also inform a State party to the Charter from which it wanted complementary information, that it may authorise its representative to participate in a specific session. This representative should be able to reply to questions put to him/her by the Commission and make statements on reports already submitted by this State. He may also furnish additional information from his State.

Rule 84—Non-submission of Reports

1. The Secretary shall, at each session, inform the Commission of all cases of non-submission of reports or of additional information requested pursuant to Rules 81 and 85 of the Rules of Procedure. In such cases, the Commission may send, through the Secretary, to the State party to the Charter concerned, a report or reminder relating to the submission of the report or additional information.
2. If, after the reminder referred to in paragraph 1 of this Rule, a State party to the Charter does not submit the report or the additional information requested pursuant to Rules 81 and 85 of the Rules of Procedure, the Commission shall point it out in its yearly report to the Assembly.

Rule 85—Examination of Information Contained in Reports

1. When considering a report submitted by a State party to the Charter under Article 62 of the Charter, the Commission should first make sure that the report provides all the necessary information including relevant legislation pursuant to the provisions of Rule 81 of the Rules of Procedure.
2. If, in the opinion of the Commission, a report submitted by a State party to the Charter, does not contain adequate information, the Commission may request this State to furnish the additional information required, by indicating the date on which the information needed should be submitted.
3. If, following the consideration of the reports, and the information submitted by a State party to the Charter, the Commission decides that the State has not discharged some of its obligations under the Charter, it may address all general observations to the State concerned as it may deem necessary.

Rule 86—Adjournment and Transmission of the Reports

1. The Commission shall, through the Secretary, communicate to States parties to the Charter for comments, its general observations made following the consideration of the reports and the information submitted by States parties to the Charter. The Commission may, when necessary fix a time limit for the submission of the comments by the States parties to the Charter.
2. The Commission may also transmit to the Assembly, the observations mentioned in paragraph 1 of this Rule, accompanied by copies of the reports it has received from the States parties to the Charter as well as the comments supplied by the latter if possible.

Rule 87—Promotional Activities

1. The Commission shall adopt and carry out a program of action which gives effect to its obligations under the Charter, particularly Article 45(1).
2. The Commission shall carry out other promotional activities in member states and elsewhere on a continuing basis.
3. Each member of the Commission shall file a written report on his/her activities at each session including countries visited and organisations contacted.

CHAPTER XVI—PROTECTION ACTIVITIES

COMMUNICATIONS FROM THE STATES PARTIES TO THE CHARTER

SECTION I—PROCEDURE FOR THE CONSIDERATION OF COMMUNICATIONS RECEIVED IN CONFORMITY WITH ARTICLE 47 OF THE CHARTER: PROCEDURE FOR COMMUNICATIONS-NEGOTIATIONS

Rule 88—Procedure

1. A communication under Article 47 of the Charter should be submitted to the Secretary General, the Chairman of the Commission and the State party concerned.
2. The communication referred to above should be in writing and contain a detailed and comprehensive statement on the actions denounced as well as the provisions of the Charter alleged to have been violated.
3. The notification of the communication to the State party to the Charter, the Secretary General and the Chairman of the Commission shall be done through the most practicable and reliable means.

Rule 89—Register of Communications

The Secretary shall keep a permanent register for all communications received under Article 47 of the Charter.

Rule 90—Reply and Time Limit

1. The reply of the State party to the Charter to which a communication is addressed should reach the requesting State party to the Charter within 3 months following the receipt of the notification of the communication.
2. It shall be accompanied particularly by:
   a) Written explanations, declarations or statements relating to the issues raised;
   b) Possible indications and measures taken to end the situation denounced;
   c) Indications on the law and rules of procedure applicable or applied;
   d) Indications on the local procedures for appeal already used, in process or still open.

Rule 91—Non-Settlement of the Issue

1. If within three (3) months from the date the notification of the original communication is received by the addressee State, the issue has not been settled to the satisfaction of the two interested parties, through the selected channel of negotiation or through any other peaceful procedure selected by common consent of the parties, the issue shall be referred to the Commission, in accordance with the provisions of Article 48 of the Charter.
2. The issue shall also be referred to the Commission if the addressee State party to the Charter fails to react to the request made under Article 47 of the Charter, within the same 3 months' period of time.

Rule 92—Seizing of the Commission

At the expiration of the 3 months' time limit referred to in Article 47 of the Charter, and in the absence of a satisfactory reply or in case the addressee State party may submit the communication to the Commission through a notification addressed to its Chairman, the other interested State party and the Secretary General.

SECTION II—PROCEDURE FOR THE CONSIDERATION OF THE COMMUNICATIONS RECEIVED IN CONFORMITY WITH ARTICLES 48 AND 49 OF THE CHARTER: PROCEDURE FOR COMMUNICATION-COMPLAINT

Rule 93—Seizing of the Commission

1. Any communication submitted under Articles 48 and 49 of the Charter may be submitted to the Commission by any one of the interested States parties through notification addressed to the Chairman of the Commission, the Secretary General and the State party concerned.
2. The notification referred to in paragraph 1 of the present Rule shall contain information on the following elements or accompanied particularly by:
   a) Measures taken to try to resolve the issue pursuant to Article 47 of the Charter including the text of the initial communications and any future written explanation from the interested States parties to the Charter relating to the issue;
   b) Measures taken to exhaust local procedure for appeal;
   c) Any other procedure for the international investigation or international settlement to which the interested States parties have resorted.

Rule 94—Permanent Register of Communications

The Secretary shall keep a permanent register for all communications received by the Commission under Articles 48 and 49 of the Charter.

Rule 95—Seizing of the Members of the Commission

The Secretary shall immediately inform the members of the Commission of any notification received pursuant to Rule 91 of the Rules of Procedure and shall send to them, as early as possible, a copy of the notification as well as the relevant information.

Rule 96—Private Session and Press Release

1. The Commission shall consider the communications referred to in Articles 48 and 49 of the Charter in closed session.
2. After consulting the interested States parties to the Charter, the Commission may issue through the Secretary, release on its private sessions for the attention of the media and the public.

Rule 97—Consideration of the Communication

The Commission shall consider a communication only when:

a) The procedure offered to the States parties by Article 47 of the Charter has been exhausted;
b) The time limit set in Article 48 of the Charter has expired;
c) The Commission is certain that all the available local remedies have been utilised and exhausted, in accordance with the generally recognized principles of international law, or that the application of these remedies is unreasonably prolonged or that there are no effective remedies.

Rule 98—Amicable Settlement

Except the provisions of the present Rules of Procedure, the Commission shall place its good offices at the disposal of the interested States parties to the Charter so as to reach an amicable solution on the issue based on the respect of human rights and fundamental liberties, as recognized by the Charter.

Rule 99—Additional Information

The Commission may through the Secretary, request the States parties or one of them to communicate additional information or observations orally or in writing. The Commission shall fix a time limit for the submission of the written information or observations.

Rule 100—Representation of States Parties

1. The States parties to the Charter concerned shall have the right to be represented during the consideration of the issue by the Commission and to submit observations orally and in writing or in either form.
2. The Commission shall notify, as soon as possible, the States parties concerned, through the Secretary of the opening day, the duration and the venue of the session at which the issue will be examined.
3. The procedure to be followed for the presentation of oral or written observations shall be determined by the Commission.

Rule 101—Report of the Commission

1. The Commission shall adopt a report pursuant to Article 52 of the Charter within 12 months, following the notification referred to in Article 48 of the Charter and Rule 90 of the present Rules of Procedure.
2. The provisions of paragraph 1 of Rule 99 of these Rules of Procedure shall not apply to the deliberations of the Commission relating to the adoption of the report.
3. The report referred to above shall concern the decisions and conclusions that the Commission will reach.
4. The report of the Commission shall be communicated to the States parties concerned through the Secretary.
5. The report of the Commission shall be sent to the Assembly through the Secretary General, together with the recommendations that it shall deem useful.

CHAPTER XVII—OTHER COMMUNICATIONS PROCEDURE FOR THE CONSIDERATION OF THE COMMUNICATIONS RECEIVED IN CONFORMITY WITH ARTICLE 55 OF THE CHARTER

SECTION I—TRANSMISSION OF COMMUNICATIONS TO THE COMMISSION

Rule 102—Seizing of the Commission

1. Pursuant to these Rules of Procedure, the Secretary shall transmit to the Commission the communications submitted to him for consideration by the Commission in accordance with the Charter.
2. No communications concerning a State which is not a party to the Charter shall be received by the Commission or placed in a list under Rule 103 of the present Rules.

Rule 103—List of Communications

1. The Secretary of the Commission shall prepare lists of communications submitted to the Commission pursuant to Rule 101 above, to which he/she shall attach a brief summary to their contents and regularly cause the lists to be distributed to members of the Commission. Besides, the Secretary shall keep a permanent register of all these communications which shall be made public.
2. The full text of each communication referred to the Commission shall be communicated to each member of the Commission on request.

Rule 104—Request for Clarifications

1. The Commission, through the Secretary, may request the author of a communication to furnish clarifications on the applicability of the Charter to his/her communication, and to specify in particular:
   a) His name, address, age and profession by justifying his very identity, if ever he/she is requesting the Commission to be kept anonymous;
   b) Name of the State party referred to in the communication;
   c) Purpose of the communication;
   d) Provision(s) of the Charter allegedly violated;
   e) The facts of the claim;
   f) Measures taken by the author to exhaust local remedies, or explanation why local remedies will be futile;
   g) The extent to which the same issue has been settled by another international investigation or settlement body.
2. When asking for clarification or information, the Commission shall fix an appropriate time limit for the author to submit the communication so as to avoid undue delay in the procedure provided for by the Charter.
3. The Commission may adopt a questionnaire for the use by the author of the communication in providing the above-mentioned information.
4. The request for clarification referred to in paragraph 1 of this rule shall not prevent the inclusion of the communication on the lists mentioned in paragraph 1 of Rule 102 above.

Rule 105—Distribution of Communications

For each communication recorded, the Secretary shall prepare as soon as possible, a summary of the relevant information received, which shall be distributed to the members of the Commission.

SECTION II—GENERAL PROVISIONS GOVERNING THE CONSIDERATION OF THE COMMUNICATIONS BY THE COMMISSION OR ITS SUBSIDIARY BODIES

Rule 106—Private Session

The sessions of the Commission or its subsidiary bodies during which the communications are examined as provided for in the Charter shall be private.

Rule 107—Public Sessions

The sessions during which the Commission may consider other general issues, such as the application procedure of the Charter, shall be public.

Rule 108—Press Releases

The Commission may issue, through the Secretary and for the attention of the media and the public, releases on the activities of the Commission in its private session.

Rule 109—Incompatibilities

1. No member shall take part in the consideration of a communication by the Commission
   a) If he/she has any personal interest in the case, or
   b) If he /she has participated, in any capacity, in the adoption of any decision relating to the case which is the subject of the communication.
2. Any issue relating to the application of paragraph 1. above shall be resolved by the Commission.

Rule 110—Withdrawal of a Member

If, for any reason, a member considers that he/she should not take part or continue to take part in the consideration of a communication, he/she shall inform the Chairman of his/her decision to withdrawal.

Rules 111—Provisional Measures

1. Before making its final views know to the Assembly on the communication, the Commission may inform the State party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation. In so doing, the Commission shall inform the State party that the expression on its views on the adoption of those provisional measures does not imply a decision on the substance of the communication.

2. The Commission, or when it is not in session, the Chairman, in consultation with other members of the Commission, may indicate to the parties any interim measure, the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.
3. In case of urgency when the Commission is not in session, the Chairman in consultation with other members of the Commission, may take any necessary action on behalf of the Commission. As soon as the Commission is again in session, the Chairman shall report to it on any action taken.

Rule 112—Information to the State Party to the Charter

Prior to any substantive consideration, every communication should be made known to the State concerned through the Chairman of the Commission, pursuant to Article 57 of the Charter.

SECTION III—PROCEDURES TO DETERMINE ADMISSIBILITY

Rule 113—Time Limits for Consideration of the Admissibility

The Commission shall decide, as early as possible and pursuant to the following provisions, whether or not the communication shall be admissible under the Charter.

Rule 114—Order of Consideration of the Communication

1. Unless otherwise decided, the Commission shall consider the communications in the order they have been received by the Secretariat.
2. The Commission may decide, if it deems it good, to consider jointly two or more communications.

Rule 115—Working Groups

The Commission may set up one or more working groups; each composed of three of its members at most, to submit recommendations on admissibility as stipulated in Article 56 of the Charter.

Rule 116—Admissibility of the Communications

The Commission shall determine questions of admissibility pursuant to Article 56 of the Charter.

Rule 117—Additional Information

1. The Commission or a working group set up under Rule 113, request the State party concerned or the author of the communication to submit in writing additional information or observations relating to the issue of admissibility of the communication. The Commission or the working group shall fix a time limit for the submission of the information or observations to avoid the issue dragging on too long.
2. A communication may be declared admissible if the State party concerned has been given the opportunity to submit the information and observations pursuant to paragraph 1 of this Rule.

3. A request under paragraph 1 of this Rule should indicate clearly that the request does not mean any decision whatsoever has been taken on the issue of admissibility.
4. However, the Commission shall decide in the issue of admissibility if the State party fails to send a written response within three (3) months from the date of notification of the text of the communication.

Rule 118—Decision of the Commission on Admissibility

1. If the Commission decides that a communication is inadmissible under the Charter, it shall make its decision known as early as possible, through the Secretary to the author of the communication and, if the communication has been transmitted to a State party concerned, to that State.
2. If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.

SECTION IV—PROCEDURES FOR THE CONSIDERATION OF COMMUNICATIONS

Rule 119—Proceedings

1. If the Commission decides that a communication is admissible under the Charter, its decision and text of the relevant documents shall as soon as possible, be submitted to the State party concerned, through the Secretary. The author of the communication shall also be informed of the Commission's decision through the Secretary.
2. The State party to the Charter concerned shall, within the 3 ensuing months, submit in writing to the Commission, explanations or statements elucidating the issue under consideration and indicating, if possible, measures it was able to take to remedy the situation.
3. All explanations or statements submitted by a State party pursuant to the present Rule shall be communicated, through the Secretary, to the author of the communication who may submit in writing additional information and observations within a time limit fixed by the Commission.
4. States parties from whom explanations or statements are sought within specified times shall be informed that if they fail to comply within those times the Commission will act on the evidence before it.

Rule 120—Final Decision of the Commission

1. If the communication is admissible, the Commission shall consider it in the light of all the information that the individual and the State party concerned have submitted in writing; it shall make known its observations on this issue. To this end, the Commission may refer the communication to a working group, composed of 3 of its members at most, which shall submit recommendations to it.
2. The observations of the Commission shall be communicated to the Assembly through the Secretary General and to the State party concerned.
3. The Assembly or its Chairman may request the Commission to conduct an in-depth study on these cases and to submit a factual report accompanied by its findings and recommendations, in accordance with the provisions of the Charter. The Commission may entrust this function to a Special Rapporteur or a working group.

FINAL CHAPTER—AMENDMENT AND SUSPENSION OF THE RULES OF PROCEDURE

Rule 121—Method of Amendment

Only the Commission may modify the present Rules of Procedure.

Rule 122—Method of Suspension

The Commission may suspend temporarily, the application of any Rule of the present Rules of Procedure, on condition that such a suspension shall not be incompatible with any applicable decision of the Commission or the Assembly or with any relevant provision of the Charter and that the proposal shall have been submitted 24 hours in advance. This condition may be set aside if no member opposes it. Such a suspension may take place only with a specific and precise object in view and should be limited to the duration necessary to achieve that aim.

DELIBERATED AND ADOPTED BY THE COMMISSION AT ITS 18TH SESSION HELD IN PRAIA, CAPE VERDE

Appendix III—Reservations

RESERVATION OF ZAMBIA TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

"The government of the Republic of Zambia . . . hereby confirms and ratifies the (Charter) . . . and undertakes faithfully to observe the provisions and carry out all the stipulations therein contained subject to the following amendments or reservations: (i) Article 13 para. 3 should read—"every individual shall have the right of access to any place, services or public property intended for use by the general public". [Explanation—the purpose of this reservation is to exclude any claim for the right to use by all citizens of *all* public property other than is fairly established.]

(ii) Article 37 should read: "immediately after the first election the Chairman of the Assembly of Heads of State of the OAU shall announce the names of those members referred to in Article 36". (Explanation: this is to avoid calling on the Chairman, who is after all a Head of State, carrying out the rather menial exercise of drawing lots. It being understood that the Secretary General of the OAU would draw such lots).

(iii) There should be an extra article which should read: "After the establishment of the Commission all members of the OAU not ratifying or adhering to the Charter shall submit reports to the Commission at appropriate intervals on the position of their laws and practices in regard to the matters dealt with in the Charter, showing the extent to which effort has been given, or is proposed to be given, to any of the provisions of the Charter by legislative or administrative action and stating the difficulties which prevent or delay ratification or adherence to the Charter.' (Explanation: in the interest of early universal ratification of the Charter by the OAU countries and also since all Heads of State of the OAU will together tackle the problems of administering or enforcing the Charter including, where necessary, criticising fellow Heads of State who are proved to have violated the Charter, all members of the OAU should carry some responsibility, under the Charter, for the state of human and peoples' rights in their respective countries)".

RESERVATION OF EGYPT TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

"Having accepted all the provisions of the African Charter on Human and Peoples' Rights . . . and with the reservation that Article 8 and para. 3 of article 8 and paragraph 3 of Article 18 be implemented in accordance with the Islamic law and that as far as the Arab Republic of Egypt is concerned, the provision of the first paragraph of Article 9 should be confirmed to such information as could be obtained within the limits of the Egyptian laws and regulations".

Appendix IV—List of Members of the African Commission on Human and Peoples' Rights (as at August 1999)

Dr I. A. Badawi El-Sheikh	Egypt
Mrs Florence Butegwa	Uganda
Mr Andrew Chigovera	Zimbabwe
Mrs Vera Chirwa	Malawi
Professor E. V. O. Dankwa	Ghana
Dr Mohamed Hatem Ben Salem	Tunisia
Mrs Jainaba Johm	The Gambia
Professor Isaac Nguema	
Mme Julienne Ondziel-Gnelenga	Congo-Brazzaville
Dr N. Barney Pityana	South Africa
Mr K. Rezzag-Bara	Algeria

Appendix V—List of Sessions of the African Commission

1st Ordinary Session
Addis, Ethiopia, 2 November 1987

2nd Ordinary Session
Dakar, Senegal, 8–13 February 1988

3rd Ordinary Session
Libreville, Gabon, 18–28 April 1988

4th Ordinary Session
Cairo, Egypt, 17–26 October 1988

5th Ordinary Session
Benghazi, Peoples' Socialist Libyan Arab Jamahiriya, 3–14 April 1989

1st Extraordinary Session
Banjul, The Gambia, 13–14 June 1989

6th Ordinary Session
Banjul, The Gambia, 23 October–4 November 1989

7th Ordinary Session
Banjul, The Gambia, 18–28 April 1990

8th Ordinary Session
Banjul, The Gambia, 8–21 October 1990

9th Ordinary Session
Lagos, Nigeria, 18–25 March 1991

10th Ordinary Session
Banjul, The Gambia, 8–15 October 1991

11th Ordinary Session
Tunis, Tunisia, 2–9 March 1992

12th Ordinary Session
Banjul, The Gambia, 12–21 October 1992

13th Ordinary Session
Banjul, The Gambia, 29 March–7 April 1993

14th Ordinary Session
Addis, Ethiopia, 1–10 December 1993

15th Ordinary Session
Banjul, The Gambia, 18–27 April 1994

16th Ordinary Session
Banjul, The Gambia, 25 October–3 November 1994

17th Ordinary Session
Lomé, Togo, 13–22 March 1995

18th Ordinary Session
Praia, Cape Verde, 2–11 October 1995

2nd Extraordinary Session
Kampala, Uganda, 18–19 December 1995

19th Ordinary Session
Ouagadougou, Burkina Faso, 26 March–4 April 1996

20th Ordinary Session
Grand Baie, Mauritius, 21–31 October 1996

21st Ordinary Session
Nouakchott, Mauritania, 15–24 April 1997

22nd Ordinary Session
Banjul, The Gambia, 2–11 November 1997

23rd Ordinary Session
Banjul, The Gambia, 20–29 April 1998

24th Ordinary Session
Banjul, The Gambia, 22–31 October 1998

25th Ordinary Session
Bujumbura, Burundi, 26 April–5 May 1999

Appendix VI—Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

OAU/LEG/AFCHPR/PROT (III), adopted by the Assembly of Heads of State and Government, 34th Session, Burkina Faso, 8–10 June 1998

The Member States of the Organization of African Unity hereinafter referred to as the OAU, States Parties to the African Charter on Human and Peoples' Rights:

Considering that the Charter of the Organization of African Unity recognizes that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples,

Noting that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of human and peoples' rights, freedoms and duties contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, and other international organizations,

Recognizing that the two-fold objective of the African Charter on Human and Peoples' Rights is to ensure on the one hand promotion and on the other protection of human and peoples' rights, freedoms and duties,

Recognizing further, the efforts of the African Commission on Human and Peoples' Rights in the protection and promotion of human and peoples' rights since its inception in 1987,

Recalling Resolution 230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government experts' meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission and to consider in particular the establishment of an African Court of Human and Peoples' Rights,

Noting the first and second Government legal experts' meetings held respectively in Cape Town, South Africa (September, 1995) and Nouakchott, Mauritania (April, 1997), and the third Government Legal Experts meeting held in Addis Ababa, Ethiopia (December, 1997), which was enlarged to include Diplomats,

Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court of Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.

HAVE AGREED AS FOLLOWS:

Article 1 ESTABLISHMENT OF THE COURT

There shall be established within the Organization of African Unity an African Court of Human and Peoples' Rights, hereinafter referred to as "the Court", the organization, jurisdiction and functioning of which shall be governed by the present Protocol.

Article 2 RELATIONSHIP BETWEEN THE COURT AND THE COMMISSION

The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights hereinafter referred to as "the Commission", conferred upon it by the African Charter on Human and Peoples' Rights, hereinafter referred to as "the Charter".

Article 3 JURISDICTION

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 4 ADVISORY OPINIONS

1. At the request of a Member State of the OAU, the OAU, any of its organs, or an African organization recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.
2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting opinion.

Article 5 ACCESS TO THE COURT

1. The following are entitled to submit cases to the Court:
   a. The Commission;
   b. The State Party which has lodged a complaint to the Commission;
   c. The State Party against which the complaint has been lodged at the Commission;
   d. The State Party whose citizen is a victim of human rights violations;
   e. African Intergovernmental Organizations.
2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.
3. The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.

Article 6 ADMISSIBILITY OF CASES

1. The Court, when deciding on the admissibility of a case instituted under Article 5(3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.
2. The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.
3. The Court may consider cases or transfer them to the Commission.

Article 7 SOURCES OF LAW

The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.

Article 8 CONSIDERATION OF CASES

The Rules of Procedure shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

Article 9 AMICABLE SETTLEMENT

The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.

Article 10 HEARINGS AND REPRESENTATION

1. The Court shall conduct its proceedings in public. The Court may however conduct proceedings in camera as may be provided for in the Rules of Procedure.
2. Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.
3. Any person, witness, or representative of the parties, who appears before the Court, shall enjoy protection and all facilities in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.

Article 11 COMPOSITION

1. The Court shall consist of eleven judges, nationals of the Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.
2. No two judges shall be nationals of the same State.

Article 12 NOMINATIONS

1. States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State.
2. Due consideration shall be given to adequate gender representation in the nomination process.

Article 13 LIST OF CANDIDATES

1. Upon entry into force of this Protocol, the Secretary-General of the OAU shall request each State Party to the Protocol to present, within ninety (90) days of such a request, its nominees for the office of judge of the Court.
2. The Secretary-General of the OAU shall prepare a list in alphabetical order of the candidates nominated and transmit it to the Member States of the OAU at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU hereinafter referred to as "the Assembly".

Article 14 ELECTIONS

1. The judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 13(2) of the present Protocol.
2. The Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions.
3. In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

Article 15 TERM OF OFFICE

1. The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.
2. The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the Secretary-General of the OAU immediately after the first election has been completed.
3. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.
4. All judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate.

Article 16 OATH OF OFFICE

After their election, the judges of the Court shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 17 INDEPENDENCE

1. The independence of the judges shall be fully ensured in accordance with international law.
2. No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.
3. The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.
4. At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.

Article 18 INCOMPATIBILITY

The position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office, as determined in the Rules of Procedure of the Court.

Article 19 CESSATION OF OFFICE

1. A judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court.
2. Such a decision of the Court shall become final unless it is set aside by the Assembly at its next session.

Article 20 VACANCIES

1. In case of death or resignation of a judge of the Court, the President of the Court shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. The Assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.
3. The same procedure and considerations set out in Articles 12, 13 and 14 shall be followed for the filling of vacancies.

Article 21 PRESIDENCY OF THE COURT

1. The Court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once.
2. The President shall perform judicial functions on a full-time basis and shall reside at the seat of the Court.
3. The functions of the President and Vice-President shall be set out in the Rules of Procedure of the Court.

Article 22 EXCLUSION

If a judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case.

Article 23 QUORUM

The Court shall examine cases brought before it, if it has a quorum of at least seven judges.

Article 24 REGISTRY OF THE COURT

1. The Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the OAU according to the Rules of Procedure.
2. The office and residence of the Registrar shall be at the place where the Court has its seat.

Article 25 SEAT OF THE COURT

1. The Court shall have its seat at the place determined by the Assembly from among States parties to this Protocol. However, it may convene in the territory of any Member State of the OAU when the majority of the Court considers it desirable, and with the prior consent of the State concerned.
2. The seat of the Court may be changed by the Assembly after due consultation with the Court.

Article 26 EVIDENCE

1. The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case.
2. The Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

Article 27 FINDINGS

1. If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

Article 28 JUDGMENT

1. The Court shall render its judgment within ninety (90) days of having completed its deliberations.
2. The judgment of the Court decided by majority shall be final and not subject to appeal.
3. Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.
4. The Court may interpret its own decision.
5. The judgment of the Court shall be read in open court, due notice having been given to the parties.
6. Reasons shall be given for the judgment of the Court.
7. If the judgment of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.

Article 29 NOTIFICATION OF JUDGMENT

1. The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States of the OAU and the Commission.
2. The Council of Ministers shall also be notified of the judgment and shall monitor its execution of behalf of the Assembly.

Article 30 EXECUTION OF JUDGMENT

The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

Article 31 REPORT

The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgement.

Article 32 BUDGET

Expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court.

Article 33 RULES OF PROCEDURE

The Court shall draw up its Rules and determine its own procedures. The Court shall consult the Commission as appropriate.

Article 34 RATIFICATION

1. The Protocol shall be open for signature and ratification or accession by any State Party to the Charter.
2. The instrument of ratification or accession to the present Protocol shall be deposited with the Secretary-General of the OAU.
3. The Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited.
4. For any State Party ratifying or acceding subsequently, the present Protocol shall come into force in respect of that State on the date of the deposit of its instrument of ratification or accession.
5. The Secretary-General of the OAU shall inform all Member States of the entry into force of the present Protocol.
6. At the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.
7. Declarations made under sub-article (6) above shall be deposited with the Secretary General, who shall transmit copies thereof to the State parties.

Article 35 AMENDMENTS

1. The present Protocol may be amended if a State Party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the States Parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.

2. The Court shall also be entitled to propose such amendments to the present Protocol as it may deem necessary, through the Secretary-General of the OAU.
3. The amendment shall come into force for each State Party which has accepted it thirty days after the Secretary-General of the OAU has received notice of the acceptance.

Appendix VII—Documents of the African Commission

ACTIVITY REPORTS

First Annual Activity Report of the African Commission on Human and Peoples' Rights, 1987–8, ACHPR/RPT/1st

Second Annual Activity Report of the African Commission on Human and Peoples' Rights, 1988–9, ACHPR/RPT/2nd

Third Annual Activity Report of the African Commission on Human and Peoples' Rights, 1989–90, ACHPR/RPT/3rd

Fourth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1990–1, ACHPR/RPT/4th

Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1991–2, ACHPR/RPT/5th

Sixth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1992–3, ACHPR/RPT/6th; reproduced in The African Society of International and Comparative Law, *Report on the 13th Session of the African Commission on Human and Peoples' Rights, Banjul, 29 March–7 April 1993*, 103–35

Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights, 1993–4, ACHPR/RPT/7th; AHG/198/(XXX) REV.2; reproduced in (1994) 4 *Review of the African Commission* 148–211

Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994–5, ACHPR/RPT/8th; reprinted in (1995) 5 *Review of the African Commission* 163–208

Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1995–6, ACHPR/RPT/9th; AHG/207 (XXXII)

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Resolution on the Establishment of Committees on Human Rights or other similar organs at national, regional or sub-regional level, *Second Activity Report of the African Commission on Human and Peoples' Rights*, 1988–1989, ACHPR/RPT/2nd, Annex VIII

Resolution on Integration of the Provisions of African Charter on Human and Peoples'

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Resolution on the Right to Recourse Procedure and Fair Trial, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1991–1992, ACHPR/RPT/5th, Annex VI

Resolution on the Right to Freedom of Association, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1991–1992, ACHPR/RPT/5th, Annex VII

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Draft Resolution on Overdue Reports for Adoption, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1991–1992, ACHPR/RPT/5th, Annex IX

Draft Resolution on Promotional Activities, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1991–1992, ACHPR/RPT/5th, Annex X

Resolution on the African Commission on Human and Peoples' Rights, *Sixth Annual Activity Repor of the African Commission on Human and Peoples' Rights*, 1992–1993, ACHPR/RPT/6th

Resolution on Human and Peoples' Rights Education, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–1994, ACHPR/RPT/ 7th, Annex X

Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples' Rights, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–1994, ACHPR/RPT/7th, Annex XI

Resolution on the Situation in Rwanda, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–1994, ACHPR/RPT/7th, Annex XII

Resolution on South Africa, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–1994, ACHPR/RPT/7th, Annex XIV

Resolution on the African Commission on Human and Peoples' Rights, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1993–1994, ACHPR/RPT/7th, Annex XV

Resolution on Algeria, 16th session, produced in ICJ, *Participation of Non-Governmental Organizations in the Work of the African Commission on Human and Peoples' Rights. A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996), 165–6

Resolution on Contemporary Forms of Slavery, 16th Session, produced in ICJ, *Participation of Non-Governmental Organizations in the Work of the African Commission on Human and Peoples' Rights. A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996), 163–4

Resolution on the Military, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–1995, ACHPR/RPT/8th, Annex VII

Resolution on Nigeria, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–1995, ACHPR/RPT/8th, Annex VII

Resolution on Rwanda, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–1995, ACHPR/RPT/8th, Annex VII

Resolution on The Gambia, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–1995, ACHPR/RPT/8th, Annex VII

Resolution on The Human Rights Situation in Africa, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–1995, ACHPR/RPT/8th, Annex VII

Resolution on Sudan, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–1995, ACHPR/RPT/8th, Annex VIII

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Resolution on Anti-Personnel Mines, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–1995, ACHPR/RPT/8th, Annex VIII

Resolution on Prisons in Africa, *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1994–1995, ACHPR/RPT/8th, Annex VIII

Resolution on Liberia, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–1996, ACHPR/RPT/9th, Annex VII

Resolution on Respect and Strengthening of the Independence of the Judiciary, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–1996, ACHPR/RPT/9th, Annex VII

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Resolution on the Electoral Process and Participatory Governance, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–1996, ACHPR/RPT/9th, Annex VII (also cited as Resolution on the Elections in Benin, Comoros and Sierra Leone)

Resolution on Burundi, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1995–1996, ACHPR/RPT/9th, Annex VII

Resolution on Zaire, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–1997, ACHPR/RPT/10th, Annex XI

Resolution on the Protection of the Name, Acronym and Logo of the African Commission on Human and Peoples' Rights, *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1996–1997, ACHPR/RPT/10th, Annex XII

Resolution on the International Criminal Court, *Eleventh Activity Report of the African Commission on Human and Peoples' Rights*, ACHPR/RPT/11th, Annex III

Resolution on Granting Observer Status to National Human Rights Institutions in Africa (no reference)

Resolution on the Ratification of the African Charter on the Rights and Welfare of the Child, 25th session (no reference)

Resolution on the Extension of the Mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa, 25th session (no reference)

Resolution on the Designation of a Special Rapporteur on the Rights of Women in Africa, 25th session (no reference)

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Recommendation on Periodic Reports, *First Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1987–1988, ACHPRT/RPT/1st, Annex IX
Recommendation on Some Modalities for Promoting Human and Peoples' Rights, *Second Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1988–1989, ACHPR/RPT/2nd, Annex IX
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Final Communiqué of the 13th Ordinary Session, Banjul, The Gambia, 29 March–13 April 1993, reprinted in International Commission of Jurists, *Participation of Non-Governmental Organizations in the Work of the African Commission on Human and Peoples' Rights. A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996), 113–118; slso in The African Society of International and Comparative Law, *Report on the 13th Session of the African Commission on Human and Peoples' Rights, Banjul, 29 March–7 April 1993* (African Society of International and Comparative Law, London, 1994), 30–2

Final Communiqué of the 14th Ordinary Session, Addis Ababa, Ethiopia, 1–10 December 1993, ACHPR/FIN/COM (XIV), reprinted in International Commission of Jurists, *Participation of Non-Governmental Organizations in the Work of the African Commission on Human and Peoples' Rights. A Compilation of Basic Documents, October 1991–March 1996* (International Commission of Jurists, Geneva, 1996), 119–26; (1993) 3 Review of the African Commission 62–6

Final Communiqué of the 15th Ordinary Session, Banjul, The Gambia, 18–27 April 1994, ACHPR/FIN/COM (XV), reprinted in International Commission of Jurists, *Participation of Non-Governmental Organizations in the Work of the African Commission on Human and Peoples' Rights. A Compilation of Basic Documents, October 1991–March 1996* (InternationalCommission of Jurists, Geneva, 1996), 133–8; (1993) 3 Review of the African Commission 71–4

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