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IMPLEMENTING HUMAN RIGHTS IN AFRICA

THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INDIVIDUAL COMMUNICATIONS

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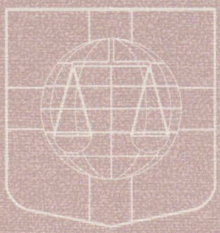

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The African Commission on Human and Peoples' Rights and Individual Communications

Inger Österdahl

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AHSG	Assembly of Heads of State and Government
AJICL	*African Journal of International and Comparative Law*
ASICL	African Society of International and Comparative Law
AU	African Union
CCPR	International Covenant on Civil and Political Rights
CESCR	International Covenant on Economic, Social and Cultural Rights
ECOSOC	Economic and Social Council
EU	European Union
GA	General Assembly
HRC'ttee	Human Rights Committee
HRLJ	*Human Rights Law Journal*
HRQ	*Human Rights Quarterly*
ICJ	International Commission of Jurists
ICLQ	*International and Comparative Law Quarterly*
ILM	*International Legal Materials*
JLPUL	*Journal of Legal Pluralism and Unofficial Law*
NGO	Non-Governmental Organization
NQHR	*Netherlands Quarterly of Human Rights*
OAS	Organization of American States
OAU	Organization of African Unity
RACHPR	*Review of the African Commission on Human and Peoples' Rights*
RGDIP	*Revue Générale de Droit International Public*
SAYIL	*South African Yearbook of International Law*
SIDA	Swedish International Development Agency
UN	United Nations
UNTS	*United Nations Treaty Series*
ZaöRV	*Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*

1. Introduction

The African Commission on Human and Peoples' Rights established in 1987 is still a regional human rights institution under construction. Caught between hard African realities and the soft African Charter on Human and Peoples' Rights, the Commission has achieved more than could be expected. For instance, over the years it has issued a number of decisions regarding individual communications alleging violations of the Charter, which now form an important case law supplementing and considerably developing the original treaty text. This study is based on the decisions of the Commission regarding individual communications.

Communications from states alleging violations of the Charter or any other international human rights convention practically never arise, as sufficient justification for not addressing them in this investigation.

In handling individual communications, the Commission has faced a number of procedural difficulties that constitute the focus of this study. The study does not address the substantive human rights law contained in the Charter on Human and Peoples' Rights. On the principle level, the Commission has solved most of the procedural problems by now, even if problems remain on the practical level. This study aims at exploring the problems that have arisen and how the Commission has solved these problems. The study perhaps may also be of use to the Commission as an inventory of its own decisions regarding procedural issues, and may serve to facilitate the synchronization of the Commission's future decisions with its earlier ones.

This study does not take up all of the procedural problems met by the Commission, but a selection has been made based on the degree of severity of the problem and on whether the problem, or the solution found, is particularly interesting or noteworthy for other reasons. The perspective is mostly African, albeit through Nordic eyes, even if some comparisons are made occasionally to the other two existing regional systems for the protection of human rights.

Before more specifically addressing the procedural problems before the Commission, this book begins by exploring the mandate of the Commission and the sources of inspiration in terms of other international human rights instruments for the Charter and for the Commission when deciding individual cases. These two chapters form a background for the

rest of the study, and may explain the origin of some of the subsequent problems of the Commission in implementing the Charter.

A number of different procedural issues are then each the focus of a separate chapter. The discussions are largely based on the decisions of the Commission. In addition to the problems and solutions found by the Commission, comments in the form of praise or criticism as well as suggestions for solutions different than those adopted by the Commission are included throughout the presentation.

The study concludes with a chapter concerning the Commission's view of the role of the (national) courts in the protection of human rights as evidenced in the decisions of the Commission concerning the individual communications. The last chapter thus constitutes a digression from the contents of the previous parts of the study, but the close connection between the role and state of the national courts and the functioning of the Commission justifies this slight detour. In addition, the strong belief the Commission demonstrates as to the importance of the courts was too tempting for a lawyer to not devote to its own chapter.

2. The mandate of the Commission

2.1 The promotional mandate

The mandate of the African Commission is spelt out in Article 45 of the African Charter.[1] It is a wide mandate. Judging from the layout of Article 45, the main task of the Commission is the *promotion* of human and peoples' rights. The function of the Commission to promote human rights is mentioned in the first sub-paragraph of Article 45.

The second, third and fourth functions are mentioned in the second to fourth paragraphs respectively: the *protection* of human and peoples' rights, the *interpretation* of the provisions of the Charter, and the performance of *any other tasks* which may be entrusted to the Commission by the Assembly of Heads of State and Government ("AHSG") of the Organization of African Unity ("OAU").[2]

[1] *See also* Emmanuel Bello, "The Mandate of the African Commission on Human and Peoples' Rights," *The African Journal of International Law*, vol. 1, 1988, pp. 31–64. The African Charter on Human and Peoples' Rights was adopted on 26 June 1981 and its text can be found for instance on the home page of the African Commission (http://www.achpr.org), in 21 *International Legal Materials ("ILM")* 58, or in *Documents of the African Commission on Human and Peoples' Rights*, ed. by Rachel Murray and Malcolm Evans, 2001, p. 3. All OAU members have ratified the African Charter. On the structure and function of the African Commission *see* generally Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights. Practice and Procedures*, 1996; and Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, 2000. On the African Charter, *see* generally Fatsah Ouguergouz, *La Charte Africaine des Droits de l'Homme et des Peuples. Une approche juridique des droits de l'homme entre tradition et modernité*, 1993; and Oji Umozurike, *The African Charter on Human and Peoples' Rights*, 1997.

[2] The Assembly of Heads of State and Government will become the AHSG of the African Union ("AU") now when the Charter of the AU has entered into force, on 26 May 2001, according to the Report of the Secretary-General on the Implementation of the Sirte Decision on the African Union [EAHG/DEC.1 (V)], OAU Doc. No. CM/2210 (LXXIV), Council of Ministers [of the OAU], Seventy-fourth Ordinary Session/Ninth Ordinary Session of the AEC [the African Economic Community], 2–7 July 2001, Lusaka, Zambia, paras. 9 and 12. Otherwise, the transformation of the OAU into the AU should entail no immediate changes in the way communications are handled under the African Charter. The Charter of the AU can be found for instance on the home page of the OAU (http://www.oau-oua.org/documents).

2.1.1 To spread information

The promotional functions of the Commission are spelt out in some detail in sub-paragraphs a) to c) in paragraph 1 of Article 45. Sub-paragraph a) deals with the dissemination of information concerning the Charter.

In addition to its general function of promoting human and peoples' rights, the Commission shall in particular "collect documents, undertake studies and researches on 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."

The text speaks for itself, but a few remarks deserve to be made. Among the functions of the Commission, it is to encourage national and local institutions concerned with human and peoples' rights. It can already be noted at this early stage that the Commission seems to have had considerable difficulties in mobilizing any activity on the part of national or local governmental institutions concerned with human and peoples' rights.[3]

Depending on how the term "institution concerned with human and peoples' rights" is interpreted, one could, for instance, claim that the courts belong to this category. In such a case, it consequently would be the function of the Commission to also encourage the national and local courts in order to increase their confidence and to take into account to a greater degree human and peoples' rights more than they currently otherwise do.

The courts do address issues of human and peoples' rights even if the term "national and local institutions concerned with human and peoples' rights" is not necessarily intended to refer to the judiciary.

[3] According to a report issued by the African Commission entitled "Note d'information relative aux Institutions Nationales Africaines de protection et de promotion des droits de l'homme," probably authored by Commissioner Kamel Rezag-Bara, and presented at the 21st Ordinary Session of the Commission, 15–24 April 1997, by the mid-1990s there were national institutions for the protection and promotion of human rights in the following African countries: Algeria, Tunisia, Morocco, South Africa, Togo, Senegal, Burundi, Chad, Cameroon, Malawi, Rwanda and Ghana. In the list of participants in the 30th Ordinary Session of the African Commission, in Banjul, from 13–27 October 2001, representatives are also listed from the National Human Rights Commissions of Cameroon, Kenya, Niger, Nigeria and Swaziland. According to Human Rights Watch, by January 2000 there were Government Human Rights Commissions in 24 African Countries (*Protectors or Pretenders? Government Human Rights Commissions in Africa*, Human Rights Watch, 2001). The African national institutions concerned with human rights held their first conference in Yaoundé, Cameroon, on 5–7 February 1996. *Cf. also* Resolution on Granting Observer Status to National Human Rights Institutions in Africa with the African Commission on Human and Peoples' Rights (ACHPR), African Commission on Human and Peoples' Rights, 26th Ordinary Session, 1–15 November 1999, DOC/OS (XXVI)/115. By mid 2002, ten national human rights institutions had been granted affiliate status with the African Commission (Algeria, Chad, Malawi, Niger, Rwanda, Senegal, and Sierra Leone).

In this context, it is appropriate to look at Article 26 of the Charter, which states that the "[s]tates 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."

From the wording of this article, it seems as if the court system properly speaking is one thing, and appropriate institutions entrusted with the promotion and protection of human and peoples' rights is something else.[4] This is not necessarily the case, however, and it may be that the courts are more appropriate for the task of promoting and, in particular, protecting human rights. This depends on practical and other considerations. The point is that the Charter does not give the final word on this, but leaves the matter open to different interpretations.

In its decisions concerning communications, the Commission has tended to not make any sharp distinction between the courts on one hand and national institutions concerned with human and peoples' rights on the other. The Commission seems to regard the courts as constituting a subgroup of the larger category of national institutions so that the two concepts partly overlap.[5]

This is a reasonable standpoint, especially since Article 26 mentions national institutions entrusted with the promotion and *protection* of the rights and freedoms contained in the Charter. The kind of activities intended by the term "protection" of human rights is usually entrusted to judicial or quasi-judicial institutions, such as the courts or other institutions aimed at resolving legal disputes.

One could also argue that the entire public administration of a state deals with human and peoples' rights, and that the function of the Commission includes encouraging the public administrative authorities to respect and enforce human and peoples' rights.

The term "national and local institutions *concerned* with human and peoples' rights" (*italics added*) in Article 45 (1) (a) as to the Commission's

[4] *Cf. also* National Institutions for the Promotion and Protection of Human Rights, United Nations, Fact Sheet No. 19, World Campaign for Human Rights; National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, United Nations, Centre for Human Rights, Geneva, Professional Training Series No. 4, 1995; the Mauritius Plan of Action 1996–2001, ACHPR, under IV. "Cooperation," "National Human Rights Institutions and Associations," paras. 64–68; and the interesting discussion in Carlson Anyangwe, "Obligations of States parties to the African Charter on Human and Peoples' Rights," *African Journal of International and Comparative Law ("AJICL")*, vol. 10, 1998, pp. 625–659, at pp. 630–634.

[5] In UN practice, the working definition of "national human rights institution" excludes the judiciary, the legislature and social welfare schemes, *see* National Human Rights Institutions, Professional Training Series No. 4, *supra* at p. 6, para. 37; and National Institutions for the Promotion and Protection of Human Rights, Fact Sheet No. 19, *supra* at p. 5.

mandate is rather broad and unspecific. It seems broader than the wording used in Article 26, "institutions *entrusted* with the promotion and protection of the rights and freedoms guaranteed by the present Charter" (*italics added*). "Entrusted with" sounds as if human rights should be the sole or at least the main activity of the institution in question. The broader formulation used in Article 45 gives the Commission a correspondingly broader space in which to maneuver as to the national and local institutions it wishes to encourage.

One could likewise claim that the power existing in any one country, i.e. the Government, is an institution ultimately concerned with human and peoples' rights. Therefore, the promotional mandate of the Commission could be interpreted as also including the encouragement by the Commission of the African governments to respect and strengthen the position of human and peoples' rights in their respective countries.

Governments are mentioned in the mandate of the Commission under paragraph 1 a) of Article 45, but not in direct connection with "institutions concerned with human and peoples' rights." Governments are also explicitly mentioned in paragraph 1 b). We will come back to the role of the Governments within the mandate of the Commission below.

There are some institutions that have been especially encouraged by the Commission and which in their turn strongly encourage the Commission. These are the national and local *non-governmental* organizations ("NGO:s") concerned with human and peoples' rights. "Institution" is a term broad enough to also cover non-governmental organizations although, admittedly, the term "institution" has a definite governmental ring to it.

NGO:s have so far been the most faithful allies of the Commission, if not its only allies on the African continent. The NGO:s include purely African organizations, partly African global organizations, and non-African NGO:s.[6]

[6] *Cf.* the Resolution on the Criteria for *Granting* and *Enjoying* Observer Status to Non-Governmental Organisations Working in the Field of Human Rights with the African Commission on Human and Peoples' Rights (*italics added*), adopted by the ACHPR at its 25th Ordinary Session, 26 April–5 May 1999, and contained in the 12th Annual Activity Report of the Commission (AHG/215(XXXV), Annex IV). The title of the resolution indicates that the African Commission is dissatisfied with the way in which the NGO:s administer their status as observers once they have been granted observer status. By mid 2002, 273 NGO:s had been granted observer status with the African Commission. A doctoral thesis was presented in December 2001 at the Uppsala Law Faculty concerning the issue of the relationship between the NGO:s and the African Commission as one of several relating to the importance of NGO:s in the context of international human rights protection (*The Status of Non-Governmental Organisations in International Law*, by Anna-Karin Lindblom). For an early discussion of the role of NGO:s in relation to the African Charter, *see* Harry M. Scoble, "Human Rights Non-Governmental Organizations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter," in *Human Rights and Development in Africa*, Ed. by Claude E. Welch, Jr., and Ronald I. Meltzer, 1984, pp. 177–203. *See also* Claude E. Welch, Jr., *Protecting Human Rights in Africa. Roles and Strategies of Non-Governmental Organizations*, 1995.

It appears that Article 45 paragraph 1 a) could also include the encouragement by the Commission of national and local NGO:s concerned with human and peoples' rights It is also conceivable that the government can sometimes delegate some of the tasks involved in the promotion of human rights to one or several existing NGO:s due to the latter's better knowledge of the issues and perhaps better local network of collaborators. Such a delegation of course presupposes that a trusting climate prevails between the government and the human rights NGO:s.

Another possibility as far as NGO:s are concerned is that the government itself creates NGO:s to deal with the promotion and protection of human rights. The creation of the "appropriate institutions" for carrying out these functions, as referred to in Article 26 of the Charter, may include the government-sponsored creation of non-governmental institutions. The question of how "non-governmental" these institutions will be is a separate issue.

It is also possible to create semi-governmental or quasi-governmental institutions for the promotion and protection of human rights. Irrespective of the issue of whether these are independent from governmental pressures, they are easy to include within the mandate of the Commission to encourage national and local institutions concerned with human and peoples' rights. One could also imagine purely governmental institutions, other than the courts, created for the protection of human rights. In so far as any such institutions exist, they obviously are included among the institutions that it is the task of the Commission to encourage.

As to the actual encouragement of the national institutions concerned, it can hardly be of an economic nature. The Commission itself is struggling against difficult economic odds. Rather, it must be a question of general moral encouragement, perhaps including a transfer of know-how from the Commissioners to the institutions in question, for instance, with respect to the rights contained in the Charter and the possibilities of filing complaints with the Commission.

In the case of NGO:s, if they are included among the "national and local institutions concerned with human and peoples' rights," the encouragement by the Commission could include encouraging the NGO:s to actually help people file a greater number of complaints concerning human rights violations. Encouragement of NGO:s could also consist of helping different NGO:s communicate with each other either within the same African country or across national boundaries.

This networking has been facilitated by the International Commission of Jurists ("ICJ"), which often has arranged workshops for NGO representatives a few days directly prior to the Commission's sessions.[7]

[7] *Cf. ICJ Workshops on NGO Participation in the African Commission on Human and Peoples' Rights 1991 to 1996. A Critical Evaluation,* by Shadrack B.O. Gutto, International Commission of Jurists; and *The Participation of NGO:s in the Work of the African*

The value of moral encouragement by the Commission should not be underestimated, irrespective of whether the recipient is a governmental or a non-governmental institution. Money helps in the struggle for human rights, but it is far from a sufficient means. In addition, encouragement by the Commission constitutes a form of international attention that is invaluable for those working with the promotion and protection of human rights. The encouragement in this case, in addition to strengthening the morale of the human rights activists, may actually help to protect them against persecution by their respective governments.

In addition to the function of encouraging national and local institutions concerned with human and peoples' rights, it should be noted that another promotional function of the Commission under Article 45 (1) (a) of the Charter is to "give its views or make recommendations to Governments." This is conditioned by the phrase "should the case arise," which, however, neither adds nor detracts significantly from the meaning of the article.

It must be presumed that the Commission would not unnecessarily give its views or make recommendations to Governments. Perhaps the phrase "should the case arise" suggests that the drafters of the Charter wished the Commission to exercise a certain restraint in giving its views and making recommendations to Governments.

On the other hand, this is not the only way in which the phrase "should the case arise" can be interpreted. It might just as well mean that the Commission should give its views or make recommendations to Governments each time there is reason to do so, i.e. "every time the case arises." This would imply that the addition "should the case arise" is intended to increase the possibilities of the Commission to give its views and make recommendations to Governments, not to force restraint upon the Commission in this respect.

As in so many other instances, it all depends on the interpretation. It seems most reasonable, with respect to "should the case arise," to treat it as a rather neutral statement: If there is reason to do so, the Commission shall give its views or make recommendations to Governments.

The most noteworthy aspect of this portion of the Commission's mandate is that giving views and making recommendations forms part of the *promotional* mandate of the Commission. This seems to support the view that the promotional and protective functions of the Commission are interrelated.[8]

Commission on Human and Peoples' Rights. A Compilation of Basic Instruments, International Commission of Jurists, 1996.

[8] *Cf.* Chidi Anselm Odinkalu and Camilla Christensen, "The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures," *Human Rights Quarterly ("HRQ")*, vol. 20, 1998, (pp. 235–280) at p. 241.

Normally, activities such as giving views and making recommendations belong to the *protective* mandate of an institution such as the Commission. The Commission typically exercises its protective mandate when it considers complaints concerning violations of the Charter. This is that which is traditionally meant by the protective mandate, in contrast to the promotional mandate, although there is no sharp dividing line between promotional and protective activities.

Rather, it is a question of definition whether one prefers to view protective activities as ultimately promotional, or promotional activities as ultimately protective, or whether one prefers to keep the two categories of activities strictly separated. When discussing the activities of the Commission, it may be convenient for practical reasons to make a distinction between the different kinds of activities and in that context, promotional activities are usefully distinguished from protective activities. The latter term then normally refers to the consideration of complaints alleging violations of the Charter (which in fact ultimately conclude with the giving of views or the making of recommendations to Governments). For the Commission itself, it should make no difference whether a listed activity is classified one way or the other.

In the case of the broad mandate of the Commission under Article 45 (1) (a), it is an advantage from the point of view of the Commission that it is entitled to give its views and make recommendations also outside the ordinary complaint procedures laid down in the Charter. If the Commission would have to wait for complaints from states or individuals to be filed before being entitled to give its views or make recommendations, this would constitute a severe limitation on the freedom of action of the Commission. The Commission now is entitled to state its opinion and make recommendations to Governments whenever it considers that there is a need to do so.

The Government to whom the views and recommendations are addressed may not appreciate being the subject of the Commission's disfavor (in most cases; although one may imagine cases where the Commission commends a government for having taken measures to strengthen human rights). The Government may claim that the Commission is acting outside its mandate under the Charter and that the Commission is interfering in the internal affairs of the state if the Commission takes the liberty of expressing its views or making recommendations, especially in cases where this is unwarranted according to the government.

In this situation, it is a strength for the Commission to be able to point to its mandate as explicitly established in the Charter, including "to give its views or make recommendations to Governments." This should, for instance, make the Commission less cautious in pointing out unsatisfactory human rights conditions in different states and recommending that the Governments take action to improve the situations. It also makes

it easier for the Commission to actually condemn particularly serious human rights crimes, should the case arise.

The Commission has actually used its promotional mandate in this manner within the framework of considering individual communications, i.e. within the framework of the protective part of its mandate.

In *Legal Resources Foundation v Zambia,* the Commission began by making a general reference to almost all aspects of its mandate as listed in Article 45, in order it appears to justify the Commission's right to consider the communication under the Charter.[9] The item "give its views or make recommendations to Governments" is listed first of the functions of the Commission in the decision. The Commission also refers to a general statement on the Commission's functions contained in Article 30 that the Commission shall "promote human and peoples' rights and ensure their protection in Africa."[10]

The Commission then became more specific in the case. Zambia argued that the Commission had no *locus standi* to adjudicate as to the validity of the domestic law. The Commission conceded the correctness of the objection, going on to state that "[w]hat must be asserted, however, is that the Commission has the duty to 'give its views or make recommendations to Governments .../ to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation / and interpret all the provisions of the present Charter ...' (Article 45)."[11]

Prior to this statement, the Commission was even more specific as to the issue regarding domestic law, stating correctly that "an international treaty body like the Commission has no jurisdiction in interpreting and applying domestic law. Instead a body like the Commission may examine a State's compliance with the treaty, in this case the African Charter. In other words, the point of the exercise is to interpret and apply the African Charter rather than to test the validity of domestic law for its own sake."[12]

2.1.2 Principles and co-operation

The promotional mandate of the Commission under sub-paragraph 1 (b) of Article 45 also includes the function "[t]o formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation." The wording of this paragraph

[9] Case 211/98, *Legal Resources Foundation v Zambia*, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, para. 57.
[10] *Ibid.*
[11] *Ibid.* at para. 61. The latter two items in the list of functions of the Commission will be discussed further *infra*.
[12] *Ibid.* at para. 59.

is rather unclear. It seems to refer to the problems African Governments may have in implementing the Charter in their own national legal systems. Then it would mean that the Commission may help the state parties in solving the problems that may arise when the Charter intersects with the national law.

Paragraph 1 b) may also imply that the Commission should issue some kind of guidelines for legislation which the African Governments may consult when they draft national legislation; a type of "model laws" demonstrating the different ways in which human rights can be taken into account in the national legislation. Whatever the intent of the drafters of the Charter, the Commission should use this lack of clarity in the text to its own advantage and interpret its mandate as broadly as possible.

The phrase "upon which African Governments may base their legislation" at the conclusion of paragraph 1 b) is enigmatic in two ways. First, it is not clear exactly to what "upon which" refers. It may refer to the "principles and rules" formulated by the Commission. It may also refer to "human and peoples' rights and fundamental freedoms."

In the first case, "African Governments may base their legislation" on the "principles and rules aimed at solving legal problems" formulated by the Commission. In the second case, African Governments may base their legislation on "human and peoples' rights and fundamental freedoms."

In the second case, that which is dubious is the phrase "*may* base their legislation" (*italics added*), as if there is a choice. State parties to the Charter are unconditionally obliged to respect the human and peoples' rights and fundamental freedoms laid down in the Charter and they are not free to choose whether to base their legislation on the Charter.[13]

Going back to the first case, there is nothing wrong with the Commission formulating principles and rules to help the states solve legal problems relating to human and peoples' rights. On the contrary, indeed this is a very good thing. If "upon which African Governments may base their legislation" in paragraph 1 b) of Article 45 refers to the principles and rules formulated by the Commission, then it is only the way in which the paragraph is drafted which is somewhat obscure and not the paragraph's actual content, to the extent that the two can be separated. It is true that unwieldy drafting may also affect the content of an article in a treaty or at least make the content unclear, as we have just seen.

Most likely the phrase "upon which African Governments may base their legislation" refers to the "principles and rules" formulated by the Commission, and *not* to the "human and peoples' rights and fundamental freedoms" mentioned in the same paragraph. Unfortunately, the Com-

[13] This is emphasized in Article 1 of the African Charter which states that not only shall the parties to the African Charter recognize the rights, duties and freedoms enshrined in the Charter; they also undertake to adopt legislative or other measures to give effect to the said rights, duties and freedoms.

mission has not yet formulated or laid down any such principles or rules, at least not to the knowledge of this author. Otherwise, the principles and rules could have constituted invaluable assistance for those states struggling with the proper implementation of the Charter in their national legislation and judicial systems.

Perhaps the content of the Commission's decisions regarding individual communications counts as principles and rules aimed at solving legal problems on which African Governments may base their legislation. The decisions often contain that which might be labeled "principles and rules" derived from the Charter through interpretation by the Commission.

Another slight obscurity with paragraph 1 b) is the reference to "'fundamental' freedoms." Why "fundamental"? Why not merely "freedoms"? The Charter does not mention any "fundamental freedoms" among the rights, freedoms and duties, enumerated in Part I of the Charter. Nor are "fundamental freedoms" mentioned in the title of the Charter, as is the case of the European Convention for the Protection of Human Rights and *Fundamental* Freedoms.[14]

The reference to "fundamental freedoms" in Article 45 (1) (b) could give the probably erroneous impression that the Commission is only entitled to formulate and lay down principles and rules relating to human and peoples' rights and some fundamental freedoms, not all freedoms.

Also, as "freedoms" in fact are not included at all in the title of the Charter, it seems unnecessary to specifically mention them in the context of the principles and rules that the Commission may formulate for the benefit of the African Governments.

This is no major issue in relation to Article 45 paragraph 1 b), but it adds to the general obscurity characterizing the drafting of the paragraph.

Last, among the promotional functions of the Commission, in subparagraph 1 c) of Article 45, is mentioned to "co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights." There is hardly any ambiguity here with respect to either the content or the wording of the paragraph.

An interesting aspect of the Commission's co-operation with other international institutions are the regular meetings the Commission has with representatives of the Inter-American and the European regional systems for the protection of human rights. These meetings are organized by the Council of Europe in the form of workshops on issues of common concern. Three such workshops have been held to date.[15]

[14] Of 4 November 1950, *European Treaty Series* No. 5. The text of the European Convention can be found also on the home page of the European Council (http://www.coe.int).

[15] In 1995, 1997 and 2000. The workshops have been organized by the North-South Centre (European Centre for Global Interdependence and Solidarity) of the Council of Europe based in Lisbon.

Generally, international co-operation among human rights institutions can only be beneficial to the cause of human rights and help strengthen the different institutions, which may be under different forms of negative pressures from uncooperative states. The African Commission, the least established of the regional commissions, is heavily dependent on the co-operation with the other human rights institutions in order to draw on their experiences.

The most intense co-operation on the part of the Commission so far has taken place with the human rights NGO:s, regardless of whether they are included in the concept of African and international "institutions" concerned with human rights. The human rights NGO:s are engaged both in the promotion and the protection of human and peoples' rights. In the African Charter system, it is mainly the NGO:s who to date have provided the Commission with individual communications, thus they are involved in the protective parts of the work of the Commission.[16] That human rights NGO:s are also involved in the promotion of human rights is rather obvious.

Looking at sub-paragraph 1 c) of Article 45 and comparing it with sub-paragraph 1 a) of the same article, one may wonder what the difference is between the function of the Commission to "encourage" national and local institutions concerned with human and peoples' rights in sub-paragraph 1 a) and to "co-operate" with other African and international institutions concerned with the promotion and protection of human and peoples' rights in sub-paragraph 1 c). The functions appear to be largely overlapping.

In the case of the encouragement of institutions, only national and local institutions are mentioned, which is natural, while international institutions are included among those with which the Commission is to co-operate. Apart from this distinction, the two functions to "encourage" and to "co-operate" with other institutions seem to be very closely related. Perhaps "encourage national and local institutions concerned with human and peoples' rights" should be interpreted as to encourage the *creation* of such institutions. This aspect of the mandate of the Commission would then nicely complement, and not mainly overlap, the function of to co-operate with other African and international institutions.

If "encourage" is supposed to be interpreted as "encourage the *creation*" of institutions dealing with human rights, then it is all the more natural that only "national and local" institutions are mentioned in this context, whereas "African and international institutions" are mentioned in the context of "co-operation."

Another issue is that exclusively "African" institutions can also be "international" if they involve more than one African country. Therefore,

[16] *See further* Chapter 5.

the wording "co-operate with other 'African and international institutions' concerned with the promotion and protection of human and peoples' rights" is slightly misleading, as it gives the impression that the institutions concerned must be either African *or* international.

2.2 Protection

The protective mandate of the Commission is laid down in sub-paragraph 2 of Article 45 of the Charter. Judging from the layout of Article 45, the promotional mandate of the Commission is of considerably greater importance than its protective mandate. When the Charter was drafted, the issue of whether the mandate of the Commission should include protective as well as promotional functions was contentious.[17] This study focuses on the protective segment of the Commission's mandate.

Whereas the promotional mandate of the Commission is spelt out in three sub-paragraphs to Article 45 (1), there are no sub-paragraphs at all to paragraph 2 setting forth the Commission's protective mandate. Paragraph 2 of Article 45 is succinct. It states that it is the function of the Commission to "[e]nsure the protection of human and peoples' rights under conditions laid down by the present Charter." According to a conventional interpretation of this passage, it means that by using the tools provided by the Charter, the Commission is to call attention to any violations of the Charter and try to stop the violations.

More precisely, a passage like "ensure the protection of human rights" in the context of human rights treaties usually refers to a procedure for handling complaints either from states or individual citizens or both. There are procedures laid down in the Charter for handling complaints concerning violations of the Charter, from both states and individuals. The protective portion of the Commission's mandate as contained in paragraph 2 of Article 45 basically means that the Commission is to handle communications from states and other complainants in accordance with the Charter.

This part of the Commission's mandate does not add much to that which is already laid down elsewhere in the Charter. Even if "the protection of human and peoples' rights" was not explicitly mentioned in Article 45, it must be presumed that the Commission would be entitled to fulfill its functions under the other articles in the Charter dealing with the

[17] Rachel Murray, "Decisions by the African Commission on Individual Communications Under the African Charter on Human and Peoples' Rights," *International and Comparative Law Quarterly ("ICLQ")*, vol. 46, 1997, (1997a), pp. 412–434, at p. 412. B.G. Ramcharan, "The Travaux Préparatoires of the African Commission on Human Rights, *Human Rights Law Journal ("HRLJ")*, vol. 13, 1992, pp. 307–314, however, asserts that it was never intended that the functions of the Commission should be limited to solely the promotion of human rights.

procedure for handling complaints of human rights violations.[18] It should be added that the protective mandate of the Commission under the brief paragraph 2 of Article 45 is thoroughly elaborated in the rules of procedure of the Commission.[19] This is true particularly in relation to the procedure for handling communications from complainants other than states.

There is no doubt that the Commission does have the mandate under Article 45 paragraph 2 to consider complaints against human rights violations as further developed in Articles 46–59. The question thus is not whether such a mandate exists. The question is rather that which the mandate precisely implies, in particular with respect to complaints submitted by individuals and other non-state actors. That issue will be developed later on in this study.

2.3 Interpretation and any other tasks

The third among the functions of the Commission listed in Article 45, paragraph 3, of the Charter is to "[i]nterpret 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." To the knowledge of this author, the Commission has never to date had the opportunity to deliver any such interpretation to any of the bodies entitled to put forward such a request. Obviously, this is because no such requests have been presented to the Commission.[20]

An increase in the number of requests for authoritative interpretation would indicate an increase in the interest in the Charter's provisions primarily on the part of the states, which would be a desirable development. The fact that there have been no such requests for an interpretation of the Charter, however, does not necessarily imply a complete lack of interest in the provisions of the Charter on the part of the state parties and African international organizations.

The addressees of the provisions of the Charter perhaps have had no difficulties in interpreting the Charter to date (even if they have not yet implemented it). Through its numerous decisions regarding individual

[18] Chidi Anselm Odinkalu and Camilla Christensen, *supra* footnote 8, at p. 242, however, argue that paragraph 2 of Article 45 strengthens the power of the Commission to consider non-state communications under the Charter.

[19] Rules of procedure of the African Commission, 6 October 1995, Chapter XVI – Protection Activities, and Chapter XVII – Other Communications. The Rules of procedure can be found for instance on the home page of the Commission (http://www.achpr.org) or in *Documents of the African Commission on Human and Peoples' Rights*, *supra* footnote 1, p. 21.

[20] This has been confirmed (in early 2002) by the information officer at the Secretariat of the Commission, Mr. Jan Jalloh.

communications, the Commission has also offered a significant amount of interpretation as to the various provisions of the Charter, so that the African states and organizations may perhaps find that which they seek by studying the Commission's decisions.

The fourth and last function of the Commission under Article 45 of the Charter is to "[p]erform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government [of the OAU]." One can here contemplate many useful tasks that the Commission could perform in the pan-African context, for instance with respect to conflict prevention and conflict resolution, to law-related peace-keeping and peace-building activities, and to efforts at democratization and building states based on the rule of law.[21] The Commission seems to have been seriously under-utilized under paragraph 4 of Article 45 to date. The only, even if important, task so far entrusted to the Commission by the AHSG of the OAU has been the elaboration of the Protocol to the Charter relating to Women's Rights.[22] This under-utilization can be the result of a lack of trust in the Commission on the part of the Assembly or a lack of interest in human rights. However, it is not due to the fact that the Commission cannot do a satisfactory job.

2.4 State reports

An additional important function of the Commission is to examine the state reports that the state parties are obliged to submit every two years from the date of the enactment of the Charter. This function is not mentioned in Article 45 of the Charter, but follows implicitly from Article 62 which states that "[e]ach State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the

[21] *Cf.* the Declaration of the AHSG on the Establishment, within the OAU of a Mechanism for Conflict prevention, Management and Resolution, adopted at the 29th Ordinary Session, in Cairo, from 28 to 30 June, 1993; and *Resolving Conflicts in Africa. Implementation Options*, OAU, OAU Information Services Publication – Series (II) 1993. On the conflict prevention mechanism of the OAU *see also* Michel Cyr Djiena Wembou, "A propos du nouveau méchanisme de l'OUA sur les conflits," *Revue Générale de Droit International Public ("RGDIP")*, vol. 98, 1994, pp. 377–385.

[22] *Cf.* Decision AHG/Dec. 126(XXXIV) adopted during the 34th Ordinary Session of the AHSG of the OAU, 8–10 June 1998, on the Annual Activities of the African Commission on Human and Peoples' Rights, para. 7, document courteously provided to this author by the information officer at the Secretariat of the Commission, Mr. Jan Jalloh. The draft Protocol to the African Charter on the Rights of Women in Africa can be found for instance on the home page of the Commission (http://www.achpr.org). For the final draft Protocol *see* Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 12–16 November, 2001, Addis Ababa, Ethiopia, (Expt/Prot.Women/Rpt. (I)). The meeting was hosted by the OAU.

legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter."[23]

In the context of tools available to the Commission for the enforcement of the Charter, the examination of state reports is a relatively potent one.[24] The examination takes place in sessions conducted in public by the Commission. The risk of then being subjected to public criticism or the possibility of public praise may potentially contribute to guiding the behavior of the state parties towards a more scrupulous implementation of the Charter. This is true as far as the submitting of reports is concerned, both in presuming that states want to be praised for having submitted reports, and also in so far as the giving of any effects to the rights and freedoms in the Charter on the national level, both of which can be demonstrated in the state report.[25]

The enforcement of human rights law generally presents difficulties, and given a relatively weak machinery for complaints, the state reporting procedure becomes all the more important. The result of the examination by the Commission of state reports is published in print. The published result contains the state report, any laudatory remarks occasioned by the report, the questions concerning any gaps or obscurities contained in the report asked by the Commissioners and the answers given by the representatives of the state to these questions.

Nowadays, state representatives most often appear at the Sessions of the Commission in order to orally present the contents of their reports and answer any questions the Commissioners may have. Between one and four state reports have been presented by the states concerned and

[23] *See also* State Reporting Procedure, OAU, ACHPR, Information Sheets No. 4 and 5.

[24] On the state reporting procedure, *see* Astrid Danielsen, a former intern with the Secretariat of the Commission, *The State Reporting Procedure under the African Charter*, Master's thesis, Faculty of Law, University of Copenhagen, Publications from the Danish Centre for Human Rights, No. 51, 1994; and the very useful reports by Rachel Murray from the Sessions of the Commission published in the *HRLJ* [so far from the 19th and 20th Ordinary Sessions in 1996 (vol. 18, No. 1-4, 1997, pp. 16–27), from the 21st and 22nd Ordinary Sessions in 1997 (vol. 19, No. 5-7, 1998, pp. 169–185), and from the 25th and 26th Ordinary Sessions in 1999 (vol. 22, No. 5–8, 2001, pp. 172–198)]; *cf. also* Guidelines for National Periodic Reports and Amendments to Guidelines for National Periodic Reports, in *Documents of The African Commission on Human and Peoples' Rights*, *supra* footnote 1, pp. 49 and 80 respectively.

[25] According to the 14th Annual Activity Report of the Commission, 24 state parties to the African Charter have not submitted any reports; 9 states have submitted one report but owe more; 4 states have submitted two or more reports but owe more; 16 states have submitted all their reports, and of these 15 states have submitted *and* presented all their reports and 1 state has submitted all its reports but has not presented them all. Considering the circumstances reigning in Africa, these figures are rather good, and the frequency with which states submit and present reports is increasing [Annex II to the 14th Annual Activity Report of the African Commission, Status of Submission of Periodic Reports to the African Commission on Human and Peoples' Rights (As at May 2001), AHG/229(XXXVII)].

examined by the Commission at recent Sessions. The first time a state presents a state report, the Commission is rather lenient in its evaluation of the report. Subsequent state reports, due every two years, are subject to a more rigorous examination.[26]

Under the Charter, as we have seen, the obligation of the states under Article 62 is limited to reporting on "the legislative or other measures taken" and does not include the requirement to report on the progress made in the enjoyment of the rights and freedoms contained in the Charter.[27]

It could be argued that under the Charter, the state parties are also implicitly obliged to report on the progress made in the enjoyment of the rights, as without any such progress over time, the legislative or other measures taken are meaningless.

Under the Commission's procedural rules, however, the states are to also report on "the progress made with regard to the enjoyment" of the rights in the Charter.[28] In addition, the rules of procedure actually go one step further and state that the state reports shall also indicate "the factors and difficulties impeding the implementation of the provisions of the Charter."[29]

An interesting way in which the Commission has recently started using the state reporting procedure is as a means to ensure that the states implement the Commission's decisions regarding communications in which a state has been found guilty of violations of the Charter in a particular case. In *Legal Resources Foundation v Zambia,* for instance, the Commission requested the Republic of Zambia to report back to the Commission when submitting its next state report in terms of Article 62 as to the measures taken to comply with the recommendation made by the Commission as a result of its violations of the Charter.[30] In that case, the Commission recommended – or "urged" – that Zambia take the steps necessary to bring its laws and Constitution into conformity with the Charter, which Zambia is obliged to do and report on in any event. Therefore, it may be easier for the Commission to use the state reporting procedure under Article 62 in this case in order to control that Zambia takes the necessary measures. If the recommendation by the Commission had been more specific and more directed towards the compensation of one particular individual for a particular violation, the state reporting pro-

[26] *Cf.* Anyangwe, *supra* footnote 4, at pp. 637–638; and Murray (1997) and (1998), *supra* footnote 24.

[27] *Cf.* the UN International Covenant on Civil and Political Rights ("UN CCPR"), 16 December 1966, 999 *United Nations Treaty Series (UNTS)* 171, Article 40 (1) which does have such a requirement.

[28] Rule 81(1) of the Rules of procedure.

[29] *Ibid.*

[30] Case 211/98, *supra* footnote 9.

cedure may constitute a less suitable control mechanism for the Commission. Even in the latter type of cases, however, the state reporting procedure could serve as a useful tool for the Commission to induce states to implement its decisions and duly compensate the victims of human rights violations.

The state reporting procedure is not only meant to be a form of control for the enforcement by the state parties of the Charter, but is also considered to constitute a means of helping the states to implement the Charter.[31] If it turns out that a state has met with difficulties in implementing the Charter, the questions put by the Commission are meant to be useful in aiding the state in its endeavors to fulfill its obligations under the Charter.

For the state, however, being subject to public scrutiny and possibly even criticism caused by one's activities in the field of human rights, or more likely lack of activities, is probably inherently uncomfortable even if the Commission strives to make the experience as pleasant as possible for the state representatives. In any case, the reporting procedure forms an important part of the enforcement procedure of the Charter and consequently it is an important aspect of the mandate of the Commission.

The state reporting procedure could be viewed as forming part of the Commission's protective mandate, if a distinction is to be made between the promotional and protective mandates of the Commission. The state reporting procedure is also of a promotional nature in the sense that it induces states to implement the Charter in order to avoid any embarrassment on the date of the examination of the state reports. In the Commission's procedural rules, the state reporting procedure is labeled a promotional activity.[32]

Indeed, the state reporting procedure is the only promotional activity that is elaborated in any detail in the Commission's procedural rules. Otherwise, there is only a brief reference to the promotional activities in the rules, stating that the Commission is to adopt and carry out a programme of action in order to give effect to its promotional obligations under the Charter, particularly Article 45 (1), which we saw above is very comprehensive.[33]

The promotional activities proper, i.e. those listed in Article 45 of the Charter, are also labeled "promotional activities" in the Commissioner's procedural rules, naturally, and they are taken up in a particular rule entitled, not surprisingly, "Promotional Activities." That which is slightly surprising, however, is that the entire chapter in the rules concerning both the state reporting procedure and promotional activities is also labeled

[31] *Cf.* Anyangwe, *supra* footnote 4, at p. 638; and Murray (1997) and (1998), *supra* footnote 24.

[32] Rules of procedure, Chapter XV – Promotional Activities: Reports Submitted by State Parties to the Charter Under Article 62 of the Charter.

[33] Rule 87 of the Rules of procedure – Promotional activities.

"promotional activities."[34] In view of the fact that both these groups of activities are treated in this one chapter, it is even more surprising that the sub-title of this entire Chapter is "Reports Submitted by State Parties to the Charter Under Article 62 of the Charter"; the chapter in reality covers more than this.

Apart from the mere drafting difficulties which may be involved, the way the state reporting procedure is addressed in the rules of procedure seems to illustrate the ambiguous nature of the state reporting procedure as possibly belonging to a category of measures existing somewhere between protective and a promotional activities.

If the state reporting procedure truly were a promotional activity, there would be no need for a separate rule entitled "Promotional Activities" concluding a chapter mainly concerned with the different aspects of the state reporting procedure.[35] The main heading of the entire chapter, however, is "Promotional Activities."

2.5 A broad mandate

It becomes obvious that if all of the aspects of the mandate of the Commission are added up, the mandate of the Commission is very broad. According to Article 45, the Commission shall promote human and peoples' rights through a number of different activities, ensure the protection of human and peoples' rights, interpret the provisions of the Charter at the request of a State Party or the OAU, and finally perform any other tasks entrusted to it by the AHSG of the OAU.

Taking the state reporting procedure under Article 62 into account, the Commission has the broadest mandate of the three regional human rights commissions and courts. Not including the state reporting procedure, the mandate of the Commission is comparable to the mandate of the Inter-American Commission.[36] The former European Commission only had as its mandate the consideration of complaints from individuals and non-governmental organizations; the European Court now has the same mandate plus the mandate to consider complaints by states.[37]

[34] *Cf. supra* footnote 32.

[35] Rule 87 of the Rules of procedure; the state reporting procedure is dealt with in the preceding rules 81–86.

[36] *Cf.* the American Convention on Human Rights, 22 November 1969, 9 *ILM* 673, Part II, Chapter VII – Inter-American Commission on Human Rights, Section 2. Functions, Article 41. The text of the Convention can also be found at the home page of the OAS (http://www.oas.org).

[37] Article 25 of the European Convention on Human Rights and Fundamental Freedoms before 1 November 1998; and Articles 33 and 34 of the European Convention as of 1 November 1998.

The Charter also encompasses the largest number of state parties, even if not the largest number of persons, compared with the European and American human rights systems. The Charter now has 53 parties, i.e. all members of the OAU. The American Convention has 25 parties (all members of the Organization of American States ("OAS") except the United States). The African system remains the largest one in terms of the number of state parties even after the increase in number of parties to the European Convention after 1989 to 43 states in total, due to the disappearance of the Soviet Union and its control over Central and Eastern Europe.

At the same time, neither is the Commission or its Secretariat the largest, although the Commission is larger than the Inter-American Commission. The Inter-American Commission consists of seven members while the European Commission consisted of one representative of each member state of the Council of Europe, i.e. as many as 40 members in 1998 the year the European Commission was dissolved.[38] The African Commission consists of eleven members.[39] The comparable United Nation's Human Rights Committee ("UN HRC'ttee") tied to the UN CCPR consists of 18 members.[40]

The Secretariat of the Commission is considerably less well equipped than the Secretariat of the other two Commissions as well as the UN HRC'ttee. The economic resources available to the Commission are smaller than those available to the other comparable treaty bodies. In addition, the Commission is functioning within the least developed of the three continents to date having a regional human rights system.

The precarious relationship between the Commission and the existing pan-African political powers also contributes to the relatively disadvantageous position of the Commission in comparison with the other comparable regional and global treaty bodies. This relationship is well illustrated among other things by the fact that the Secretariat of the Commission, in Banjul, The Gambia, is located far away from the headquarters of the OAU, in Addis Ababa.

Thus the small African Commission is expected to carry out a large and difficult task. The wide range of functions of the Commission under the Charter hardly corresponds to any similarly wide powers in real terms. However, through the creative use of both the mandate and resources, the Commission has been able to achieve more than could be hoped for judging from its rather difficult starting position. A broad and slightly ambiguous mandate also offers the Commission a great amount of freedom of action.

[38] Article 34 of the American Convention; Article 20(1) of the European Convention before 1 November 1998.
[39] African Charter, Article 31.
[40] UN CCPR, Article 28(1).

In the following chapters, we will see how the Commission has utilized and developed its protective mandate to handle communications from states, individuals and other non-governmental entities concerning violations of the Charter. We will also discuss ways in which the procedure for considering communications could be strengthened.

The experiences of the other two regional Commissions and Courts of Human Rights as well as the experiences of the global UN HRC'ttee certainly constitute an important source of inspiration for the Commission. Before we embark on a proper study of the communications' procedure, we will explore, in chapter 3, how the existing human rights conventions were mirrored in the text of the Charter at the time of its drafting and how the Commission proceeds today when it, wisely, wishes to integrate with its own case law the experiences of the other similar regional and global systems for the protection of human rights.

2.6 No African Court

There is still no African Court on Human and Peoples' Rights.[41] The Protocol to the African Charter on an African Court on Human and Peoples' Rights was adopted by the 34th Ordinary Session of the AHSG of the

[41] With respect to the prospective Court, *see* Arthur E. Anthony, "Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa," *Texas International Law Journal*, vol. 32, 1997, pp. 511–524; Ibrahim Ali Badawi El-Sheikh, "Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Introductory Note", *AJICL*, vol. 9, 1997, pp. 943–952; Hamid Boukrif, "La cour africaine des droits de l'homme et des peuples: Un organe judiciaire au service des droits de l'homme et des peuples en Afrique," *AJICL*, vol. 10, 1998, pp. 60–87; Nico Krisch, "The Establishment of an African Court on Human and Peoples' Rights," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht ("ZaöRV")*, vol. 58, 1998, pp. 713–732; Abdelsalam A. Mohamed, "Individual and NGO participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons From the European and Inter-American Courts of Human Rights, *Journal of African Law ("JAL")*, vol. 43, 1999, pp. 201–213; John Mubangizi and Andreas O'Shea, "An African Court on Human and Peoples' Rights," *South African Yearbook of International Law ("SAYIL")*, vol. 24, 1999, pp. 256–269; Mutoy Mubiala, "La cour africaine des droits de l'homme et des peuples: Mimétisme institutionnel ou avancée juridique?," *RGDIP*, vol. 102, 1998, pp. 765–780; Makau Mutua, "The African Human Rights Court: A Two-Legged Stool?," *HRQ*, vol. 21, 1999, pp. 342–363; Gino J. Naldi and Konstantinos Magliveras, "The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison," *AJICL*, vol. 8, 1996, pp. 944–969; Gino J. Naldi and Konstantinos Magliveras, "Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights," *Netherlands Quarterly of Human Rights ("NQHR")*, vol. 16, 1998, pp. 431–456; Vincent O. Orlu Nmehielle, "Towards an African Court of Human Rights: Structuring and the Court," *Golden Gate University School of Law Annual Survey of International and Comparative Law*, vol. 6, 2000, pp. 27–60; Andre Stemmet, "A Future African Court for Human and Peoples' Rights and Domestic Human Rights Norms," *SAYIL*, vol. 23, 1998, pp. 233–246; Nsongurua J. Udombana, "Toward the African

OAU on 9 June 1998, but has not yet been ratified by enough member states to be enacted. Fifteen ratifications are necessary before the Protocol can enter into force.[42]

In the absence of a court, the Commission has to perform both the quasi-judicial more conciliating functions of a commission and the judicial more case law oriented functions of a court. In addition, the Commission has its comprehensive promotional mandate to fulfill. To the extent that the states accept it, a court would take care of the more sophisticated legal intricacies involved in the communications and thus relieve the Commission of some of its current responsibilities. Unfortunately, the ratification process does not proceed quickly.

Now when the African Union is under construction, it perhaps would also be a good idea to consider merging the African Court on Human and Peoples' Rights with the planned Court of Justice of the African Union. The proper relationship between the European Court of Human Rights (of the Council of Europe) and the European Court of Justice (of the European Union) has been much debated. Since the African institutions are at an earlier stage of the development, it would be easier to tie the two Courts together in African than is now the case in Europe. On the other hand, there may be strong reasons for not merging the two Courts; the human rights court may be a stronger protector of human rights if it stands alone and does not have to take any other interests into consideration. In any event, for the foreseeable future it will be the Commission who will continue to be the sole mechanism protecting and promoting the African Charter, with all the work this entails.

As to the relationship between the African Court and the Commission, the Protocol to the African Charter states that the African Court shall "complement the protective mandate of the African Commission."[43] From the point of view of the Court, in the best of all worlds, the groundwork will have been laid by the Commission and once the communication reaches the Court, it will only have to concentrate on issues of legal principle.

Court on Human and Peoples' Rights: Better Late Than Never," *Yale Human Rights and Development Law Journal*, vol. 3, 2000, pp. 45–111; and Inger Österdahl, "The Jurisdiction *Ratione Materiae* of the African Court of Human and Peoples' Rights: A Comparative Critique," *Review of the African Commission on Human and Peoples' Rights ("RACHPR")*, vol. 7, 1998, pp. 132–150. For a comparison with another African international court, *cf.* Kofi Oteng Kufuor, "Securing Compliance With the Judgements of the ECOWAS Court of Justice, *AJICL*, vol. 8, 1996, pp. 1–11.

[42] Article 34(3) of the Protocol. So far (mid 2002), five states have ratified the Protocol: Burkina Faso, The Gambia, Mali, Senegal, and Uganda. The text of the Protocol can be found for instance in *Documents of The African Commission on Human and Peoples' Rights*, *supra* footnote 1, p. 82; or on the home page of the African Commission (http://www.achpr.org).

[43] Article 2 of the Protocol.

It is also not inconceivable that the words of a court would weigh a little heavier in relation to the states, so that the African states would respect the judgments of an African Court more than the decisions of the Commission. In principle, of course, the judgments of the Court will be binding.[44]

A particular trait of the statute of the African Court is that NGO:s and individuals are allowed direct access to the Court.[45] There thus is no guarantee that the communications will be better prepared when they reach the Court than when they reach the Commission. For individuals and NGO:s to have direct access to the Court, the Member State in question will have to make a declaration that it accepts the Court's competence to receive such petitions.[46] It is questionable whether the African Charter system will benefit from letting individuals and NGO:s file directly with the Court. It would seem better to let individuals and NGO:s refer their case to the Court after the Commission has considered the communication. Otherwise, the Court risks being clogged by deficient communications, spending its time, just as the Commission, in trying to get the additional information it needs in order to render good judgments. If there were two levels in the protection system, it would seem more effective to distinguish quite clearly between the roles of the two instances so that the system does not end up with two African Commissions.

The Protocol regarding the Court states that the Rules of Procedure of the Court shall lay down detailed conditions under which the Court shall consider the cases brought before it, bearing in mind the complementary nature of the Commission and the Court.[47] As to the rules of procedure, the Protocol further states that the Court is to consult the Commission as appropriate.[48]

Another particularity of the statute of the African Court, which is only mentioned in this context because it is so unique, is the rule that "[i]f 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."[49] Usually the opposite is guaranteed, namely that a judge who is a national of a State party to a case is guaranteed a place on the Court.[50] The independence and impartiality of the prospective judges perhaps was a concern for the drafters of the Protocol on the African Court on Human Rights. The independence of the members of the Commission has always been an issue of contention. As

[44] Article 30 of the Protocol.
[45] Article 5(3) of the Protocol.
[46] Article 34(6) of the Protocol.
[47] Article 8 of the Protocol.
[48] Article 33 of the Protocol.
[49] Article 22 of the Protocol.
[50] *Cf.* Articles 27(2) of the European Convention and Article 55 of the American Convention.

to the Commissioners, the African Charter only states that the members of the Commission shall serve in their personal capacity.[51] In the rules of procedure of the Commission, under "Incompatibilities," it is stated that no member of the Commission shall take part in the consideration of a communication in which he or she has a personal interest or has participated, in any capacity, in the adoption of any decision relating to the case.[52]

In the Protocol on the Court, the issues of independence and incompatibility are treated separately. On the issue of independence, the Protocol states that no judge may hear any case in which the same judge has previously participated within in any capacity.[53] The Protocol also states that the independence of the judges shall be fully ensured in accordance with international law and that the judges shall at no time be held liable for any decision or opinion issued in the exercise of their functions.[54] Both paragraphs seem to bear witness to the fear on the part of the drafters of the Protocol that the member states would not respect the independence of the judges.

On the issue of incompatibility, the Protocol on the African Court states that the position of the judge on 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.[55] This is what is usually intended by a rule concerning incompatibility. In the rules of procedure, the Commission seems to have mixed up the issue of independence with the issue of incompatibility; the two are undeniably closely related to each other.

[51] Article 31(2) of the African Charter.
[52] Rule 109 of the Rules of procedure.
[53] Article 17(2) of the Protocol.
[54] Article 17(1) and (4) of the Protocol.
[55] Article 18 of the Protocol.

3. The sources of inspiration

3.1 The Charter

There are traces of several international human rights instruments in the African Charter. Here we will investigate the possible sources of inspiration as primarily concern the design of the individual communications' procedure.

Naturally, the Charter is modeled after the other two comprehensive regional human rights conventions, the European and the American, both as concerns the procedural aspects as well as the substantive aspects having to do with the content of the rights proclaimed. The Charter is also modeled after the UN CCPR and its First Optional Protocol dealing with individual communications.[1] In general, the Charter seems to be modeled more after the UN CCPR than after the regional human rights conventions.

As far as the content of the rights is concerned, the Charter is also modeled after the United Nation's International Covenant on Economic, Social and Cultural Rights ("UN CESCR") to a certain but lesser extent, as the Charter includes a number of economic, social and cultural rights.[2] Ultimately, from the point of view of content, the Charter, like all other human rights conventions mentioned above, is modeled after the UN Universal Declaration of Human Rights.[3] In contrast to the other human rights conventions, the Charter also resembles the Universal Declaration in the way in which the Charter is drafted; the Charter is briefer and more vague than is typical among human rights conventions.

More surprisingly, the Charter also turns out to be modeled after the "1503 procedure" before the UN Commission on Human Rights, based on resolution 1503 adopted by the Economic and Social Council ("ECOSOC") in 1970.[4] This, at least, is the conclusion one must draw after a

[1] First Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 *UNTS* 302.

[2] UN International Covenant on Economic, Social and Cultural Rights, 16 December 1976, 993 *UNTS* 3.

[3] UN General Assembly ("GA") resolution 217 A (III) of 10 December 1948.

[4] Resolution instituting procedures to enable the Commission on Human Rights and the Subcommission on Prevention of Discrimination and Protection of Minorities to deal with communications relating to violations of human rights and fundamental freedoms in private

comparison between the procedure established in the Charter and the procedure under resolution 1503. The similarity of the Charter to resolution 1503 is limited solely to the procedural aspects of the Charter, as resolution 1503 only concerns issues of procedure.

The similarity of the procedure for the consideration of individual communications under the Charter to the procedure laid down in resolution 1503 introduces a complication into the Charter, as the nature and purpose of the two respective procedures are, or at least should be, rather different. The fact that the procedure laid down in the Charter resembles the procedure under resolution 1503 would seem to illustrate the hesitance on the part of the drafters, discernible from the Charter itself, concerning whether the Charter should generally include a procedure for the consideration of communications. The resulting text of the Charter could be described as an attempt on the part of the drafters at having their cake and eating it too. The way in which the Commission has elegantly handled this built-in complication in the Charter is discussed in the following chapters.

Despite the hesitance on the part of the drafters of the Charter to all appearances about whether to include a procedure for the consideration of communications, the Charter in the end makes compulsory both the procedure for the consideration of communications from states and for the consideration of other communications. Somewhat paradoxically, the Charter at the time of its adoption in 1981 with this went further than all the other comprehensive human rights conventions which at that time included a system for the consideration of complaints. From the point of view of human rights, it is a great advantage of the Charter that it has made obligatory the consideration of complaints about violations of the Charter from states as well as from individuals.

On a number of points, the Charter is utterly original in relation to the other and previous human rights instruments. The points on which the Charter is original mostly concern its substantive content and will not be further discussed here.[5] To the extent that the truly original traits in the Charter relate to the procedure for the consideration of individual communications, we will return to these in the chapters that follow.

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meetings, E/RES/1503 (XLVIII), 27 May 1970; and resolution 1 (XXIV) of the Subcommission on Prevention of Discrimination and Protection of Minorities concerning procedures for the implementation of Economic and Social Council resolution 1503 (XLVIII), 13 August 1971. Susanne Malmström, a former intern with the Secretariat of the Commission, has made a similar observation in *The Communication Procedure Under the African Charter on Human and Peoples' Rights*, Master's thesis, Raoul Wallenberg Institute, Faculty of Law, Lund University, 1995, p. 31. On the 1503 procedure *see further* Frank Newman and David Weissbrodt, *International Human Rights*, 1990, chapter IV; and Maria Luisa Bartolomei, *Gross and Massive Violations of Human Rights in Argentina 1976–1983*, 1994.

[5] *See* "The surprising originality of the African Charter," article in course of preparation by the present author.

If one looks at the articles in the Charter concerning the procedure for the consideration of "other communications," i.e. communications other than from states, that which is most striking is that they do not state very much about the procedure to be followed by the Commission.[6] The First Optional Protocol to the UN CCPR is also brief, but still stands out as more exhaustive than the corresponding articles in the Charter. The corresponding parts of the European and American Conventions are also more detailed.[7]

The procedural provisions of the Charter relating to individual communications begin with the rule that "[b]efore each session, the Secretary of the Commission shall make a list of the communications ... and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission."[8] This article most resembles a rule of procedure of the UN HRC'ttee, which considers the individual communications brought under the First Optional Protocol to the UN CCPR.[9] There is no similar provision in the rules of procedure of the former European Commission[10] or of the Inter-American Commission.[11]

The Charter then contains a list of the conditions for the admissibility of individual communications just as the other human rights conventions, although the list in the Charter is slightly longer.[12]

Some of the more unusual features of the list of conditions for admissibility contained in the Charter seem to be inspired primarily by UN resolution 1503. Condition no. 3, for instance, that (individual) communications shall be considered if they "[a]re not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity"[13] strongly resembles the following provision in the resolution concerning the implementation of resolution 1503: "Communications shall be inadmissible if their language is essentially abusive and in particular if they contain insulting refe-

[6] Articles 55-59.

[7] As from 1 November 1998, the European Convention only includes a Court of Human Rights. The provisions relating to the procedure before the European Commission were more detailed than the corresponding provisions in the African Charter.

[8] Article 55 (1) of the African Charter.

[9] *See* Rule 79 (1) of the Rules of Procedure of the Human Rights Committee, UN Doc. No. CCPR/C/3/Rev. 6, 24 April 2001.

[10] Rules of procedure of the European Commission of Human Rights as in force at 28 June 1993.

[11] Rules of procedure of the Inter-American Commission on Human Rights, 1 May 2001. The Rules of procedure can be found, for instance, on the home page of the OAS (http://www.oas.org). *See further* Dinah Shelton, "New Rules of Procedure for the Inter-American Commission on Human Rights", *HRLJ*, vol. 22, No. 5–8, 2001, pp. 169–171.

[12] Article 56 of the African Charter.

[13] Article 56 (3) of the African Charter.

[14] Resolution 1 (XXIV) of the Subcommission on Prevention of Discrimination and Protection of Minorities, *supra* footnote 4, para. 3 (b).

rences to the State against which the complaint is directed."[14] The UN resolution is more generous than the Charter in that it adds that "[s]uch communications may be considered if they meet the other criteria for admissibility after deletion of the abusive language."[15] Luckily from the point of view of human rights, the Commission has never declared a communication inadmissible due to the quality of the language used, although in *Ligue Camerounaise des Droits de l'Homme v Cameroon,* the Commission noted the "insulting language" used in the communication.[16] There are hints of a similar condition for admissibility in the other human rights conventions, but the Charter and resolution 1503 are the most explicit.

Another even more unusual condition for admissibility under the Charter is condition no. 4, that an individual communication must not be "based exclusively on news disseminated through the mass media."[17] This condition can only be found in the resolution concerning the implementation of resolution 1503, not in the other relevant human rights conventions. The resolution implementing resolution 1503 states that "[a] communication shall be inadmissible if it appears that it is based exclusively on reports disseminated by mass media."[18] The Commission has addressed this condition once in *Sir Dawda K Jawara v The Gambia* when The Gambia claimed that the communication was inadmissible because it was based exclusively on news disseminated through the mass media.[19]

The Commission refuted this objection as presented by The Gambia in the constructive way in which the Commission generally handles the more obscure aspects of the Charter: "While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word 'exclusively'."[20] The Commission continued, discussing the important role of the mass media for the disclosure of human rights violations in Africa: "There is no doubt that the media remains the most important and if not the only source of information. It is common knowledge that information on human rights violations is always gotten from the media. The Genocide in Rwanda, the human rights abuses in Burundi, Zaire, Congo, to name but a few, were revealed by the media."[21]

[15] *Ibid.*

[16] Case 65/92, decided at the 21st Ordinary Session of the African Commission, 15–24 April 1997, para. 15.

[17] Article 56 (4) of the African Charter.

[18] Resolution 1 (XXIV) of the Subcommission on Prevention of Discrimination and Protection of Minorities, *supra* footnote 4, para. 3 (d).

[19] Case 147/95, 149/96, decision of 11 May 2000.

[20] *Ibid.* at para. 24.

[21] *Ibid.* at para. 25.

Concerning the evaluation of the information received by the Commission, the Commission continued: "The issue therefore should not be whether the information was gotten from the media, but whether the information is correct. Did the complainant try to verify the truth about these allegations? Did he have the means or was it possible for him to do so, given the circumstances of his case?"[22] The Commission's conclusion was that the communication in this case could not be found to be based exclusively on news disseminated through the mass media because the author of the communication also referred to facts other than those contained in the newspaper article in question.[23]

A further unusual aspect of the conditions for admissibility of individual communications under the Charter is that the communications are to be submitted "within a reasonable period from the time local remedies are exhausted."[24] The European and American Conventions prescribe a six months' time limit whereas the First Optional Protocol to the UN CCPR is silent on the matter. The resolution concerning the implementation of resolution 1503, however, states that "[a] communication shall be inadmissible if it is not submitted to the United Nations *within a reasonable time* after the exhaustion of the domestic remedies as provided above"(*italics added*).[25] Here again the Charter most resembles the 1503 procedure. The Commission has never had reason to address this particular condition for admissibility, so it is still unclear how the term "reasonable period" in the Charter would be interpreted. The Commission at least has never declared a communication inadmissible on the ground that it was not submitted within a reasonable period from the time the local remedies were exhausted. Nor has any state party so far claimed that a communication should be dismissed on this ground.

In the article following the one regarding the conditions for admissibility, the Charter states that "[p]rior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission."[26] There is nothing particularly unusual in this provision. On the contrary, it is natural that the communications are brought to the knowledge of the State accused of the violations of the Charter, otherwise there would be no real procedure before the Commission. The provision in the Charter seems to be modeled after the First Optional Protocol to the UN CCPR.[27]

In practice, all communications are always brought to the knowledge of the State concerned immediately upon receipt of the communication

[22] *Ibid.* at para. 26.
[23] *Ibid.* at para. 27.
[24] Article 56 (6) of the African Charter.
[25] Resolution 1 (XXIV) of the Subcommission on Prevention of Discrimination and Protection of Minorities, *supra* footnote 4, para. 5.
[26] Article 57 of the African Charter.
[27] *Cf.* Article 4 (1) of the First Optional Protocol.

by the Secretariat of the Commission. The State concerned is regularly asked to comment both on the admissibility of the communication and on the substance of the complaint. In practice thus the Commission goes further than that which is demanded by the Charter, as the Commission brings the communication to the knowledge of the state concerned prior even to its consideration of the admissibility of the communication.[28]

On the other hand, the Commission does not quite live up to the demand in the Charter that the Chairman of the Commission brings the communication to the knowledge of the state concerned. In practice, it is the Secretariat of the Commission that takes care of this matter, a very reasonable solution.

The article in the Charter concerning the procedure for the substantive consideration of the individual communications is next.[29] Only the possible sources of inspiration for the drafters of this article will be discussed here. The actual content of the article and the way in which the Commission has put it into practice will be treated later in this study.

The article regarding the consideration on the merits of individual communications under the Charter does not resemble any article in any of the other comparable human rights conventions. If one looks at the 1503 procedure, however, one discovers several similarities.[30] Both the 1503 procedure and the Charter focus on gross human rights violations. The Charter states that "[w]hen 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 [of the OAU] to these special cases."[31]

Resolution 1503 similarly requests the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider the communications brought before it "... with a view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission [on Human Rights]."[32] These two provisions are so similar that it is easy to draw the conclusion that the drafters of the Charter provision were inspired by resolution 1503.

The Charter further states that as the next step in the procedure for the consideration of individual communications "[t]he Assembly of Heads of State and Government may then request the Commission to undertake

[28] *Cf. infra* ch. 7 footnote 12.
[29] Article 58 of the African Charter.
[30] *Cf. supra* footnote 4.
[31] Article 58 (1) of the African Charter.
[32] Para. 5 of resolution 1503, *cf. supra* footnote 4.

an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations."[33]

The corresponding provision under the 1503 procedure "[r]equests the Commission on Human Rights after it has examined any situation referred to it by the Sub-Commission to determine ... [w]hether it requires a thorough study by the Commission and a report and recommendations thereon to the [Economic and Social] Council ..."[34] These two provisions are also strikingly similar.

There is a concluding provision regarding cases of emergency in the Charter which is without parallel in any other human rights conventions or resolution 1503: "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."[35]

Another provision in the Charter relating to the procedure for handling individual communications, as well as communications from states, is worded in a way very similar to the corresponding provision in resolution 1503. The provision concerns confidentiality, which is not a central aspect of the procedure for the consideration of individual communications, at least not from the point of view of this study. The Charter states that "[a]ll measures taken within the provisions of the present Chapter [Chapter III. Procedure of the Commission] shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide."[36]

Resolution 1503 for its part "[d]ecides that all actions envisaged in the implementation of the present resolution by the Sub-Commission on Prevention of Discrimination and Protection of Minorities or the Commission on Human Rights shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council."[37]

There was a provision with a similar purpose in the European Convention before 1 November 1998, which, however, was worded differently.[38] In the current European Convention, there is a provision on confidentiality relating to friendly settlement proceedings.[39] In the American

[33] Article 58 (2) of the African Charter.

[34] Para. 6 (a) of resolution 1503, *cf. supra* footnote 4. Contrary to the African Charter, resolution 1503 also offers another alternative to the thorough study, namely an investigation by an *ad hoc* committee (para. 6 (b)). On the other hand, the African Charter in Article 46 allows "any appropriate method of investigation" to be used by the Commission which makes it possible also for the African Commission to carry out on-site inspections.

[35] Article 58 (3) of the African Charter.

[36] Article 59 (1) of the African Charter.

[37] Para. 8 of resolution 1503, *cf. supra* footnote 4.

[38] Article 32 (3) of the European Convention before 1 November 1998. *See also* Article 31 (2).

[39] Article 38 (2) of the European Convention after 1 November 1998.

Convention, there are also articles on the confidentiality of the procedure before the Inter-American Commission, but again worded differently than the one found in the Charter.[40] In the First Optional Protocol to the UN CCPR, there is no provision on confidentiality.[41] In sum, although there are provisions with a similar import in the other human rights conventions, the drafting of the article on confidentiality in the Charter seems most directly inspired by resolution 1503.

The manner in which the complaints concerning violations of the Charter are labeled is also reminiscent of the 1503 procedure. The complaints from states as well as from individuals are labeled "communications" in the Charter, just as in resolution 1503, which, however, solely aims at communications other than communications from states.[42] The First Optional Protocol to the UN CCPR also mentions "communications" from individuals and the UN CCPR itself speaks of "communications" from states. The drafters of the Charter thus may have been inspired either by the 1503 procedure or by the procedure under the First Optional Protocol, and possibly by the UN CCPR itself. The drafters were in any case more inspired by the terminology used in the UN system than the corresponding terminology used in the regional human rights conventions.

The European Convention before 1 November 1998 spoke of "petitions" to the European Commission from individuals; the current European Convention speaks of individual "applications" to the European Court of Human Rights. The American Convention uses the term "petition" with respect to complaints from individuals and the term "communication" with respect to complaints from states. The drafters of the Charter perhaps found the term "communication" to be the most neutral. The term "petition" may have sounded a bit too aggressive, especially considering the prevailing hesitancy about whether to include a complaint procedure at all in the Charter.

Since the African system is also a regional system, one could have assumed that the drafters of the Charter would have been more inspired by the other regional human rights conventions than by the global mechanisms as concerns the choice of terminology as well as other points. The European Convention perhaps would have been controversial as a model due to the colonial past of many European countries. The American Convention however should suffer from no such disadvantage, from the point of view of the drafters of the Charter as most of the parties to the American Convention are instead developing countries. The association

[40] Articles 50 (2) and 51 (3) of the American Convention.

[41] Although there is such a provision in the Rules of procedure of the HRC'ttee, Rule 96, *cf. supra* footnote 9.

[42] Resolution 1 (XXIV) concerning procedures for the implementation of resolution 1503, *cf. supra* footnote 4, mentions individuals, groups of individuals and organizations as potential authors of communications (para. 2 (b)).

of the United States with the American Convention perhaps rendered the American Convention controversial as a model as well due to the perceived neo-colonialism on the part of the United States, even if it is not a party to the Convention.

Or perhaps it was simply the more specific and demanding nature of the regional conventions that made the drafters of the Charter opt for the somewhat less distinct UN instruments as models.

In sum, the Charter as a whole seems to be modeled more after the existing UN instruments than after the regional human rights conventions. As far as the communications procedure is concerned, the Charter surprisingly seems to be modeled more after the 1503 procedure than after the First Optional Protocol to the UN CCPR, which would otherwise seem to be the natural choice given that the drafters seemed to prefer to turn to the UN instruments for inspiration rather than to the regional conventions.

The introduction of elements of the 1503 procedure into the Charter complicates the application of the Charter by the Commission. The Charter is a rather straightforward convention for the protection of human rights, with the complaint procedure under such a convention an important instrument in the implementation of the convention. The complaint instrument is supposed to be used on a fairly regular basis and the state parties to the convention are supposed to be denounced far and wide for their human rights violations. The purpose of this is to shame the state parties into giving effect to the convention if they do not voluntarily implement it. Another purpose of the complaint procedure is to teach the states the correct way of implementing the convention through the clarifications offered by the decisions of the different bodies created to receive and consider the complaints. On another level, the purpose of the complaint procedure is to provide the victim of a human rights violation with redress. The point is that the individual complaint procedure under a human rights convention is and should be a rather sharp instrument in the implementation of the convention; this is why states so often are so initially afraid of it. The individual complaint procedure is also a legal instrument for implementation rather than simply a political statement.

The 1503 procedure, on the other hand, is only meant for exceptional cases of gross human rights violations. The nature of the procedure is discreet and quiet, involving more political components than a procedure before a quasi-judicial body such as the Commission, not to speak of a procedure before a human rights court.

The 1503 procedure is not tied to the implementation of any particular human rights convention. Neither is the 1503 procedure designed to be a means for a particular individual to obtain redress. Rather, it is a means to put pressure on a state to stop a consistent pattern of gross human rights violations.

The outcome of the 1503 procedure is even more advisory by nature than the outcome of the communications procedure before a quasi-judicial body such as the Commission. Under the 1503 procedure, recommendations are ultimately made to the ECOSOC, whereas in practice the recommendations in the decisions of the Commission are addressed directly to the state concerned, although this is not evident from the Charter. Under the Charter, the recommendations are made to the OAU AHSG.

In comparison with the binding decisions of a human rights court, the recommendations flowing from the 1503 procedure of course carry very little weight. The recommendations issued by a quasi-judicial human rights commission can be placed somewhere between the judgments of a human rights court and the 1503 procedure recommendations.

Even though one of the purposes of the communications procedure before a body such as the Commission is to assist the parties in reaching a friendly resolution to their dispute, just as the issue of friendly settlement is emphasized in resolution 1503, the procedure under the Charter as a whole must be considered much "harder" than the 1503 procedure and the 1503 procedure thus much softer than the Charter procedure.

Thus, the Commission was given the soft instruments of the 1503 procedure as a means to implement the basically hard procedures of the Charter. This is indeed a complicated task. We will later see how the Commission has sorted this out.

3.2 The practice of the Commission

The Charter is unique in that it includes two articles permitting or even encouraging the Commission to draw inspiration from other human rights instruments and practices when it interprets and applies the Charter.[43] This possibility as laid down in the Charter may be seen as a compensation for the otherwise rather weak protection of human rights afforded by the Charter itself. It is a powerful compensation too and an important tool in the hands of the Commission for strengthening the African Charter system.

Another passage in the Charter which the Commission can refer to in order to justify its consideration of human rights instruments other than the Charter is a passage in the preamble whereby the parties to the Charter "[reaffirm] their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations." The Commission has never made use of the possibility to refer to this passage in the

[43] Articles 60 and 61 of the African Charter. *Cf. also* Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331.

preamble. Strictly speaking, the Commission has no need for the preamble in this respect due to the generosity of the articles on the approved sources of inspiration within the very Charter itself.

The articles in the Charter allow for a wide spectrum of human rights instruments and practices to be taken into account by the Commission, indeed there seems to be almost no limit to the freedom of the Commission in choosing its sources of inspiration.

Primarily, "[t]he 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."[44]

Since the term "particularly" is inserted before the enumeration of the different instruments from which the Commission may draw inspiration, the list may be seen as a non-exhaustive exemplification of conceivable instruments. One can also note the choice of the term "shall" in the beginning of the article. The Commission not only "may" draw inspiration from other human rights instruments, it "shall" draw inspiration from sources other than the Charter itself.

As if this were not sufficient, the Commission, secondly, "... shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine."[45] These articles taken together allow the Commission to take into account practically any human rights instrument or practice it wishes to invoke.

In its decisions concerning individual communications, the Commission has often made use of this possibility to take into consideration human rights instruments other than the Charter. This tendency has become more marked in recent years, especially as can be seen from the decisions included in the 14th Annual Activity Report of the Commission.[46] The Commission has given proof of a rather radical and bold approach towards the incorporation other human rights instruments with

[44] Article 60 of the African Charter.

[45] Article 61 of the African Charter.

[46] The decisions taken at the 28th and 29th Ordinary Sessions of the African Commission (AHG/229(XXXVII), Annex V).

the African Charter system. To the knowledge of this author, there is no other comparable human rights commission or court equally open to other human rights instruments or decisions by other human rights agencies as the Commission.

So how does the Commission proceed when it draws inspiration from the existing international law on human and peoples' rights other than the Charter? We will look at some examples from the recent case law of the Commission.

In *Legal Resources Foundation v Zambia,* the Commission is quite explicit not only about its ability, but its duty to take other international human rights law into account when interpreting and applying the Charter.[47] The Commission also makes extensive references to other human rights instruments and implementing bodies in the case.

The Commission states: "In the task of interpretation and application of the Charter, the Commission is enjoined by Articles 60 and 61 to 'draw inspiration from international law on human and peoples' rights' as reflected in the instruments of the OAU and the UN as well as other international standard setting principles (Article 60). The Commission is also required to take into consideration other international conventions and African practices consistent with international norms etc."[48]

In order to substantiate its argument that a state may not invoke its national laws to avoid international obligations,[49] the Commission then refers to a "General Comment" on this subject issued by the UN Committee on Economic and Social Rights (tied to the UN CESCR).[50]

The Commission further refers to a number of decisions by the Inter-American Commission on Human Rights in order to support its argument that the Commission indeed was competent to decide the case against Zambia, thus refuting the Zambian argument that the Commission had no right to adjudicate on the validity of domestic law: "Likewise an international treaty body like the Commission has no jurisdiction in interpreting and applying domestic law. Instead a body like the Commission may examine a State's compliance with the treaty in this case the African Charter. In other words the point of the exercise is to interpret and apply the African Charter rather than to test the validity of domestic law for its own sake."[51]

Further, as to its own decision, the Commission refers to a General Comment issued by the UN HRC'ttee when emphasizing the fundamental importance of the article on non-discrimination in the Charter.[52] "Equality or lack of it affects the capacity of one to enjoy many other

[47] Case 211/98, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001.

[48] *Ibid.* at para. 58.

[49] *See* Article 27 of the Vienna Convention on the Law of Treaties.

[50] Case 211/98, *supra* footnote 47, at para. 59, footnote 1.

[51] *Ibid.* at para. 59, footnote 2.

[52] Article 2 of the Charter.

rights," the Commission cites and then refers to the General Comment of the UN HRC'ttee for a more complete discussion regarding non-discrimination.[53] Concerning the possibility of justifying limitations on the right to non-discrimination, the Commission refers to the Vienna Declaration and Programme of Action of 1993.[54]

Finally, in *Legal Resources Foundation v Zambia,* the Commission draws some interesting parallels between itself and the "European and Inter-American jurisdictions."[55]

The Commission finds that "[c]onsistent with decisions in the European and Inter-American jurisdictions, the Commission's jurisdiction does not extend to adjudicating on the legality or constitutionality or otherwise of national laws. Where the Commission finds a legislative measure to be incompatible with the Charter, this obliges the State to restore conformity in accordance with the provisions of Article 1 [of the Charter]."[56] In order to substantiate its finding, the Commission refers to a judgment of the European Court of Human Rights.[57]

In *Civil Liberties Organisation and Others v Nigeria,* the Commission again dwells on that which it considers to be its obligation to take into account instruments other than the Charter when making decisions on individual communications.[58] In the words of the Commission, "[i]n interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly fifteen years. The Commission is also enjoined by the Charter and international human rights standards which include decisions and general comments by the UN treaty bodies (Article 60). It may also have regard to principles of law laid down by State Parties to the Charter and African practices consistent with international human rights norms and standards (Article 61)."[59]

In reaching a decision as to whether the Charter is applicable to military tribunals and whether Article 7 in the Charter, regarding access to

[53] Case 211/98, *cf. supra* footnote 47 at para. 63, footnote 3. In para. 70, footnote 4, the Commission refers to another General Comment by the UN HRC'ttee, in the context of discussing whether the justification of limitations of the rights and freedoms provided for in the Charter can be derived solely from popular will.

[54] *Ibid.* at para. 67; the Vienna Declaration and Programme of Action (1993) is contained in the Report of the World Conference on Human Rights (1993: Vienna), UN 13 October 1993.

[55] *Ibid.* at para. 68.

[56] *Ibid.*

[57] The reasoning of the African Commission is interesting not only because of the parallels the Commission draws between itself and the agencies implementing the European and Inter-American Conventions on Human Rights, but also because of the conclusion the Commission draws concerning the legal force of its own decisions. We will come back to this issue in ch. 9 footnote 12.

[58] Case 218/98, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001.

[59] *Ibid.* at para. 24.

justice and due process, is derogable, the Commission refers both to a General Comment by the UN HRC'ttee and to some unspecified decision of the (former) European Commission on Human Rights.[60] On the issue of the right to defense, the Commission refers to two decisions by the Inter-American Commission on Human Rights.[61]

In addition to finding that Nigeria had violated the right to appeal as set out by the Charter, the Commission also found that Nigeria had violated the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, paragraph 6,[62] although in the conclusion of the Commission's decision only the violation of the Charter is mentioned. The UN CCPR is also cited in this context as is yet another decision by the Inter-American Commission on Human Rights.[63]

In discussing the publicity of court hearings, the Commission extensively cites the UN CCPR and the relevant General Comment by the UN HRC'ttee, also inserting a reference to a decision by the European Commission on Human Rights.[64] In deciding, finally, whether there had been a breach of the right to be presumed innocent, the Commission refers both to the UN CCPR and to another decision by the European Commission.[65]

In sum, when deciding practically each of the issues involved in *Civil Liberties Organisation and Others v Nigeria,* the Commission uses instruments other than the Charter as guides, quoting decisions and comments issued by other human rights agencies in the same manner as its own past decisions. To an outside observer, it seems as if the Commission places decisions by other agencies at the same level of legal authority as it places its own past decisions, and that the Commission may just as well quote a foreign decision in order to support its decision in a particular case as a past decision of its own.

This kind of openness to other systems for the protection of human rights as shown by the Commission is unique. It illustrates among other things that the Commission is truly universalist in the way it perceives human rights.[66] Given the relatively meager body of case law available to the Commission, it is wise from an economic point of view to make use of the already existing case law of other systems, given that the per-

[60] *Ibid.* at para. 27.
[61] *Ibid.* at para. 29.
[62] *Ibid.* at para. 33. Annexed to ECOSOC resolution 1986/10 of 21 May 1986.
[63] Case 218/98, *cf. supra* footnote 58, at para. 34.
[64] *Ibid.* at paras. 35–38.
[65] *Ibid.* at paras. 40–41.
[66] The only time the African Commission has touched upon the issue of cultural sensitivity in any decision so far was in *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* where the cultural sensitivity of the Commission, however, yielded a markedly internationalist result (case 143/95, 150/96, decision of 15 November 1999, paras. 20–32, *see* in particular para. 26).

ceptions of the human rights involved are similar between the systems. Perhaps the other human rights bodies should also cite decisions by other bodies more often. Indeed, they should be able to find a number of interesting arguments also in the decisions of the African Commission. It should not always be only the African Commission who perceives the need to cite decisions by the other bodies.[67]

In *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso,* the Commission found a violation of the UN "Fundamental" Principles on the Independence of the Judiciary, among other things, although this finding does not appear in the conclusion of the decision.[68] It was a little surprising that the Commission found a violation of the Fundamental Principles and not of the right to work contained in the Charter, which appeared to be the human right involved.

In the case, in connection with its additional finding that Burkina Faso had violated the right to the respect of the dignity inherent in a human being, and the right to liberty as well as to the security of one's person under the Charter, the Commission also found, a bit unnecessarily it may seem, that Burkina Faso had violated the UN Declaration on the Protection of All Persons Against Forced Disappearances.[69] Just as the finding that the UN Basic Principles on the Independence of the Judiciary had been violated, the violation of the UN Declaration on forced disappearances does not appear in the conclusion of the decision issued in the case by the Commission.

In this and in other cases, the Commission does not seem to make any distinction between the violation by states of legally binding international human rights instruments and legally non-binding, or advisory, international human rights instruments. In *Mouvement Burkinabé,* for instance, there should also have been binding international instruments that the Commission could have invoked in addition to the Charter, and possibly in addition to the non-binding international instruments the Commission did invoke.

The same is true with respect to the decisions by other international human rights implementing bodies; the Commission does not make any

[67] For a strong appeal for "the comparative approach" in the field of human rights, *see* Lovemore Madhuku, "The Impact of the European Court of Human Rights in Africa: The Zimbabwean Experience," *AJICL*, vol. 8, 1996, pp. 932–943; *cf. also* Christof Heyns, "African Human Rights Law and the European Convention," *South African Journal on Human Rights*, vol. 11, 1995, pp. 252–264, and Frans Viljoen, "The Relevance of the Inter-American Human Rights System for Africa", *AJICL*, vol. 11, 1999, pp. 659–670.

[68] Case 204/97, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, para. 38. The Fundamental Principles referred to (denoted "basic" in the title of the document) were adopted by the Seventh UN Congress on Crime Prevention and the Treatment of Offenders of 1985, and confirmed by UN GA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[69] Case 204/97, *ibid.* at para. 44. The Declaration was adopted by UN GA resolution 47/133 of 18 December 1992.

distinction in principle between the decisions by quasi-judicial bodies, which are advisory by nature, and decisions by judicial bodies, which are binding. On the other hand, the decisions by judicial human rights bodies are only binding for the parties to the treaty under which the court is created (and even more specifically only for the parties to the case), so in the case of the Commission, it truly does not matter whether the foreign decision it quotes is originally advisory or legally binding. Usually, however, decisions by courts are ranked as having a higher legal precedence than decisions by quasi-judicial agencies.

In two other recent decisions against Nigeria, *Media Rights Agenda*[70] and *Huri-Laws*,[71] the Commission also explicitly and extensively quoted other international human rights instruments as well as the practice of other international human rights agencies.

However, the Commission does not limit itself to being inspired only by foreign human rights law. In *Media Rights Agenda,* the Commission begins by quoting its own Resolution on the Right to Recourse Procedure and Fair Trial[72] as a means of interpreting the Charter provision concerning a fair trial.[73] The Charter itself is silent on the issue of the right of the accused to be informed of the charges made against him or her. The Resolution adopted by the Commission, however, includes this right. Citing the Resolution, the Commission concludes that "[t]he failure and/or negligence of the security agents who arrested the convicted person to comply with these requirements is therefore a violation of the right to fair trial as guaranteed under Article 7 of the Charter."[74]

That which the Commission is invoking here is a resolution adopted by itself, not a resolution adopted, for instance by the OAU or by any other more politically or legally authoritative assembly than the Commission itself. This is again a rather bold way of bringing the Commission's own views to bear on the Commission's interpretation and application of the Charter. The approach of the Commission is creative and constructive and the material result in this case is very reasonable.

In fact, the Commission could rather easily have arrived at the same substantive interpretation of the Charter by quoting for instance the other human rights conventions, which all include the right of the accused to be informed of the charges made against him or her as an element of the right to a fair trial. Even though the foreign human rights conventions do

[70] Case 224/98, decided at the 28th Ordinary Session of the African Commission, 23 October-6 November 2000.

[71] Case 225/98, decided at the 28th Ordinary Session of the African Commission, 23 October-6 November 2000.

[72] Adopted by the Commission at its 11th Ordinary Session, 2–9 March 1992, and contained in the 5th Annual Activity Report of the Commission, *Annual Activity Reports*, Volume One, 1987–1997, ACHPR, p. 135.

[73] Article 7 of the Charter.

[74] Case 224/98, *supra* footnote 70, para. 44.

not belong to the African Charter system or to the OAU, binding international human rights conventions would seem to carry more legal weight, even in the context of interpreting the Charter, than a resolution adopted by the Commission itself. Not in the least as the Charter explicitly states that the Commission shall draw inspiration from international human rights law.

In any event, the very reasonable interpretation made by the Commission of the right to fair trial under the Charter in *Media Rights Agenda* seems to have been accepted by the state parties to the Charter, since they have approved the Annual Activity Report of the Commission in which the decision is included and have accepted its publication.[75] One could almost venture to say that the Commission has achieved an amendment of the Charter through practice. This by far is not the only time that the Commission has succeeded in such an essentially difficult undertaking.

As far as international human rights law is concerned, the Commission also quotes it extensively in *Media Rights Agenda*. On the issue of the right to public trial, the Commission states that "[n]either the African Charter nor the Commission's Resolution on the Right to Recourse Procedure and Fair Trial contain any express provision for the right to a public trial. That notwithstanding, the Commission is empowered by Articles 60 and 61 of the Charter to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine. Invoking these provisions, the Commission calls in aide General Comment 13 of the UN HRC'ttee on the right to fair trial."[76]

After having taken the General Comment of the UN HRC'ttee into account, the Commission comes to the conclusion that the exclusion of the public from the trial in question amounted to a violation of the victim's right to fair trial under the Charter. One could also argue in this case that the Commission has performed an amendment of the Charter through practice.[77] On the other hand, both the right of the accused to be informed of the charges made against him or her and the right to public trial are so fundamental to the right to fair trial that it could also be claimed that they are inherent in the latter and thus already laid down in the Charter, although not explicitly.

As with respect to other decisions by the Commission, in *Media Rights Agenda* one may wonder why the Commission for instance chose

[75] The 14th Annual Activity Report, *cf. supra* footnote 46; *cf.* Article 59 of the African Charter.

[76] Case 224/98, *supra* footnote 70, para. 51.

[77] *Cf. supra* footnote 75.

to refer to the General Comments by the UN HRC'ttee when other documents, which can be seen as more binding and thus of a higher legal precedence also seemed to be available.

In the case of the right to a public trial, and the circumstances under which this right may be restricted, there should be a number of judgments by the European Court of Human Rights treating this issue and perhaps also by the Inter-American Court of Human Rights, or by the regional Commissions. In addition, the views arrived at by the UN HRC'ttee itself in individual cases arguably carry greater weight than the General Comments it issues.

There most likely is no significant difference in the material content of these decisions and instruments, so that the material conclusion of the Commission would be the same irrespective of the documents it turned to for inspiration. Traditionally, however, if an instrument of a higher legal precedence is available, it is invoked before an instrument of a lower legal value. One could say that the Commission displays a radical attitude in the way in which it makes use of the different sources of legal arguments and that it shows an exceptionally great respect for instruments of soft law.

That which is somewhat strange is that the Commission's decision in *Media Rights Agenda* as to the right to public trial is not quoted in the Commission's later decision in *Civil Liberties Organisation and Others v Nigeria* where the Commission also discusses the publicity of court hearings.[78] Its own prior case-law otherwise would naturally appear to be the first source the Commission should quote in order to substantiate its arguments in later decisions.

On the subject of the right to defense in *Media Rights Agenda,* the Commission cites its own resolution, mentioned earlier, on the Right to Recourse Procedure and Fair Trial in addition to citing the relevant provision of the Charter.[79] It is unclear what this adds to the Commission's argument as the content of the Charter provision and the content of the paragraph of the resolution invoked by the Commission are very similar. It seems superfluous to invoke instruments other than the Charter when not necessary; if it is a case of a clear violation of a clear provision of the Charter no other references should be needed.

If the Commission cites instruments other than the Charter unnecessarily, this may convey the impression that the Commission does not think that a violation of the Charter in itself is sufficiently serious, but that other instruments must also be violated for the breach to be taken seriously. This in its turn could contribute to a diminishing of the respect in general for the Charter. The violation of the Resolution on the Right to

[78] *Cf. supra* footnote 58, paras. 35–39.

[79] Case 224/98, *cf. supra* footnote 70, at para. 56; for the resolution *cf. supra* footnote 72.

Recourse Procedure and Fair Trial found by the Commission does not appear in the text of the conclusion of the decision.

Further, the Commission in *Media Rights Agenda* found that the officers sitting on the Special Military Tribunal involved were not competent as judges.[80] Because of this, there had been a violation of the UN Basic Principles on the Independence of the Judiciary in the view of the Commission.[81] Again, one may wonder why the Commission cites the UN Basic Principles and not the Charter itself. The Charter also provides that courts must be competent in order for a trial to be fair.[82] In previous decisions, the Commission has in fact invoked the Charter in the context of considering the right to be tried by a competent court and not the UN Basic Principles.[83]

The particular finding that the incompetence of the military tribunal violated the UN Basic Principles does not appear in the text of the conclusion of the decision, but a different violation of the UN Basic Principles is included there. We will return to this issue below.

On the subject of a civilian being tried by a military tribunal, the Commission first found that the trial of a civilian by a Special Military Tribunal is prejudicial to the basic principles of a fair hearing as guaranteed by the Charter.[84] This sounds as if the Commission is of the opinion that the trial of a civilian under these circumstances constitutes a violation of the Charter. The Commission however goes on to cite in addition its own Resolution on the Right to Fair Trial and Legal Assistance in Africa, in support it appears of its interpretation of the Charter.[85]

Incidentally, it can be noted that in *Media Rights Agenda,* the Commission is much more severe with military tribunals trying civilians than it seems to be in its later decision in *Civil Liberties Organisation and Others v Nigeria.*[86] In *Media Rights Agenda,* the Commission states its general position that military courts and tribunals "... should not, in any circumstances whatsoever, have jurisdiction over civilians."[87] This would also seem to be the Commission's interpretation of the Charter in *Media Rights Agenda.* In *Civil Liberties Organisation and Others v Nigeria,*

[80] Case 224/98, *cf. supra* footnote 70, para. 60.

[81] *Ibid.* For the Basic Principles *cf. supra* footnote 68.

[82] Article 7 (1) (a) of the African Charter.

[83] *See* for instance case 64/92, 68/92, 78/92 *Krishna Achuthan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi,* decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994, para. 46.

[84] In Article 7; case 224/98, *supra* footnote 70, para. 61.

[85] Adopted by the Commission at its 26th Ordinary Session, 1–15 November 1999, and contained in the 13th Annual Activity Report of the Commission (AHG/222(XXXVI), Annex IV). By this resolution the Commission adopts the Declaration and Recommendations of the Seminar on the Right to a Fair Trial, Dakar, 9–11 September 1999, ACHPR, 26th Ordinary Session, 1–15 November 1999, DOC/OS(XXVI)/INF.19.

[86] Case 218/98, *supra* footnote 58.

[87] Case 224/98, *supra* footnote 70, para. 62.

however, the Commission a bit surprisingly comes to the conclusion that it was "reasonable" that the civilian was tried by a Special Military Tribunal in the case.[88]

In the view of this author, the Commission does not present any convincing arguments as to why an exception to the strict rule referred to in *Media Rights Agenda,* that civilians should never under any circumstances be tried by military tribunals, was justified in the second case. The Commission is not bound to follow its own previous decisions, but it generally does, just as any other quasi-judicial agency or court. It would seem wise on the part of the Commission to be consistent, not in the least in order to build up a solid body of case law and maximize the respect for its decisions.

On the subject of the independence of the judiciary, the Commission cites several different human rights instruments in *Media Rights Agenda:* The Charter, the UN Basic Principles on the Independence of the Judiciary, a General Comment by the UN HRC'ttee, and a state report by Egypt to the UN HRC'ttee (submitted under Article 40 of the UN CCPR).[89] In reality, only the reference to the Charter was necessary since the Commission found that there had been a clear violation of a clear provision of the Charter.[90]

In contrast to earlier mentioned cases, the specific principle in the UN Basic Principles on the Independence of the Judiciary cited in this context, Principle 5, actually also appears in the conclusion of the decision by the Commission. Thus the Commission finds that Nigeria had violated both the Charter and the UN Basic Principles.

In general, it is strange that a commission created under one treaty finds violations to have taken place of instruments other than its own treaty. The Commission rather should use the other instruments in order to interpret its own treaty and then possibly find violations of its own treaty to have taken place. It is particularly strange for a commission to find that a violation has taken place of other instruments that are not legally binding.

If a non-binding instrument has been issued by the same organization or group of states concluding the treaty, it may be reasonable for a commission to find a violation of the non-binding instrument to have taken place. The Inter-American Commission, for instance, for good reasons tries violations of the American Declaration on the Rights and Duties of Man by those states which have not ratified the American Convention.[91]

[88] Case 218/98, *supra* footnote 58, para. 25.

[89] Case 224/98, *supra* footnote 70, paras. 64–65.

[90] Article 7 (1) (d) of the African Charter.

[91] The Rules of Procedure of the Inter-American Commission on Human Rights, *supra* footnote 11, Article 23; The Statute of the Inter-American Commission on Human Rights, October 1979, Article 20. The Statute (as well as the Rules of procedure) can be found for instance on the home page of the OAS (http://www.oas.org).

A non-binding instrument issued by an organization or group of states different than the one having concluded the treaty, however, is quite far removed from the implementation system surrounding the treaty in question. Thus in the view of this author, such a non-binding instrument should as a maximum be used indirectly as an aid in the interpretation of the treaty, in this case of the Charter, and not directly as an independent standard.

On the subject of the independence of the judiciary, the Commission also showed a much more severe attitude towards military tribunals in its decision in *Media Rights Agenda* than in the later decision in *Civil Liberties Organisation and Others v Nigeria*.[92] Quoting the same General Comment as in *Media Rights Agenda,* the Commission in *Civil Liberties Organisation and Others v Nigeria* came to the opposite conclusion, namely that military tribunals are not necessarily dependent and thus that the trial of civilians by such tribunals does not necessarily amount to a violation of the right to fair trial.[93]

Consequently, Nigeria was found not guilty of a violation of the provision in the Charter laying down the right to be tried by an impartial court or tribunal; or put differently, this provision in the Charter was not included among the ones which had been violated by Nigeria in the view of the Commission.[94] Neither on this point was any convincing arguments presented by the Commission to support its departure from its reasoning in *Media Rights Agenda.*

In addition to being diametrically opposed to its conclusion in *Media Rights Agenda*, the tolerance shown by the Commission towards military tribunals in *Civil Liberties Organisation and Others v Nigeria* is quite startling. Hopefully this does not constitute the beginning of a new trend in the decision-making by the Commission, but rather is an irregular deviation from the established case law.

It is true that the Commission is somewhat unclear in *Civil Liberties Organisation and Others v Nigeria,* so that the present author may have misunderstood the message of the Commission. That which causes the lack of clarity is primarily that the Commission at the very end of its argument suddenly states that "[i]t has already been pointed out that the military tribunal fails the independence test."[95] However, the Commission did not find that there had been a violation of the Charter provision establishing the right to be tried by an impartial court or tribunal. Nor for that matter did the Commission find that Nigeria had violated its duty under the Charter to guarantee the independence of the courts.[96]

[92] Case 218/98, *supra* footnote 58.
[93] *Ibid.* at paras. 27 and 44.
[94] Article 7 (1) (d) of the African Charter.
[95] Case 218/98, *supra* footnote 58, para. 44, *in fine*.
[96] Article 26 of the African Charter.

Further, the Commission in *Media Rights Agenda* cites the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, in addition to the right to the respect of the dignity inherent in a human being laid down in the Charter.[97] Invoking the Body of Principles here is just as unnecessary as in the other instances cited above where there have been clear violations of clear Charter provisions, but the Commission still invokes the Body of Principles in order to strengthen its point.

Finally, *Media Rights Agenda* is noteworthy in that the Commission in its conclusion finds that there has been a violation of the UN Basic Principles on the Independence of the Judiciary,[98] in addition to the serious violations of the Charter proper. Thus the Commission is not only inspired by foreign legal instruments, but actually applies them within the frame of its procedure for handling individual communications. This practice becomes all the more noteworthy when one considers that the instrument in question in *Media Rights Agenda* is a non-binding resolution adopted by the UN General Assembly.

In *Huri-Laws,* the Commission again cites the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in addition to the right to human dignity in the Charter.[99] The Commission also refers to one judgment by the European Court of Human Rights and one decision by the (former) European Commission on Human Rights.[100] The Commission states that "[t]he treatment meted out to the victim in this case constitutes a breach of the provision of Article 5 of the Charter and the relevant international human rights instruments cited above [i.e. the UN Body of Principles and the European Convention on Human Rights]."[101]

Again, the only matter important to the Commission is actually whether the accused state has violated the Charter, interpreted if necessary with the help of other international human rights instruments of various kinds. It is superfluous to state that a certain treatment of an individual also constitutes a breach of international instruments other than the Charter. It is also an incorrect statement since the African states are not bound in this case by the European Convention on Human Rights, or by the legally non-binding UN Body of Principles. Therefore it is difficult to claim that an African state has actually violated either of these instruments.

In addition, the treatment meted out by Nigeria to the victim in this case certainly conflicts with many international legal instruments of a

[97] Case 224/98, *supra* footnote 70, para. 70. The Body of Principles was adopted by UN GA resolution 43/173 of 9 December 1988.
[98] *Cf. supra* footnote 68.
[99] Case 225/98, *supra* footnote 71, para. 40.
[100] *Ibid.* at para. 41.
[101] *Ibid.*

binding as well as non-binding nature, other than the two instruments mentioned in the decision of the Commission. If the Commission wants to point out that Nigeria has violated a number of international instruments in addition to the Charter, the Commission should take care to enumerate all of the instruments that Nigeria has violated, not just a few. If the Commission for some reason wishes to choose a few international instruments that in the view of the Commission Nigeria has violated in addition to the Charter, then the Commission should expressly state the reasons behind its choice. Otherwise any reader of the decision will ask him- or herself why the Commission decided to choose the European Convention and the UN Body of Principles in this case.

Finally, and perhaps most importantly, as has been pointed out earlier, the fact that the Commission unnecessarily cites other international human rights instruments may create a risk of weakening the respect for the Charter generally. It appears as if the Commission does not think it sufficient if a state has violated only the Charter; in order to emphasize the gravity of the violations, the Commission perhaps also wants to show that the acts of the state are contrary to other human rights instruments as well. In the view of this author, this constitutes an unfortunate use of the possibility of taking inspiration from other international human rights instruments.

It should be sufficient for the Commission that a state has violated the Charter. The acts of the state do not become more serious or blameworthy just because they happen to conflict also with other human rights instruments. The Commission does not need other human rights instruments in order to strengthen the Charter in cases of clear breaches of the Charter. In the view of this author, the Commission should limit its use of the possibility to draw inspiration from other human rights instruments to the cases in which there is a real need to strengthen or clarify the provisions of the Charter.

Further, in *Huri-Laws,* the Commission refers not to a foreign legal instrument but to its own Resolution on the Right to Recourse Procedure and Fair Trial which the Commission also cited in *Media Rights Agenda.*[102] Referring back to its resolution, the Commission in *Huri-Laws* arrives at the conclusion that the failure of Nigeria to inform the victims as to the reasons for their arrest and detention, as well as the charges made against them, constitutes a violation of the right to fair trial as guaranteed under the Charter, which however does not mention the right to be informed.[103] The Commission reasoned in a similar way in *Media Rights Agenda.*[104]

In *Huri-Laws*, the Commission could just as well have referred to its

[102] *Cf. supra* footnote 72.
[103] Case 225/98, *supra* footnote 71, paras. 43–44.
[104] *Cf. supra* footnote 74.

own by now established case law, i.e. its decision in *Media Rights Agenda* that preceded *Huri-Laws*, at least in the terms of the numbering of the cases.

Apart from this observation of minor importance, the same objections can be raised in *Huri-Laws* as in *Media Rights Agenda* against the way in which the Commission arrived at its conclusion as to the issue of informing the victims of the reasons for their arrest and of the charges made against them.[105] The conclusion itself is no doubt correct.

The Commission in *Huri-Laws* referred to its own Resolution on the Right to Recourse Procedure and Fair Trial also in the context of discussing the violation of an explicit provision in the Charter.[106] The Commission states that the article on a fair trial in the Charter is "reinforced by ... the Commission's Resolution on Fair Trial [sic]."[107] In the view of this author, there is no need to strengthen an explicit provision in the Charter with a similar provision contained in a resolution adopted by the Commission. The Charter is strong enough in itself and resolutions adopted by the Commission have a weak legal value, if indeed any. When an express provision exists in the Charter, there is also evidently no need for an amendment through practice of the Charter in order to fill in any gaps in the Charter. This gap may otherwise be filled with the contents of a resolution adopted by the Commission, which in its turn may be accepted by the state parties and thus amount to an amendment through practice of the Charter.[108]

The Commission also cites another of its resolutions in *Huri-Laws* regarding the right to freedom of association.[109] The freedom of association is already established in the Charter[110] so that it also was unnecessary as to this issue on the part of the Commission to invoke one of its resolutions with a view to reinforcing the Charter. The Commission's resolution does not add anything to that which already exists in the Charter.

In its decision in the case of *John K. Modise v Botswana* (II), the Commission states that at one point during the procedure it "decided to defer its decision [on admissibility] until it received information on the manner in which other human rights bodies handle cases involving Complainants who are lacking financial means."[111] This is a clear and direct illustration of how the Commission draws inspiration from the other sys-

[105] *Ibid.* and subsequent text.
[106] Article 7 (1) (d); case 225/98, *supra* footnote 71, para. 45.
[107] Case 225/98, *supra* footnote 71, para. 45.
[108] *Cf. supra* footnote 75.
[109] Resolution on the Right to Freedom of Association, adopted by the Commission at its 11th Ordinary Session, 2–9 March 1992, and contained in the 5th Annual Activity Report of the Commission, *Annual Activity Reports*, Volume One, 1987–1997, ACHPR, p. 137.
[110] In Article 10.
[111] Case 97/93 (II), decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 19.

tems for the protection of human rights. The result of the investigation of the Commission, however, is not unfortunately accounted for in the decision. The communication appears to have been declared admissible before any information on the practice of the other human rights bodies had been obtained.[112] After the decision regarding admissibility, the Commission notes that "a letter was received from the European Commission on Human Rights in reply to the Secretariat's request regarding the issue of financial difficulties."[113] Nothing more than that is said in the decision either concerning the human rights bodies to which the Commission had turned, the other human rights bodies if any who responded to the request of the Commission, or the content of the letter from the European Commission concerning the European practice relating to complainants lacking financial means.[114]

As for other international human rights instruments and practices which have been cited by the Commission recently, there are several examples in the comprehensive decisions in *Amnesty International and Others v Sudan*[115] and *Malawi African Association and Others v Mauritania*[116] respectively.

In *Amnesty International, and Others v Sudan* the Commission refers to the right to appeal as "a general and non-derogable principle of international law," which must satisfy the conditions of effectiveness.[117] The Commission refers further on to "international humanitarian law," in general.[118] The matter at issue was the widespread extra-judicial executions of civilians, with respect to which the Commission found that Sudan had violated the right to life established in the Charter.[119] The Commission also observed that Sudan should take measures to ensure that the civilians in Sudan, currently engaged in a civil war, were treated in accordance with international humanitarian law.

Since the Commission had earlier stated that the Charter in its entirety is non-derogable, it would seem as if the Commission could have confined itself to emphasizing that Sudan must ensure the right to life under the Charter even in times of civil war.[120] Concerning the force of the Charter, the Commission added to its finding that there had been numer-

[112] *Ibid.* at para. 20.
[113] *Ibid.* at para. 22.
[114] *Cf. infra* ch. 4.1 footnote 11.
[115] Case 48/90, 50/91, 52/91, 89/93, decision, probably, of 11 May 2000 (the decision is not dated).
[116] Case 54/91, 61/91, 96/93, 98/93, 164–196/97, 210/98, decision of 11 May 2000.
[117] Case 48/90, 50/91, 52/91, 89/93, *supra* footnote 115, para. 37.
[118] *Ibid.* at para. 50.
[119] Article 4.
[120] The first time the Commission stated that the African Charter is non-derogable was in case 74/*92 Commission Nationale des Droits de l'Homme et des Libertés v Chad*, decided at the 18th Ordinary Session of the African Commission, October 1995, para. 40.

ous extra-judicial executions that "[e]ven if these are not all the work of forces of the government, the government has a responsibility to protect all people residing under its jurisdiction."[121] This relates to the *"Drittwirkung"* of the Charter, on which subject the Commission has developed an interesting doctrine that, however, will not be discussed further here.

In *Malawi African Association and Others v Mauritania,*[122] the Commission refers to the UN Declaration of the Rights of Peoples Belonging to National, Ethnic, Religious or Linguistic Minorities,[123] the Universal Declaration of Human Rights,[124] and the UN CESCR[125] (the issue involving the latter two instruments was unremunerated work). No instruments other than the Charter appear in the text of the conclusion of the Commission's decision.

In addition to these specific instruments, the Commission also makes a sweeping reference to "[v]arious texts adopted at the global and regional levels" affirming the importance of the eradication of discrimination in all its guises.[126] The more specific the Commission is, the more effective its argumentation becomes, and vice versa. It should also be pointed out that the rule of non-discrimination is laid down in the Charter and does not really need to be reinforced by other international instruments.[127] In *Alhassan Abubakar v Ghana,* the reference of the Commission was even more sweeping.[128] In this case, the Commission just referred to "(Cases from UN system)" in order to substantiate its argument that an author of a communication who resides outside the state against which the complaint is brought cannot be required to return to that state in order to exhaust local remedies.[129]

With respect to the issue of unremunerated work, or practices analogous to slavery, in *Malawi African Association and Others v Mauritania* which involved the Universal Declaration and the UN CESCR, the Commission made use of the foreign human rights instruments in order to interpret the article in the Charter concerning exploiting and degrading treatment.[130] There is an article in the Charter regarding the right to work that would seem to have been relevant as well;[131] the articles in-

[121] Case 48/90, 50/91, 52/91, 89/93, *supra* footnote 115, para. 50.
[122] Case 54/91, 61/91, 96/93, 98/93, 164–196/97, 210/98, *supra* footnote 116.
[123] UN GA resolution 47/135 of 18 December 1992, *ibid.* at para. 131.
[124] *Ibid.* at para. 135.
[125] *Ibid.*
[126] *Ibid.* at para. 131.
[127] Article 2.
[128] Case 103/93, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996.
[129] *Ibid.* at para. 24. *Cf. infra* ch. 4.2 footnote 108 and subsequent text.
[130] Article 5.
[131] Article 15.

voked in the other human rights instruments concerned different aspects of the right to work.[132]

One final decision will be taken up for comment. In *Amnesty International v Zambia,* the Commission added a right to the Charter that originally did not exist.[133] The source of the inspiration for this new right was perhaps the American Convention on Human Rights, as none of the other general human rights conventions mention it. "The arbitrary removal of one's citizenship ... cannot be justified," the Commission states without further argumentation.[134] The right to nationality, however, is not included in the Charter. It is included in the American Convention on Human Rights.[135] Additional argumentation would seem to have been justified on the part of the Commission in order to convince the reader of the decision that there actually exists a right to nationality in the Charter, perhaps including an explicit reference to the American Convention or some other relevant international instrument or practice.

In *Amnesty International v Zambia,* the Commission further refers to "the rules of natural justice" without, however, convincingly showing why this was necessary since the rules amounted to the right to have one's cause heard, as expressly laid down in one of the articles of the Charter.[136]

The Commission thus often draws inspiration from or takes into consideration other international human rights instruments and practices when applying the Charter. Some recent examples of the way in which the Commission proceeds in doing this have been given above. Many cases remain which will not be treated in detail here.[137]

[132] Articles 23 and 7 respectively.

[133] Case 212/98, decision of 5 May 1999.

[134] *Ibid.* at para. 44.

[135] Article 20 of the American Convention.

[136] Case 212/98, *supra* note 133, para. 42; Article 7 of the African Charter.

[137] Case 71/92 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996; case 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; case 90/93 *Paul S. Haye v The Gambia*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; case 97/93 *(II) John K. Modise v Botswana*, *supra* footnote 110; case 101/93 *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995; case 102/93 *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, decision of 31 October 1998; case 140/94, 141/94, 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, decision of 15 November 1999; case 206/97 *Centre for Free Speech v Nigeria*, decision of 15 November 1999; and case 232/99 *John D. Ouko v Kenya*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000.

3.3 The rules of procedure

The Commission's procedural rules also seem to be inspired primarily by the rules of procedure of the UN HRC'ttee as far as the consideration of individual communications is concerned. Some rules have been more or less copied by the Commission.[138] The headings of the different sections in the chapter in the African rules of procedure dealing with individual communications are identical in wording to the headings in the rules of procedure of the UN HRC'ttee. The rules of procedure of bodies such as the UN HRC'ttee or the regional human rights commissions regulate much the same issues so the fact that the rules may be similar is nothing particularly noteworthy as such.

With respect to the similarities between the rules of procedure of the UN HRC'ttee and the Commission, however, the similarity between the rules relating to the clarification of communications perhaps has entailed additional problems for the Commission, or at least some confusion. The rule relating to clarification in the rules of procedure of the UN HRC'ttee appears to be designed with a different purpose in mind than the rule on clarification in the African rules of procedure. Implanting a rule that is somewhat foreign to the procedure before the African Commission obviously causes complications. In the African procedure, the rule on clarification is basically unnecessary despite the fact that it serves a useful purpose in the procedure before the UN HRC'ttee. Because of the rule on clarification, presumably, an extra level has been introduced in the procedure for handling communications by the Commission, namely a decision on "receivability." As far as this author has been able to judge, this level does not contribute anything to the African procedure, except negative aspects such as a more cumbersome handling of the communications, greater time consumption, as well as confusion concerning the terminology and the legal implications of a decision on receivability. We will come back to these issues and some illustrative examples.[139]

As we can see, the wording of the rule on clarification in the rules of procedure of the UN HRC'ttee and in the African rules of procedure is very similar:

[138] *See* for instance Rules 80 and 84 of the Rules of procedure of the HRC'ttee which appear as Rules 104 and 109 in the African Rules of procedure.

[139] On receivability *cf. also* Ankumah (1996), *supra* ch. 2.1 footnote 1, pp. 56–60. The most detailed and insightful treatment of the issue of receivability in the context of the African Commission found by this author is provided by Signe Röpke, a former intern with the Secretariat of the Commission, in *The African Commission on Human and Peoples' Rights – a case study*, Master's thesis, Faculty of Law, University of Copenhagen, 1995, in chapter 5.

UN Human Rights Committee:[140]

1. The Secretary-General may request clarification from the author of a communication concerning the applicability of the Protocol to his communication, in particular regarding:

(a) The name, address, age and occupation of the author and the verification of the author's identity;
(b) The name of the State party against which the communication is directed;
(c) The object of the communication;
(d) The provision or provisions of the Covenant alleged to have been violated;
(e) The facts of the claim;
(f) Steps taken by the author to exhaust domestic remedies;
(g) The extent to which the same matter is being examined under another procedure of international investigation or settlement.

2. When requesting clarification or information, the Secretary-General shall indicate an appropriate time limit to the author of the communication with a view to avoiding undue delays in the procedure under the Protocol.

3. The Committee may approve a questionnaire for the purpose of requesting the above-mentioned information from the author of the communication.

4. The request for clarification referred to in paragraph 1 of the present rule shall not preclude the inclusion of the communication in the list provided for in rule 79, paragraph 1, of these rules.

The African Commission:[141]

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 [sic] name, address, age and profession by justifying his [sic] 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;

[140] Rule 80.
[141] Rule 104.

(g) The extent to which the same issue has been settled by another international investigating 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 [an unhappily chosen term in this context, author's note] so as to avoid undue delay in the procedure provided for by the Charter.

3. The Commission may adopt a questionnaire for 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 [should be 103, author's note] above.

The point, however, is that the rules of procedure of the UN HRC'ttee were designed for a different kind of situation than the rules of procedure of the African Commission, at least this is the conclusion of this author after having studied the respective rules.

In the case of the UN HRC'ttee the rules state that the UN Secretary-General shall bring to the attention of the Committee communications that are or appear to be submitted for consideration by the Committee under Article 1 of the First Optional Protocol to the UN CCPR.[142] Then the rules of procedure of the UN HRC'ttee state that "[t]he Secretary-General, when necessary, may request clarification from the author of a communication as to whether the author wishes to have the communication submitted to the Committee for consideration under the Protocol. In case there is still doubt as to the wish of the author, the Committee shall be seized of the communication."[143]

This rule seems to be designed for a situation in which the UN Secretary-General receives a number of different kinds of communications daily from individuals all over the world and the Secretary-General sometimes needs to clarify whether a particular communication is intended to be a complaint under the Optional Protocol or something else, for instance drawing the Secretary-General's attention to a particular situation. Therefore, there is a need for the rule on clarification just quoted in the rules of procedure of the UN HRC'ttee.

In the African rules of procedure on the other hand, the inclusion of the corresponding rule is less warranted. The Commission does not have the same broad mandate as the UN, but is concerned only with the implementation of the African Charter. It is unlikely that the Commission would be overflowed with communications of different kinds from individuals and not be able to sort out those intended as individual communica-

[142] Rule 78(1) of the Rules of procedure of the UN HRC'ttee.
[143] Rule 78(2) of the Rules of procedure of the UN HRC'ttee.

tions under the Charter; that they are intended to be communications of course does not guarantee that they fulfill all the formal requirements of admissibility.[144]

Thus, in the African context, the clarification of the intentions of the author of the communication does not seem to be as pressing an issue as in the context of the UN HRC'ttee, and thus the rule on clarification in the African rules of procedure does not seem as warranted as in the rules of procedure of the UN HRC'ttee. The Commission simply does not seem to need that kind of clarification. The Commission may need additional information in order to determine the admissibility of the communication, but that is a separate issue.

Despite the rule of clarification in its rules of procedure – which takes up more or less the same aspects of the communication as the rule relating to admissibility in the Charter[145] – the Commission regularly asks for additional information concerning the admissibility of the communication which should be unnecessary since the rule on clarification basically covers all the aspects of admissibility. If clarifications have been requested, there should be no need for additional information relating to admissibility; if there still is a need for additional information, this demonstrates that the clarification procedure is not working properly. In principle, the handling of the communication should not continue to the level of admissibility if the communication was not receivable in the first place. On the other hand, if the communication is receivable, it should also be admissible as the conditions for receivability and admissibility largely overlap.[146]

The main result of the rule of clarification in the African rules of procedure is that supplementation to the communications may be requested twice in different contexts, and that an additional level has been added to the handling of the communications. Both of these aspects of the proced-

[144] *Cf.*, however, Röpke, *supra* footnote 139, who in 1995 wrote that the Commission "receives a number of letters daily containing general information on the human rights situation in States parties to the Charter. The division between such general information and submissions intended as communications under the Charter is not always clear." *Ibid.* at p. 15. With the growing experience of the Secretariat since 1995, one could imagine that sorting out the individual communications from the general information has become easier.

[145] Article 56 of the African Charter.

[146] The three conditions in Article 56 which do not occur in the rule on clarification in the Rules of procedure are that the communication should be submitted within a reasonable period from the time local remedies are exhausted [Article 56(6)], the communication should not be based exclusively on news disseminated though the mass media [Article 56(4)] and the communication should not be written in disparaging or insulting language directed against the State concerned and its institutions or to the OAU [Article 56(3)]. None of these three conditions have been of any significance in the African Commission's practice to date.

ure risk entailing practical problems for the Commission and the author of the communications.[147]

After clarifications have been requested and received by the Commission if deemed necessary, the communication may presumably be declared receivable. As far as this author has understood the African rules of procedure, the rule on the clarification of the communications relates to the decision on the receivability of the communication, which precedes the decision on admissibility. The decision on the receivability of the communication is not mentioned in the rules of procedure but is taken up, explicitly or implicitly, in practically all decisions by the Commission.

In an official publication by the Commission, the issue of receivability is explained in this way: "When communications against states parties are brought to the Commission by individuals or other legal personalities, the Commission first applies the test of seizure. If, for example, a communication does not allege any prima facie violation of the Charter, the Commission cannot receive it. Also, if a communication is submitted against a state or legal personality not party to the African Charter, the communication is irreceivable. /---/ In its early years the Commission sometimes considered seizure/receivability and admissibility simultaneously and took decisions on both together."[148]

There is nothing in the Charter to suggest that a certain level of receivability in the handling of communications was intended by the drafters of the Charter; on the other hand, as we will see later, it is difficult to determine exactly that which the drafters had in mind as far as the procedure for the handling of individual communications is concerned. In the Article dealing with the admissibility of communications, it is stated that "[c]ommunications relating to human and peoples' rights ... *received* by the Commission, shall be considered if they ..." (*italics added*).[149] This probably does not imply that there must be a decision as to receivability.

One problem with the African procedure as expressed in the Charter together with the rules of procedure is that most communications which for different reasons have been declared inadmissible to date should have instead been declared not receivable as the communications did not fulfill the criteria for receivability set out in the rule concerning clarifications in the rules of procedure. In other words, this should have been the

[147] As suggested by Röpke, *supra* footnote 139, one way of rationalizing the procedure from the point of view of the Commission would be to let the Secretariat itself take care of the handling of the communication and thus the securing of the necessary information up to the stage where the Commission is to consider the admissibility of the communication. *Ibid.* at p. 19.

[148] Decisions of the African Commission on Human and Peoples' Rights 1986–1997, *Law Reports of the African Commission*, Series A, Volume 1, ACHPR/LR/A/1, Banjul 1997, p. 4.

[149] Article 56 of the African Charter.

case if the rule regarding receivability and clarification had been applied in a consistent manner by the Commission, which does not seem to have happened. On the many occasions when a communication has been declared inadmissible, it might as well have been declared not receivable if the necessary clarifications were not produced. Discontinuing the handling of the communication at as early a stage as possible would seem to benefit the Commission considering its lack of resources in general. If no clarifications are provided by the author of the communication in order to make the communication receivable, it is unlikely that additional information will later be provided rendering the communication admissible.

The legal significance of the decision on receivability is unclear; after having studied the decisions of the Commission, this author cannot come to any other conclusion than that the decision on receivability has no legal significance, apart from showing that the Commission is going to continue its consideration of the communication at least until it decides the issue of admissibility. If the decision is one of inadmissibility, the consideration will be discontinued with the decision. The issue of legal significance does not become easier to disentangle by the Commission's somewhat inconsistent use of terms. At times, the Commission speaks about seizure instead of receivability and thus decides to be seized instead of declaring the communication receivable. The Commission sometimes makes no explicit decision either as to receivability or seizure, but only decides on the issue of admissibility.

Another aspect of the rules of procedure of the UN HRC'ttee that seems to have been copied by the Commission is the demand that all information is to be provided in writing, as well as the fact that there are no rules relating to oral proceedings. To the reader of the Commission's procedural rules, it consequently appears as if there are no oral elements in the procedure before the Commission. This impression is wrong, however, because the Commission in practice regularly invites the parties to the dispute to appear before the Commission to argue their case. Oral contributions to the proceedings before the Commission were referred to for the first time in *Constitutional Rights Project v Nigeria* and *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria* as early as 1994.[150]

This also illustrates the disadvantage of modeling the procedural rules of the Commission too closely after the procedural rules of the UN HRC'ttee which conducts its work in a different manner. Maybe it was unexpected to the drafters of the Commission's procedural rules that oral elements would be added to the African procedure. On the other hand, oral proceedings have taken place both before the former European

[150] Case 87/93, *supra* footnote 137.

Commission on Human Rights and before the Inter-American Commission on Human Rights, so that oral proceedings are quite a familiar feature of the regional systems for the protection of human rights.[151] When the original rules of procedure of the Commission were revised in 1995, at least the oral element of the proceedings should have been recognized.[152] The fact that the Commission permits oral contributions to its proceedings is nothing for which to be ashamed. On the contrary, it is good that this possibility exists for the parties to the case.

[151] *Cf.* Article 48(1)(e) of the American Convention and Article 28(1)(a) of the European Convention before 1 November 1998.

[152] The original Rules of procedure were adopted on 13 February 1988 and are contained in the 1th Annual Activity Report of the African Commission, *Annual Activity Reports*, Volume One, 1987–1997, ACHPR, p. 13.

4. The exhaustion of local remedies

4.1 Why exhaustion is not always necessary

In order for an individual or non-state communication to be taken up in substance by the African Commission, the communication first has to pass the test of admissibility.[1] If the communication is not considered admissible, it will not be further considered on the merits. The test of admissibility is therefore crucial. To date, most of the individual communications submitted have been considered inadmissible by the Commission for one reason or another.[2]

In the beginning of its existence, the Commission found almost all communications that came before it inadmissible. This situation has changed in later years, and the Commission now considers most communications on the merits. If the Commission does not try the communications on the merits, there is no possibility for developing the human rights law of the African Charter, nor is there a chance for embarrassing the wrongdoing state through a decision by the Commission. Thus it is central to the Charter, the Commission and the system for the protection of human rights overall created by the Charter that the communications are indeed considered on the merits and that the Commission arrives at a decision regarding the substance of the complaints. In most cases, the decision is likely to be that the state party concerned has violated the Charter, and furthermore, in most cases the violation is likely to be very serious.[3]

[1] Article 56 of the African Charter.

[2] Sixty-three out of a total number of approximately 115 communications having been decided up to the 29th Ordinary Session of the Commission. Of the 63 communications, 25 were declared not receivable, either because they were filed against states or other entities not parties to the African Charter (24), or because they were too general and did not allege any specific violations of the Charter (1). In addition, in the case of 12 communications, the procedure was discontinued due either to a friendly settlement, a withdrawal of the communication or silence on the part of the complainant. Thus so far only 40 communications have been considered on the merits by the Commission. The figures are somewhat approximate due to the difficulties involved in getting exact information on the subject.

[3] In 37 of a total of 40 decisions on the merits, the state has been found to have violated the African Charter on some or all of the counts.

The test involving the admissibility of an individual communication is slightly more formal than the ensuing consideration of the communication in substance. The test of admissibility, however, also to a certain degree involves the substance of the complaint. For instance, it must be likely from the communication that it concerns a case of a real violation(s) of the Charter and not trivial issues or issues lying outside the scope of the rights and freedoms laid down in the Charter. A superficial and preliminary consideration of the substance of the communication is performed already when the Commission tries its admissibility. There are also other linkages between the formal test of admissibility and the consideration of the substance of the communication to which we will return.

The issue of admissibility has presented the Commission with important and difficult problems, largely because of the poor quality, from a formal legal point of view, of many of the individual communications that have so far reached the Commission. The poorer the quality, the greater the number of communications the Commission has to reject because they do not pass the test of admissibility. As more and more communications recently do pass the test of admissibility, the conclusion may be drawn that the quality of the communications is improving, a situation which inspires hope for the future of the development of the human rights law under the Charter.

The Commission has solved the problems it has met relating to the admissibility of communications for the most part in a reasonable way. Some aspects of the admissibility of the individual communications have caused the Commission greater problems than others.

The aspect causing the Commission the most problems has been the requirement under the Charter that the communication should be sent only after the exhaustion of local remedies.[4]

It can be noted that the Charter states that local remedies should be exhausted, first on the condition that they exist, and, second, on the condition that it is not obvious that the local procedure would be unduly prolonged.

The Commission stated in *Sir Dawda K Jawara v The Gambia* that the requirement that the local remedies be exhausted is one of the most important conditions for the admissibility of communications.[5] No doubt

[4] Article 56(5) of the African Charter: "[Communications relating to human and peoples' rights ... shall be considered if they]: 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." There are seven different requirements in all listed in Article 56 for the admissibility of an individual communication. *See further* Onje Gye-Wado, "The Rule of Admissibility Under the African Charter on Human and Peoples' Rights," *AJICL*, vol. 3, 1991, pp. 742–755.

[5] Case 147/95, 149/96, decision of 11 May 2000, para. 30. A particularly instructive discussion of the purport of the requirement to exhaust local remedies is carried out by the Commission in this case, paras. 29–39.

therefore, the Commission continued, in almost all the cases, the first requirement looked at by both the Commission and the state concerned is the exhaustion of local remedies.[6] In *Constitutional Rights Project v Nigeria,* the Commission similarly stated that the exhaustion of local remedies is just one of the seven conditions specified for admissibility, but it is the one that usually requires the most attention.[7]

This requirement is a fundamental and uncontested principle of international law, implying that anyone who considers him- or herself the object of a human rights violation should exhaust all national possibilities to obtain redress first, before turning to an international agency like the Commission.[8] The point of the requirement is that the states themselves should have the possibility of remedying any wrongs committed against the individuals under their jurisdiction. Also, another issue is that the international agency should only be resorted to in a few exceptional cases. It is not to be an organization parallel to the national court system (or even be looked upon as an extension of the national court system as an agency which will normally consider one's case after all national remedies have been duly exhausted, thus the other relatively strict conditions for admissibility).[9]

There are a number of problems in practice associated with the requirement for the exhaustion of local remedies. First of all, there perhaps are no local remedies to exhaust. A system of courts or similar institutions may exist, but perhaps does not function properly for different reasons, for instance having to do with staffing, other resources, competence or corruption (probably the most common situation on the African continent). A court system may exist, but the country can be engaged in disturbances or civil or international war that puts the normal public administration including the courts out of function, intentionally or unintentionally on the part of the Government.[10]

[6] *Ibid.* at para. 30.

[7] Case 148/96, decision of 15 November 1999, para. 7.

[8] The same rule applies to any other international legal claim; domestic remedies should always be sought first. *See further* for instance C.F. Amerasinghe, *Local Remedies in International Law*, 1990; A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, 1983.

[9] The African Commission repeats this principle in case 25/89, 47/90, 56/91, 100/93, *World Organization Against Torture, Lawyers' Committee for Human Rights, Les Témoins de Jéhovah, Union Inter-Africaine des Droits de l'Homme v Zaire*, decided at the 19th Ordinary Session of the African Commission, 26 March–4 April 1996, paras. 53–54. The Commission has since referred to this principle of international law in many cases.

[10] Except for South Africa, it is difficult to find current literature on the functioning of the judiciary in African countries. Here are some very few examples: Abdullahi Ahmed An Na'im, "Detention without trial in the Sudan: the use and abuse of legal powers," *Columbia Human Rights Law Review*, vol. 17, 1986, pp. 159–187; Patrick Dankwa Anin, "The Role of the Judiciary in the Promotion and Protection of Human Rights – the Gambian

If remedies to exhaust exist, there may be a number of practical difficulties involved for the individual wishing to make use of the national courts. Probably few ordinary Africans have the means to take proceedings before a court. Apart from that, the fact that internal remedies must be exhausted before a complainant may turn to the Commission may not be widely known.

A bit surprisingly, the Commission has had reason to address the issue of the financial aspects of instituting legal procedures in only two cases to date.[11] In *Africa Legal Aid v The Gambia,* in which the Commission elaborated its view somewhat on the issue of complainants lacking financial means, the Commission still rejected the claim that the complainant should not have to exhaust local remedies: "The statement of

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Experience," *AJICL*, vol. 3, 1991, pp. 771–784; Carlson Anyangwe, "Administrative Litigation in Francophone Africa: The Rule of Prior Exhaustion of Internal Remedies," *AJICL*, vol. 8, 1996, pp. 808–826; Chiefs and African States, *Journal of Legal Pluralism and Unofficial Law ("JLPUL")*, special issue, nos. 25-26, 1987; Conference on the contribution of traditional authority to development, democracy, human rights and environmental protection: strategies for Africa, *JLPUL*, nos. 37-38, 1996; Nelson Enonchong, "Public Policy and *Ordre Public*: The Exclusion of Customary Law in Cameroon," *AJICL*, vol. 5, 1993, pp. 503–524; Sandra Fullerton Joireman, "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy," *Journal of Modern African Studies*, vol. 39, 2001, pp. 571–596; "Legal Structures for Improving Compliance with the Rule of Law in Africa," *African Society of International and Comparative Law ("ASICL")*, Ninth Annual Conference, 1997; L.A A. Kyando and C.M. Peter, "Lay People in the Administration of Criminal Justice: the Law and Practice in Tanzania," *AJICL*, vol. 5, 1993, pp. 661–682; H.J.A.N. Mensa-Bonsu, "Human Rights and the Juvenile Justice system – the Ghanaian Experience," *ASICL*, Seventh Annual Conference, 1995, pp. 321–347; Eze Onyekpere, *Justice for sale: a report on the administration of justice in the magistrates and customary courts of Southern Nigeria*, Civil Liberties Organisation, 1996; John Quigley, "The Tanzania Constitution and the Right to a Bail Hearing," *AJICL*, vol. 4, 1992, pp. 168–182; J. Redgment, "The structure of the courts of appeal of Botswana, Bophuthatswana and Zimbabwe," *Comparative and International Law Journal of Southern Africa*, vol. 21, 1988, pp. 105–113; S.M.A. Salman, "Lay tribunals in the Sudan: a historical and socio-legal analysis," *JLPUL*, no. 21, 1983, pp. 61–128; *Universal Rights, Local Remedies: implementing human rights in the legal systems of Africa*, papers and proceedings of a conference in Dakar, Senegal, 11–13 December 1997 on the protection of human rights under the constitutions of Africa, ed. by Abdullahi Ahmed An Na'im, 1997; Ernest E. Uwazie, "Modes of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria," *JLPUL*, no. 34, 1994, pp. 87–103; G.N.K. Vukor-Quarshie, "Criminal justice administration in Nigeria: Saro-Wiwa in review," *Criminal Law Forum*, vol. 8, 1997, pp. 87–110; and Nii Lante Wallace-Bruce, "Ghana's Legal Aid Scheme – A Worthy Beginning," *AJICL*, vol. 4, 1992, pp. 905–926.

[11] Case 97/93, *John K. Modise v Botswana (II)*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, paras. 16–22; case 207/97, *Africa Legal Aid v The Gambia*, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, para. 33 (i), (ii), (iii).

facts in the brief shows how NGO:s helped [the complainant] to return home, he could have been assisted to pursue a remedy in the courts of The Gambia."[12]

The Commission seems to state that if a complainant lacking financial means him- or herself is represented by an NGO, it is reasonable to expect the NGO to have the necessary resources in order to exhaust all available local remedies. It is possible, in the event the complainant was not represented by an NGO or someone else with financial resources, the Commission would not have required the exhaustion of local remedies.

It is also possible, if the Commission found the NGO to be largely lacking financial means as well, that the Commission would not push the requirement of the exhaustion of local remedies as hard as in *Africa Legal Aid v The Gambia*. In *Huri-Laws,* for instance, where the issue of financial means arose in another context, the NGO who had authored the communication could not attend the Session of the Commission in which the communication was to be considered, due to lack of funds.[13] In *Africa Legal Aid v The Gambia,* the Commission seems to imply that the NGO had sufficient economic means to assist the complainant in exhausting all local remedies. One implicit presumption on the part of the Commission must be that the NGO does not charge any fees for its legal assistance to the victim in this situation, as the victim most likely would not be able to pay such fees either.

Incidentally, the Commission's handling of *Africa Legal Aid v The Gambia* is somewhat curious. First, the Commission declared the communication admissible and requested arguments on the merits of the case.[14] However, in the end the Commission then "[a]fter reconsidering its decision on admissibility ... [d]eclares the communication inadmissible for non-exhaustion of local remedies having ascertained that on the one hand the Complainant did not resort to local remedies, nor were the alleged violations brought to the attention of the Respondent State."[15] This kind of about face on the part of the Commission does not augment well for the respect for its decisions in general.

In some cases, it may even be physically dangerous for an individual to bring an action against the state accusing the state of often serious human rights violations. The Commission found that this was the situation

[12] Case 207/97, *supra* footnote 11, para. 33 (i).

[13] Case 225/98, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000.

[14] Case 207/97, *supra* footnote 11, para. 17.

[15] *Ibid.* at conclusion. The manner in which the Commission expresses itself is also somewhat curious in that in reality resorting to local remedies is the equivalent of bringing the alleged violations to the attention of the Respondent State.

for instance in the case of *Kazeem Aminu v Nigeria*[16] and *Rights International v Nigeria*.[17]

In its most recent decision relating to the dangers involved in bringing an action against the state, the Commission stated "[r]elying on its case law ... the Commission finds that the Complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugees. The Commission therefore declared the communication admissible based on the principle of construct ve exhaustion of local remedies."[18]

The Commission has found in only two, perhaps three cases so far that all the local remedies had actually been duly exhausted before the communication reached the Commission. This was clearly the case in *Bob Ngozi Njoku v Egypt* and *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi*.[19] This probably also was the case, although a little less clear, in *Legal Resources Foundation v Zambia*.[20] In the latter case, the complainant had taken the matter as far as the Supreme Court and the state party acknowledged that "although the communication is vague as to the details of the judicial process that was exhausted" the issues raised by the complainant had been finally settled by the Supreme Court of Zambia.[21] Without commenting further on the matter of exhaustion of local remedies itself, the Commission states with respect to the issue of admissibility that "[h]aving considered that the communication satisfied the provisions of Article 56 of the Charter [governing all the seven different requirements for admissibility], the communication was declared admissible."[22] From this, the conclusion must be drawn that the Commission also was of the opinion that all available domestic remedies had been exhausted.

[16] Case 205/97, decision of 11 May 2000, para. 13.

[17] Case 215/98, decision of 15 November 1999, para. 24. An allegation of such dangers is also made in case 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, *Malawi African Association and Others v Mauritania*, decision of 11 May 2000, para. 78; in *Dawda K Jawara v The Gambia*, *supra* footnote 5, paras. 35–37; and in 103/93 *Alhassan Abubakar v Ghana*, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, para. 24.

[18] Case 232/99 *John D. Ouko v Kenya*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 19.

[19] Case 40/90, decision of 11 November 1997, para. 57; and case 231/99, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 21.

[20] Case 211/98, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, para. 51.

[21] *Ibid.* at paras. 6, 7, and 41.

[22] *Ibid.* at para. 51. According to the Supreme Court, however, as quoted by the Zambian government before the Commission, due to the system of parliamentary sovereignty prevailing in Zambia "even the Supreme Court could not 'attack' an Act of Parliament (as Sakala JS put it)" (para. 68 of the Commission's decision). Thus one may wonder whether in fact there were any local judicial remedies for the complainant to exhaust at all.

It is somewhat doubtful, however, whether all of the local remedies had indeed been exhausted in *Legal Resources Foundation v Zambia.* The Supreme Court of Zambia itself is quoted in the decision of the Commission as stating that the application to the Supreme Court had been commenced by a wrong procedure.[23] The question then arises whether instead there was a more correct judicial procedure to invoke or whether there was no adequate judicial procedure available at all to the complainant, instead of the "wrong" one before the Supreme Court. This question is not addressed in the Commission's decision, further strengthening the impression that the Commission did find that all of the available domestic remedies actually had been exhausted in the case.

From the fact that so far only three communications have been found to fulfil the exhaustion of local remedies requirement, the conclusion may be drawn on the one hand that this is indeed a difficult requirement for the author of a communication to fulfil, and, on the other hand, that the Commission must in practice try to apply this requirement in a way which does not entail blocking almost all of the communications from further substantive consideration.

In the particular case of *Bob Ngozi Njoku,* the Commission came to the unusual decision moreover that the Charter had not been violated by the accused state. The communication concerned a Nigerian student who was caught with drugs in a suitcase at the Cairo airport in transit from New Delhi to Lagos. He claimed that the suitcase did not belong to him. Mr. Ngozi was sentenced to life imprisonment. Another interesting aspect of this case is that the Commission decided that one of its Commissioners, Mr. Isaac Nguéma, former Chairman of the Commission, should pursue his good offices with the Egyptian government with a view to obtaining clemency for Mr. Ngozi on purely humanitarian grounds.[24]

In addition to the difficulties already mentioned associated with the requirement that local remedies must be exhausted, is the not uncommon situation in which there is a large number of victims whose respective cases would clog the national courts, risking an excessively long time to settle, if there is any chance at all of arriving at any settlement.

In the Charter, although not directly connected to the enumeration of the conditions for admissibility, there is a reference to particularly grave situations "a series of serious or massive violations of human and peoples' rights."[25] With regard to such particularly serious cases, the Commission has developed a doctrine according to which it does not require any

[23] Case 211/98, *supra* footnote 20, at para. 55.

[24] *Cf. infra* chapter 9 on the recommendations of the African Commission.

[25] Article 58(1) of the Charter. The requirements of admissibility as already mentioned are enumerated in Article 56.

[26] Case 16-18/88, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994, para. 26.

efforts to exhaust local remedies to be made at all on the part of the complainants, on the assumption that any endeavor to exhaust such remedies in the particularly serious cases would be fruitless.

This doctrine was first laid down in the case of *Comité Culturel pour la Démocratie au Bénin, Badjogoume Hilaire, El Hadj Boubacar Diawara v Benin*. There the Commission stated: "The Commission, in light of its mandate to protect human and peoples' rights, cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in respect of each individual complaint. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the great numbers of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable or, in the words of the Charter, 'unduly prolonged'."[26] Thus, in such cases, no domestic legal action has even to be attempted.[27]

This doctrine of the Commission occurs in many decisions, as the communications often involve serious human rights crimes committed against a large number of victims. Two of the Commission's earlier decisions in which this doctrine reappeared is the case of *Organisation Mondiale Contre la Torture, Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Inter-Africaine des Droits de l'Homme v Rwanda*[28] and *World Organization Against Torture, Lawyers' Committee for Human Rights, Les Témoins de Jéhovah, Union Inter-Africaine des Droits de l'Homme v Zaire*[29] respectively.

The same issue arose in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* and the Commission arrived at the same conclusion, namely that the communication should be declared admissible despite the lack of exhaustion of local remedies.[30] The communication was filed on behalf of 517 West Africans who had been expelled from Zambia in 1992 on grounds of being in Zambia illegally. "The mass nature of the arrests," the Commission writes, "the fact that victims were kept in detention prior to their expulsions, and the speed with which the expulsions were carried out gave the complainants no opportunity to establish the illegality of these actions in the [Zambian] courts."[31]

With respect to the possibility that the families of the victims, left

[27] This author has not seen any cases so far concerning a single individual which the Commission has considered serious enough to merit this exception from the exhaustion of local remedies rule.

[28] Case 27/89, 46/91, 49/91, 99/93, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996.

[29] Case 25/89, 47/90, 56/91, 100/93, *cf. supra* footnote 9, para. 57.

[30] Case 71/92, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, para. 30 and following.

[31] *Ibid.* at para. 30.

behind in Zambia, would have been able to institute legal proceedings on the part of the victims, the Commission pointedly notes that "... all individuals were expelled simultaneously, without regard to the possible progress of such proceedings. This fact alone gives rise to serious doubts as to the effectiveness of the remedies technically available to the complainants under Zambian law, and the Zambian government, while making reference to the numerous protective provisions in the Zambian constitution and subordinate laws, has offered no proof to the contrary."[32]

It should be noted that the Zambian Government actually presented a counter-argument to the accusations made in the communication.[33] The accused state rarely, if at all, answers the charges made against it, although it seems that the trend is slowly changing in favor of more co-operation with the Commission on this point.

The decision in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* is also interesting as the Commission recognizes the need for African states to take drastic actions to protect their peoples and their economies, "burdened as they are with the consequences of colonialism."[34] Such drastic action could thus be the mass expulsion of foreigners. The Commission does not seem to find that the economic argument carries much weight as an excuse for mass expulsion, however, as the Commission still comes to the conclusion that Zambia violated the Charter. The Commission seldom makes references to Africa's colonial past in its decisions. To the knowledge of this author, this is the only time.

On another aspect of the issue as to whether national remedies should be considered to exist, and thus whether the Commission is justified in demanding that the local remedies be exhausted, is that the Commission has had occasion to develop a substantial case law. This case law is based on a number of communications, primarily from Nigeria, relating to the "ouster clauses" issued by that Government and considerably circumscribing the jurisdiction of the ordinary courts, in favor of special (more or less political and/or incompetent) tribunals.

The Government of Nigeria has since changed, but as the Commission pointed out in its recent decisions in *Media Rights Agenda* and in *Huri-Laws*, under general international law the new Government inherits the responsibility of the previous government of any human rights violations that may have been committed.[35] The Commission continued:

[32] *Ibid.* at para. 32.

[33] The Commission commends the Zambian Government for this in para. 35, *ibid.*

[34] *Ibid.* at para. 34.

[35] *Cf.* case 224/98 *Media Rights Agenda v Nigeria*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 36; case 225/98 *Huri-Laws v Nigeria,* decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 36. *Cf. also* the earlier case 83/92, 88/93, 91/93 *Jean Yaovi Degli (on behalf of Corporal N. Bikagni) and Others v Togo*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995, para. 49.

"The Commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication ... Therefore, even if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position still remains that the responsibility of the present government of Nigeria would still be engaged for acts of human rights violations which were perpetrated by its predecessors."[36]

The Commission adds, critically, that "[f]urthermore, the Commission noted that although Nigeria is under a democratically elected government, the new constitution provides in its section 6(6)(d) that no legal action can be brought to challenge 'any existing law made on or after 15 January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law'."[37]

The Commission found that there were no avenues for exhausting local remedies at the time the alleged human rights violations were committed.[38] It is unclear from the decision whether there were any avenues for exhausting local remedies at the time of the decision. It is possible to imagine that the new democratically elected Government would have made it possible to seek redress for victims of human rights violations committed by the previous regime. Since the Commission did not find that there were any avenues for exhausting local remedies, the conclusion must be drawn that no such possibility existed even at the time of the decision of the Commission.

The reference made by the Commission to the new constitution of Nigeria does not quite answer the question of whether there were any local remedies available to the complainants at the time of the decision of the Commission. The new constitution states that no legal action can be brought to challenge "any *existing* law ..." (*italics added*).[39] The Commission hinted in its decision, however, that the new Nigerian Government might have repealed the offensive laws.[40] In that case, the laws under which the victims were tried and sentenced would no longer exist and thus the new constitution would not stop the victims from seeking redress since the constitution only aims at existing laws.[41] Judging from the reasoning of the Commission, however, there still were no remedies available to the victims at the time of the decisions in either *Media Rights Agenda* or *Huri-Laws*.

The fact that the Commission has received many communications regarding Nigeria is due in part to the large number of serious human

[36] Case 224/98, *supra* footnote 35, para. 37; case 225/98, *supra* footnote 35, para. 37.
[37] Case 224/98, *supra* footnote 35, para. 38; case 225/98, *supra* footnote 35, para. 38.
[38] Case 224/98, *supra* footnote 35, para. 39; case 225/98, *supra* footnote 35, para. 39.
[39] *Cf. supra* footnote 37.
[40] *Cf. supra* footnote 36.
[41] *Cf. supra* footnote 37.

rights crimes that have been committed in Nigeria. However, it is also and primarily due to the fact that there is a large number of efficient NGO:s in Nigeria engaged in human rights filing many communications, either in their own name or on behalf of victims of human rights violations. The importance to the Commission of NGO:s in general has been significant if not decisive, but this issue will not be further discussed here.[42] The relationship between the Commission and NGO:s is unprecedently intimate and most likely mutually rewarding; the NGO:s have been the only friends of the Commission for a long period of time.

The "ouster clauses" introduced above have been contained in decrees such as the State Security (Detention of Persons) Decree No. 2 of 1984,[43] the Robbery and Firearms (Special Provision) Decree No. 5 of 1984,[44] the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986,[45] the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987,[46] the Legal Practitioners' Decree of 1993,[47] the Constitution (Suspension and Modification) Decree No. 107 of 1993,[48] and the Political Parties (Dissolution) Decree No. 114 of 1993,[49] the Presidential election (Basic Constitutional and Transitional Provisions (Repeal) Decree No. 39 of 1993,[50] the Transition to Civil Rule (Disqualification and Prohibition of Certain Presidential Aspirants (Repeal) Decree No. 42 of 1993,[51] among others.

The "ouster clauses" prevent the ordinary courts from trying any material issue arising under the decree, from trying the constitutional validity of the decree, and also from entertaining appeals of the decisions by the special tribunals created under the decrees.

In its first decision on the matter, *Constitutional Rights Project (in*

[42] *Cf. supra* ch. 2.1.1 footnote 6.

[43] Case 225/98, *supra* footnote 35, para. 10.

[44] Case 60/91, *Constitutional Rights Project v Nigeria,* decision of 3 November 1994.

[45] Case 224/98, *supra* footnote 35, para. 14.

[46] Case 87/93, *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria,* decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994.

[47] Case 101/93, *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995.

[48] Case 129/94, *Civil Liberties Organisation v Nigeria*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995. The Constitution (Suspension and Modification) Decree, according to the decision of the Commission, specified that even decrees that might have lacked an internal ouster clause could not be challenged (case 102/93, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, decision of 31 October 1998, para. 42). As the Commission aptly put it, the Nigerians thus faced huge legal obstacles in challenging any new law (*ibid.*).

[49] Case 129/94, *ibid.*

[50] Case 102/93, *supra* footnote 48.

[51] *Ibid.*

respect of Zamani Lekwot and 6 Others) v Nigeria,[52] the Commission found, with respect to the "ouster clauses" and the existence of a legal remedy, that the remedy available in that case was "... a discretionary, extraordinary remedy of a non-judicial nature. The object of the remedy is to obtain a favor and not to vindicate a right. It would be improper to insist on the complainant seeking remedies from a source that does not operate impartially and has no obligation to decide according to legal principles. The remedy is neither adequate nor effective."[53] The Commission continues, "[t]herefore, the Commission is of the opinion that the remedy available is not of a nature that requires exhaustion according to Article 56, paragraph 5 of the African Charter."[54]

In the case of *International PEN, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria,* the Commission refers to its earlier decisions with respect to the issue of the "ouster clauses" and admissibility, and adds a forceful constitutional argument as to why the "ouster clauses" are unacceptable: "In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illusory. They create a legal situation in which the judiciary can provide no check on the executive branch of government."[55]

The lack of legal remedies is not only relevant to the consideration of the admissibility of the communication, but may also in itself constitute a violation of the Charter. In a recent decision against Mauritania, for instance, *Malawi African Association and Others v Mauritania*, the Commission described the appeal procedure involved in one of several communications relating to Mauritania, and came to the conclusion that the lack of a genuine appeal procedure constituted a violation of the right to appeal under the Charter.[56] This decision is the Commission's most comprehensive one to date in terms of the length, the number of articles of the Charter having been violated and the severity of the violations.

[52] Case 87/93, *supra* footnote 46.

[53] *Ibid.* at para. 23. According to the decision of the Commission, the Civil Disturbances Act empowered the Armed Forces Ruling Council to "confirm" the penalties of the Tribunal. It is a little unclear what this implies in terms of the extent of the possibility to review the decision of the Tribunal. In any case, of course, it is completely unacceptable, just as the Commission found, that a purely political agency adjudges legal cases.

[54] *Ibid.* at para. 24.

[55] Case 137/94, 139/94, 154/96, 161/97, decision of 31 October 1998, para. 76. The important role of the courts in the view of the African Commission will be discussed *infra* in Chapter 10.

[56] Case 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, *cf. supra* footnote 17, para. 94. *See also* case 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others v Sudan*, decision of 11 May 2000, para. 31. Article 7(1)(a) of the Charter states: "1. Every individual shall have the rights to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force ..."

The Commission found that in some of the instances involved in the communications against Mauritania, there was no possibility at all for appeal. The Commission then continued: "... [E]ven when an appeal was allowed ... the Court of Appeal confirmed the verdicts, even though the accused had contested the procedure of the initial trial, and the Public Prosecutor's office did not contest the complaints of the accused. From all indications, the Court of Appeal simply confirmed the sentences without considering all the elements of fact and law. Such a practice can not be considered a genuine appeal procedure. For an appeal to be effective, the appellate jurisdiction must, objectively and impartially, consider both the elements of fact and of law that are brought before it."[57]

Another irregularity of almost medieval dimensions found by the Commission in some of the trials carried out in Mauritania was the presumption of guilt of those persons who refused to defend themselves during the trials: The presiding judge declared that the refusal of the accused persons to defend themselves was tantamount to an admission of guilt.[58] The accused persons' lawyers were given no opportunity to prepare their cases before the commencement of the trials, for which reason they withheld their defense.[59] The tribunal based the verdicts it handed down on the statements made by the accused during their time in custody, statements obtained by force.[60] One particular trial, furthermore, was conducted in Arabic, of which only three of the twenty-one persons accused in that trial could speak fluently.[61]

"Ouster clauses" were also addressed, among other things, in the case of *Sir Dawda K Jawara v The Gambia*, mentioned earlier.[62] The complainant, who was in the words of the Commission the former Head of State of the Republic of The Gambia, alleged the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree No. 30/31, ousting the competence of the courts to examine or question the validity of any such Decree.[63] The Commission in its decision stated that "... in a situation where the jurisdiction of the courts have been ousted by decrees whose validity cannot be challenged or questioned, as is the position with the case under consideration, local remedies are deemed not only to be unavailable but also non-existent."[64] The Commission added that "[t]he prospect of seizing the national courts, whose

[57] Case 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, *ibid.*
[58] *Ibid.* at para. 95.
[59] *Ibid.* at paras. 3 and 96.
[60] *Ibid.* at paras. 3 and 95.
[61] *Ibid.* at paras. 3 and 97.
[62] *Cf. supra* footnote 5.
[63] *Ibid.* at para. 2. The passage is not entirely easy to follow, but it is clear that it is a question of ouster clause.
[64] *Ibid.* at para. 34.

jurisdiction have been ousted by decrees, in order to seek redress is nil."[65]

In a similarly recent, as well as instructive, decision concerning Sudan, *Amnesty International and Others v Sudan*, the Commission also had reason to consider the issue of "ouster clauses" in the context of trying the admissibility of the communications. The Commission found, with respect to the 1994 national security law, one of several decrees and laws involved in the case against Sudan, that the stipulation that "no legal action, no appeal is provided for against any decision issued under this law" is tantamount to the non-existence of an appeal procedure.[66]

According to the Commission, despite this seemingly clear statement in the law, appeal is allowed in some cases, but this possibility of appeal does not fulfil the demands of effectiveness and existence contained in the Charter:[67] "Indeed, appeals to this court are only permissible in the event of a death penalty or prison terms over thirty years. This implies that no other sentence can be appealed before the High Court, which consequently renders the appeal procedure inexistent for the complainants."[68]

A provision with an effect similar to the "ouster clauses" of Nigeria and Sudan is an amnesty law adopted in 1993 by the parliament of Mauritania. This was also considered by the Commission in the context of deciding on the admissibility of the communications against Mauritania in a case mentioned earlier, *Malawi African Association and Others v Mauritania*.[69] The Commission noted "... that the amnesty law adopted by the Mauritanian legislature had the effect of annulling the penal nature of the precise facts and violations of which the plaintiffs are complaining; and that the said law also had the effect of leading to the foreclosure of any judicial actions that may be brought before local jurisdictions by the victims of the alleged violations."[70] Under these circumstances, there obviously are no local legal remedies at the disposal of the complainants.

On the related subject of whether Mauritania can block the Commission from considering individual communications relating to the events covered by the amnesty law, the Commission makes the clear statement that "... an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter."[71]

[65] *Ibid.* at para. 38.
[66] Case 48/90, 50/91, 52/91, 89/93, *supra* footnote 56, para. 35.
[67] *Ibid.* at para. 36.
[68] *Ibid.*
[69] *Cf. supra* footnote 17.
[70] *Ibid.* at para. 82.
[71] *Ibid.* at para. 83.

In its decision concerning Mauritania, moreover, the Commission had reason once again to return to the issue of how to handle cases involving a large number of victims from the point of view of the mandatory exhaustion of local remedies: "The gravity of the human rights situation in Mauritania and the great number of victims involved renders the channels of remedy unavailable in practical terms, and, according to the terms of the Charter, their process is 'unduly prolonged'."[72] Almost the exact same sentence occurs in the decision concerning Sudan that was mentioned earlier.[73]

Of course, if the local legal remedies are rendered practically nonexistent by "ouster clauses," amnesty laws or similar measures, this alone justifies a decision by the Commission to declare the communications admissible, the lack of exhaustion of local remedies notwithstanding. The additional justification that the number of victims renders the local remedies unavailable is in fact unnecessary under these circumstances. As a matter of judicial policy, the Commission is probably correct in supporting its decisions with as many alternative justifications as possible, both in order to strengthen its decision and to demonstrate to the state parties to the Charter that which the Commission finds acceptable and not acceptable; teaching the states, in other words as well as future complainants, for that matter, how to understand the Charter.

Despite the explicit view of the Commission that it should not become a court of first instance replacing the national system for judicial remedies,[74] the fact that many communications involve serious human rights violations against a large number of victims in combination with the fact that the national judicial systems more often than not are malfunctioning anyway, contributes to making the Commission nevertheless a court of first instance in many cases. When the fact that the complainants in only three cases before the Commission have been able to fully exhaust the local remedies to date is considered, it becomes obvious that the Commission generally enters into the picture on a rather low level in the legal proceedings.[75]

The cases discussed so far illustrate exceptional situations where it has been rather obvious that there are no local remedies to exhaust, in theory or in practice, and where, consequently, it has been comparatively easy for the Commission to disregard the exhaustion requirement in considering whether a communication can be declared admissible by the Commission.

In the case of *Peoples' Democratic Organisation for Independence and Socialism v The Gambia*, which was a comparatively more "normal"

[72] *Ibid.* at para. 85.
[73] *Cf. supra* footnote 56, at para. 39.
[74] *Cf. supra* footnote 9.
[75] *Cf. supra* footnotes 19 and 20.

case, the complainant was considered to have done that which could be demanded in the face of unwilling authorities and courts, and thus to have fulfilled the requirement of exhaustion.[76]

In *Louis Emgba Mekongo v Cameroon,* the complainant had had judicial appeals pending for twelve years and an appeal for executive clemency pending for four years at the time of the decision by the Commission. The Commission considered it obvious in the case that the procedure of local remedies had been unduly prolonged.[77] This thus was another fairly easy question of admissibility for the Commission to resolve.

In *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso,* some of the victims involved had tried for as long as fifteen years to obtain redress through the national courts without any response whatsoever.[78] The Commission found that "... the Complainant had approached the competent national authorities with a view to obtaining redress for the alleged violations and to clarify the cases of disappearances and assassinations that had remained unpunished."[79] As the parties did not carry through their initial intention to reach an amicable resolution, the communication was declared admissible.[80] The Commission must implicitly have been of the opinion that the domestic procedure had been unduly prolonged.

In the case of *William A. Courson v Equatorial Guinea*, the Commission found that the victim of the alleged human rights violations had been granted amnesty and had been released from prison and that therefore "it appears most unlikely for any domestic court to entertain this appeal as this would only be a purely theoretical exercise."[81] The Commission declared the communication admissible because there had been some procedural irregularities during the trial against the victim that the Commission wanted to clarify.

In the end, the Commission found that there had been no violation of the Charter in the case, mainly because the complainant, and the Government (more easily understood), had not provided the Commission with sufficient enough information in order for the Commission to clearly establish whether the relevant articles of the Charter had indeed been violated.[82]

This is another problematic aspect of the procedure before the Com-

[76] Case 44/90, decided at the 20th Ordinary Session of the African Commission, 21-31 October 1996, paras. 33–35.

[77] Case 59/91, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994, paras. 20–21.

[78] Case 204/97, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, paras. 4, 14.

[79] *bid.* at para. 36.

[80] *Ibid.*

[81] Case 144/95, decision of 11 November 1997, para. 16.

[82] *Ibid.* at para. 19 and following.

mission. At times, the information provided by the author of the communication is not sufficient for the Commission to be able to make a meaningful decision on the substance of the communication. The question arises as to the type of decision the Commission should make in such a case, an issue which will not be discussed further here.

Considering further the case of *William A. Courson v Equatorial Guinea,* one could perhaps argue that the most adequate remedy in this case would have been damages to the victim of the alleged human rights violation, and that the local remedies should have been exhausted with this purpose first in mind. Nothing in the Commission's decision indicates that local remedies were not available for such proceedings.

One may ask whether the Commission should inevitably accept as admissible communications according to which the complainants only seek a declaration that the state in question has violated the Charter.[83] If carried to its logical extreme, such reasoning would result in all communications being admissible, as it is only the Commission proper who has the power to find violations of the Charter. In the case of *William A. Courson v Equatorial Guinea,* it perhaps would have been better to point out the possibility of filing national proceedings in order for the victim to get damages for the human rights violations allegedly suffered and then, if it turned out impossible to exhaust local remedies for that purpose in theory or in practice, encourage the complainant to return to the Commission with a renewed complaint.

In the case of *Union Nationale des Syndicats Autonomes du Sénégal v Senegal,* one of the victims involved had been tried and convicted for "acts or manoeuvres likely to compromise public security," served his sentence and then had been released from prison.[84] The Commission found that the file indicated that the complainant had yet to exhaust all domestic remedies.[85] One may wonder what the chances are of the victim in this case obtaining some form of redress or satisfaction in the local courts for the human rights violations that most likely were committed. Presumably, the Commission was of the opinion that the exhaustion of all local remedies would be more than "a purely theoretical exercise" in that case.[86]

Likewise, in the case of *Lawyers' Committee for Human Rights v Tanzania,* the Commission was of the opinion that the victim should try local remedies first before turning to the Commission.[87] The commun-

[83] *Cf.* case 144/95, *supra* footnote 81, para. 4.

[84] Case 226/99, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 8.

[85] *Ibid.* at para. 14.

[86] *Cf.* the case of *William A. Courson v Equatorial Guinea, supra* footnote 81, para. 16.

[87] Case 66/92, decided at the 14th Ordinary Session of the African Commission, December 1993.

ication alleged a violation of several aspects of the right to a fair trial. Since bail had eventually been granted the victim, the Commission could not exclude the possibility "that the domestic legal process is responsive and actively considering the case."[88] Thus the victim was to try to exhaust the potential local remedies first.[89]

In the case of *International PEN on behalf of Senn and Sangare v Côte d'Ivoire,* the Commission likewise demanded that the victims try exhausting local remedies before turning to the Commission.[90] The two victims had been detained and sentenced to three years in prison because of a newspaper article they had written. They were released after eight months, however, as the result of an amnesty. The author of the complaint still maintained a violation of Article 9 of the Charter on the freedom of expression. The Commission held that the victims should begin by pursuing national procedures to seek reparations or at least provide the Commission with information as to whether the national remedies had been exhausted.[91]

Returning to the case of *Union Nationale des Syndicats Autonomes du Sénégal v Senegal*, a curious and ambiguous detail in the Commission's decision in the case is that it also found that "the communication presents a *prima facie* case of series of violations of the African Charter."[92] As we have seen in earlier cases, the Commission has laid down the doctrine that if the communication gives evidence of a series of serious or massive violations of human rights, the Commission will not require the exhaustion of local remedies before the communication may be declared admissible.[93]

Thus, the Commission in *Union Nationale des Syndicats Autonomes du Sénégal v Senegal,* either deviates from its own doctrine as it declares the communication inadmissible or it does not find the alleged violations of human rights serious enough or having been committed against a large enough number of persons in order for the communication to merit an exemption from the requirement of the exhaustion of local remedies. The Commission otherwise should have declared the communication admissible in line with its well-established case law on this matter.

Another type of situation, this time relating to Nigeria, in which the Commission has found it pointless to require the exhaustion of local remedies is where the victims of the alleged human rights violations have been executed.

[88] *Ibid.* at para. 13.
[89] *Ibid.* at para. 14.
[90] Case 138/94, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995.
[91] *Ibid.* at para. 9.
[92] Case 226/99, *supra* footnote 84, para. 14.
[93] *Cf. supra* footnote 24 and subsequent text.

In the case concerning *International PEN and Others v Nigeria*, the Commission starts by reiterating its very reasonable view that where the government by decree has removed the possibility of people to turn to the courts, no local remedies then exist to exhaust.[94] In this particular case, however, the Commission continues by stating that "[i]n light of the fact that the subjects of the communications are now deceased, it is evident that no domestic remedy can now give the complainants the satisfaction they seek."[95] The Commission thus declared the communications admissible on the ground that the complainants had been executed while their communications were pending at the Commission.

The question one may ask is whether the Commission itself is able to give the complainants the satisfaction they seek, even if this question is regarded only from a strictly legal perspective. If it is a question of damages to the families of the victims, a local court may be just as suited as the Commission to entertain such a case, in the event there are functioning local courts for this purpose, which was not the case in *International PEN and Others v Nigeria* according to the Commission. Then, however, the question is not whether the victims have been executed, but whether courts exist to which the families can turn.

If the satisfaction sought by the families or the counsel of the victims is that the human rights violations carried out by Nigeria should be declared to constitute violations of the Charter, then the Commission most likely is the only body which can give the complainants the satisfaction they seek. It is only the Commission that has the power to pronounce on violations of the Charter proper.

Usually, however, international bodies like the Commission do not entertain cases just because the complainants want them to try alleged violations of the international treaty the implementation of which the body is to control. The complainants are usually required to exhaust local remedies in any circumstance.

Therefore, it would be more logical if the Commission did not find cases in which the victims had been executed automatically admissible, even if this measure as such constitutes an honorable gesture on the part of the Commission. Instead, it should consider such cases just as any other case and require the exhaustion of local remedies first, at least in principle.

If there are no adequate local remedies, the Commission may then declare the communication admissible on this ground, not on the ground that the complainants have been executed.

In *Forum of Conscience v Sierra Leone*, the Commission again is somewhat unclear on the matter of the requirement of the exhaustion of

[94] Case 137/94, 139/94, 154/96, 161/97, *supra* footnote 55.
[95] *Ibid.*, at para. 77.

local remedies on behalf of executed victims.[96] The Commission took note of the fact that the complaint was filed on behalf of persons (24 soldiers) who already had been executed: "In this regard, the Commission held that there were no local remedies for the Complainant to exhaust. Further that even if such possibility had existed, the execution of the victims had completely foreclosed such a remedy."[97] This is an ambiguous statement. The communication concerned the lack of the right to appeal in the original proceedings before a court-martial in Sierra Leone. Since the victims had already been executed when the communication reached the Commission, there was of course no point in bringing an appeal against their executions at that time. In that sense, there was no local remedy available. The Commission does not discuss, however, whether for instance it would have been possible for the surviving relatives to claim damages before the local courts. If such a possibility would have existed, which is unlikely, there would have been local remedies available. If there actually were no local remedies to exhaust, it is unnecessary to add the legally dubious statement that the execution of the victims had under any circumstances completely foreclosed such a remedy.

A further kind of situation where the Commission has found it pointless to require the exhaustion of local remedies is where the victim is being held without charges and, most importantly, on the personal order of the Head of State.[98] The Commission quite correctly stated that "[w]here the remedy is at the complete discretion of the executive the existence of local remedies is futile and to exhaust them would be ineffective."[99]

As noted earlier, out of the total of 115 decisions regarding communications up to the 29th Session of the Commission, sixty-three have been declared inadmissible or not receivable (twenty-five of the sixty-three were considered not receivable, implying that the communications were rejected at an even earlier stage before any consideration of their admissibility was undertaken).[100]

In the fifty-eight decisions regarding communications in which the Commission engaged in a discussion of the exhaustion of local remedies, twenty-one communications have been declared inadmissible due to the lack of exhaustion, whereas thus thirty-seven communications have been declared admissible, mostly thanks to the constructive way in which the Commission interprets the Charter and similarly adapts the rules of the Charter to the African realities.

[96] Case 223/98, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 14.
[97] *Ibid.*
[98] Case 64/92, 68/92, 78/92, *Krishna Achuthan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994.
[99] *Ibid.* at para. 25.
[100] *Cf. supra* footnote 2.

The rest of the communications considered inadmissible – seventeen according to my own, inexact, calculations – have foundered on account of other admissibility requirements.[101]

4.2 Why exhaustion is sometimes necessary

In some cases where there seems to have been a realistic possibility for the author of the complaint to actually exhaust or at least to try to exhaust local remedies, the Commission has applied a rather strict consideration of the communication and declaring it inadmissible.[102]

[101] For some useful tables sorting out different aspects of the communications finalized up to the Commission's 20th Session in 1996, *see* Frans Viljoen, "Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997", in *Human Rights Law in Africa 1997*, ed. by Christof Heyns, pp. 47–116.

[102] These are all the communications declared inadmissible by the Commission due to the non-exhaustion of local remedies up to its 14th Annual Activity Report: Case 8/88, *Nziwa Buyingo v Uganda*, decided either at the 16th or the 17th Ordinary Session of the African Commission, 25 October–3 November 1994 or 13–22 March 1995; case 13/88, *Hadjali Mohand v Nigeria,* decided at the 6th Ordinary Session of the African Commission, 23 October–4 November 1989; case 43/90, *Union des Scolaires Nigériens-Union Générale des Etudiants Nigériens au Bénin v Niger*, decided at the 15th Ordinary Session of the African Commission, April 1994 (the question may be raised why this communication was not considered to give evidence of a case of serious or massive violations of human and peoples' rights and consequently why the Commission did require the exhaustion of local remedies, *cf. supra* footnote 25); case 45/90, *Civil Liberties Organisation v Nigeria,* decided at the 15th Ordinary Session of the African Commission, April 1994; case 53/91, *Alberto T. Capitao v Tanzania*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995; case 72/92, *Bamidele Aturu v Nigeria*, decided at the 12th Ordinary Session of the African Commission, 12–21 October 1992; case 73/92, *Mohammed Lamine Diakité v Gabon*, decision of 11 May 2000; case 86/93, *Ebrima M. S. Ceesay v The Gambia*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; case 90/93, *Paul S. Haye v The Gambia*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; case 92/93, *International PEN v Sudan*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995; case 107/93, *Academic Staff of Nigerian Universities v Nigeria*, decided at the 15th Ordinary Session of the African Commission, April 1994; case 127/94, *Sana Dumbuya v The Gambia*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995; case 135/94, *Kenya Human Rights Commission v Kenya*, decided at the 18th Ordinary Session of the African Commission, 2–11 October 1995; case 131/94, *Ousman Manjang v The Gambia*, decided at the 15th Ordinary Session of the African Commission, April 1994; case 138/94, *International PEN on behalf of Senn and Sangare v Côte d'Ivoire*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995; case 198/97, *S.O.S. Esclaves v Mauritania*, decision of 5 May 1999; case 201/97, *Egyptian Organisation for Human Rights v Egypt*, decision of 11 May 2000; case 207/97, *Africa Legal Aid v The Gambia*, *supra* footnote 11; case 209/97 *Africa Legal Aid v The Gambia*, decision of 11 May 2000; case 219/98, *Legal Defence Centre v The Gambia*, decision of 11 May 2000; case 221/98, *Alfred B. Cudjoe v Ghana*, decision of 5 May 1999; case 226/99, *Union Nationale des Syndicats Autonomes du Sénégal v Senegal*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000; and case 230/99 *Motale Zacharia Sakwe v Cameroon*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000.

This includes communications from which it is clear that the case is still pending before the national courts and the national procedure has not (yet) been unduly prolonged.[103]

The case of *Motale Zacharia Sakwe v Cameroon* appears to have been a rather clear-cut, however unhappily, case of inadmissibility.[104] According to the decision "[o]n the surface of the complaint, it appears that the Complainant did not exhaust domestic remedies. The Commission noted further that the parties did not respond to its requests for additional information on the issue of exhaustion of local remedies, despite repeated reminders."[105]

The unhappy aspect is that this communication, like most communications before the Commission, alleges very serious human rights violations such as unlawful detention, torture, and the absence of a fair trial.[106] Once a communication is declared inadmissible, chances are that the complainant will never return to the Commission with the complaint. As there is no information in *Motale Zacharia Sakwe v Cameroon* concerning any efforts on the part of the author of the communication to exhaust local remedies and neither the author nor the Government responded to the requests of the Commission for further information, the Commission was left however with no other choice than to declare the communication inadmissible.[107]

The case of *Legal Defence Centre v The Gambia* brings up the situation where the victim of the human rights violation is no longer in the country where the alleged violations have taken place.[108] The question is whether this is a valid excuse for not exhausting the local remedies available in the country which the victim has left. The judgement of the Commission in such situations varies from case to case depending on the particular circumstances.

In *Legal Defence Centre v The Gambia,* the victim had been deported from The Gambia to Nigeria and the deportation order was still subsisting at the time of the decision of the Commission.[109] The Commission,

[103] Case 45/90, *Civil Liberties Organisation v Nigeria*, *supra* footnote 102; case 72/92, *Bamidele Aturu v Nigeria*, *supra* footnote 102; and case 135/94 *Kenya Human Rights Commission v Kenya*, *supra* footnote 102.

[104] Case 230/99, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000.

[105] *Ibid.* at para. 19.

[106] *Ibid.* at para. 10.

[107] The Commission found itself in a similar situation in case 201/97 *Egyptian Organisation for Human Rights v Egypt*, *supra* footnote 102; the case of 209/97 *Africa Legal Aid v The Gambia*, *supra* footnote 102. is also rather clear-cut although there is no indication of any repeated demands for further information from the parties (which is not necessary; one request is enough).

[108] Case 219/98, *supra* footnote 102.

[109] *Ibid.* at para. 16.

however, concluded that "the victim does not need to be physically in a country to avail himself of available domestic remedies, such could be done through his counsel. In the instant case, it noted that the complaint was filed by a Human Rights NGO based in Lagos, Nigeria. Rather than approach the Commission first, the complainant ought to have exhausted available local remedies in the Gambia."[110]

In *Africa Legal Aid v The Gambia,* the Commission discusses in detail whether residence outside the jurisdiction of the state in which the human rights violation have taken place relieves the complainant of the duty to exhaust local remedies. The Commission cites two of its earlier decisions in which it found that the victims had fled their home countries for fear of their lives and thus could not be required to exhaust local remedies before turning to the Commission:[111] "The same could not be said of a minor needing the protection of the State, as was the situation in the instant case."[112] Thus in *Africa Legal Aid v The Gambia*, as in *Legal Defence Centre v The Gambia,* the Commission concluded that the complainant should exhaust the local remedies first, although the victims of the alleged human rights violation had already returned to Malawi from Gambia.

The reasoning of the Commission in the earlier case of *Alhassan Abubakar v Ghana* appears to have been the opposite: "Where the author of a case is resident outside the territory of the state against which the case is brought, he cannot be required to return to that state in order to exhaust local remedies ..."[113] The Commission continues: "In the case at hand, to compel the complainant to return to Ghana in order to seek a remedy before the national courts would be too onerous a requirement. Accordingly, the Commission does not consider that local remedies are available in this case."[114]

As in the cases of *Legal Defence Centre v The Gambia* and *Africa Legal Aid v The Gambia,* the alleged victim in *Alhassan Abubakar v Ghana* should have been able to use counsel in order to avail himself of the local remedies in Ghana, as should the victims of human rights violations in other similar cases. The Commission perhaps has changed its attitude over the years and has become more demanding as concerns the exhaustion of local remedies. In most cases, however, where the alleged victims of human rights violations reside outside the country in which the violations have taken place, usually because of fear for their lives, the

[110] *Ibid.* at para. 17.

[111] Case 207/97, *supra* footnote 11, paras. 35–37. The decisions cited were case 103/93 *Alhassan Abubakar v Ghana*, *supra* footnote 17; and case 215/98, *Rights International v Nigeria*, *supra* footnote 17.

[112] Case 207/97, *supra* footnote 11, para. 37.

[113] Case 103/93, *supra* footnote 17, para. 24.

[114] *Ibid.*

Commission does *not* require the exhaustion of local remedies, even by counsel.[115]

The Commission perhaps is of the opinion that it would be equally dangerous for counsel to seek exhaustion of the local remedies as for the victim who has fled the country. On the other hand, counsel based outside the state in which the alleged human rights violations have taken place, should be able to achieve at least a partial exhaustion of local remedies through correspondence. There are of course several practical disadvantages involved for counsel not being personally present in the country where the exhaustion of remedies is being sought.

If the court proceedings are oral, which usually is at least partly the case, there is no choice for counsel but to be personally present where the remedies are being sought. However, it is then doubtful whether the case can be decided locally at all if the victim is also not present during the oral proceedings.

In *Legal Defence Centre v The Gambia,* the victim's representative was a human rights NGO based in Lagos, Nigeria. The Commission still found that the NGO should have exhausted available local remedies in The Gambia.[116] Either the Commission was of the opinion that this could be done by correspondence or it was of the opinion that persons representing the NGO should travel to The Gambia in order to exhaust the local remedies there or engage local counsel. If either of the two latter assumptions is correct, the Commission must have presumed that it would not be dangerous to act as the legal representative of the alleged victim in The Gambia.

Still, the alleged victim in *Legal Defence Centre v The Gambia* had been deported from The Gambia to Nigeria, allegedly because of his newspaper writings concerning Nigeria under the military rule of General Sani Abacha, which would seem to add a certain political dimension to the case, but of course not necessarily involving personal dangers for a legal representative. Indeed, perhaps it was more dangerous for the human rights NGO to act on behalf of the victim in Nigeria than in The Gambia.

In *Africa Legal Aid v The Gambia,* the Commission seems to be summarizing its doctrine to date as to the exhaustion of local remedies when the victim has fled the country: "The Commission should not ... be taken to have laid down a hard and fast rule that whenever a Complainant finds himself outside the jurisdiction, the inescapable conclusion should be that the requirement of exhaustion of local remedies mandated under

[115] *See* the case of 205/97, *supra* footnote 16, para. 13; case 147/95, 149/96, *supra* footnote 5, paras. 35–37; 215/98, *supra* footnote 17, para. 24; 232/99, *supra* footnote 18, para. 19.

[116] *Cf. supra* footnote 110.

Article 56(5) does not apply."[117] It is dependent on the situation whether the Commission finds that the exhaustion of local remedies applies or does not apply.

The practice of the Commission is understandable and reasonable. It would seem important that the Commission is consistent from case to case so that it evaluates similar circumstances in a similar manner to the greatest extent possible. As noted above, even in cases where the victims fear for their lives, they should be able to avail themselves of the domestic remedies through counsel, at least occasionally, on the condition that it is not also dangerous for the counsel to bring an action against the state.

A recent decision in which the Commission declared the case inadmissible due to a lack of exhaustion of the local remedies is *Mohammed Lamine Diakité v Gabon*. The case is noteworthy not so much because the Commission declared the communication inadmissible, as the complainant had never contested the decision of expulsion issued against him, but because it took the Commission eight years to arrive at this decision.[118] This illustrates another problematic aspect of the procedure before the Commission, namely the long time it sometimes takes the Commission to arrive at its final decisions on individual communications. Luckily, the tendency in the cases heard by the Commission is that it has been arriving at its decisions more quickly as time goes by.

In its peculiar decision relating to the case of *John K. Modise v Botswana (I)*, the Commission found that the complainant had brought his first local action over sixteen years ago, suing to be recognized as a Botswanan citizen by birth as opposed to citizenship by registration. However, the legal process was repeatedly interrupted by the summary deportations of which he was the victim.[119] The national legal procedures were willfully obstructed according to the Commission.[120] Thus the complainant had done all he could to exhaust the local remedies in the view of the Commission and the communication was declared admissible.

At the end of its final decision, the Commission writes "[i]f issues related to the acquisition of full citizenship are not resolved by competent domestic judicial authorities, or in the event of new facts coming to light, Mr. Modise can resort once more to the Commission."[121] Hopefully, the issue of whether Mr. Modise had in fact been granted the kind of citizenship he desired was clearer to the Commission than appears from its decision. Otherwise it seems rather hard to direct a complainant

[117] Case 207/97, *supra* footnote 11, para. 38.
[118] Case 73/92, *supra* footnote 102. The communication was dated 10 April 1992.
[119] Case 97/93 (I), decided at the 21st Ordinary Session of the African Commission, 15–24 April 1997, para. 20.
[120] *Ibid.*
[121] *Ibid.* at para. 40.

to turn to the domestic courts when he has been trying for over sixteen years to establish his claims through these courts without success.[122]

In fact, another case concerning the same matter and bearing the same number, *John K. Modise v Botswana (II)*, was decided by the Commission in October/November 2000.[123] In this decision, after a thorough and critical analysis of the way the Botswanan authorities had handled the question of Mr. Modise's citizenship, the Commission "[u]rges the government of Botswana to take appropriate measures to recognise Mr. John Modise as its citizen by descent and also compensate him adequately for the violations of his rights occasioned."[124] This is a far more reasonable decision than the one taken four years earlier. If the two different decisions illustrate a development in the Commission's reasoning, it is a very positive development indeed.

One curious aspect about the way in which the Commission handled the case of *John K. Modise v Botswana (I)* is the fact that it first decided the case, although from the decision itself it is unclear what that decision actually was. It then reopens the case without there being any apparent new circumstances to take into account. In *John K. Modise v Botswana (II)*, the Commission explains that its decision had been to close the case by considering that Mr. Modise's naturalization constituted an amicable settlement of the matter.[125]

Following a request by the representative of Mr. Modise, the Commission decided to reopen the case in November 1997 and to re-examine the reasons that led to its previous decision to close the case on the basis of an amicable settlement.[126] This twist in the Commission's way of handling the case was lucky for Mr. Modise, and for the image of the Commission. The Commission should strive to avoid such unorthodox moves, however, even if they may sometimes lead to a better substantive result. The credibility of the Commission is weakened when it alters its own decisions for no other apparent reason than that the first decision was not well thought-out.[127]

An issue which has not come up before the Commission so far, but which might arise, is the question of whether the requirement of the exhaustion of local remedies also applies to customary courts of law or similar customary institutions for the settlement of disputes. It is conceiv-

[122] The decision in *John K. Modise v Botswana (I)* is contained in the 10th Annual Activity Report of the African Commission, *Annual Activity Reports*, Volume One, 1987–1997, ACHPR, p. 401.

[123] Case 97/93 (II), *supra* footnote 11.

[124] *Ibid.* at conclusion.

[125] *Ibid.* at para. 44.

[126] *Ibid.*

[127] *Cf. supra* footnote 15. *See also* case 218/98, *Civil Liberties Organisation and Others v Nigeria*, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, paras. 19 and 20.

able that in some cases there are possibilities for the victim of a human rights violation to obtain redress through customary legal bodies. The Commission has not discussed this possibility in any of its decisions to date, perhaps as no such possibility has existed or because the Commission is of the opinion that it is the national judicial system that should be considered. Since customary law and courts play an important role throughout Africa, the opinion of the Commission as to the role the customary courts should play in the exhaustion of local remedies would be very interesting to learn.

5. Who is the victim?

An issue which has been problematic for the African Commission when deciding on the admissibility of an individual communication, judging from the extent to which the Commission has addressed this issue in its decisions to date, is the question of who actually is the victim of a human rights violation.

The term "victim" itself is not mentioned in the African Charter or in the Commission's procedural rules, which by the way do not add anything to the Charter on the subject of admissibility.[1] The fundamental issue of the status of the victim, however, arises under the Charter, which states that "[c]ommunications relating to human and peoples' rights referred to in Article 55 ... shall be considered if they: 1. Indicate their authors even if the latter request anonymity."[2]

The question then becomes who is entitled to file a complaint before the Commission – only the victim him- or herself, or other persons or organizations on behalf of the victim? If persons other than the victim may file complaints, the question then is who may do so, persons closely related to the victim or persons not at all related to the victim. By "a person filing a complaint on behalf of the victim" is here meant persons, who independently of the victim, file a complaint on the victim's behalf. It is obvious that legal counsel, contacted by the victim, may file a complaint before the Commission as the victim's legal representative.

Thus, the use of legal counsel or an NGO member as a legal representative of the victim in the proceedings before the Commission is not counted here as "a person filing a complaint on behalf of the victim." Typically, all persons appearing in judicial or quasi-judicial proceedings as complainants are represented by some type of legal counsel. This in itself does not raise any particular questions as far as the identity of the victim is concerned, nor as to the relationship between the person or the organization filing the complaint and the victim.

The difference between "a person complaining on behalf of the victim" and the victim him- or herself complaining through a legal repres-

[1] Rule 116 of the Rules of procedure: "The Commission shall determine questions of admissibility pursuant to Article 56 of the Charter."

[2] Article 56(1) of the African Charter

entative is that in the case where there is a legal representative, there has been some measure of contact between the victim and the legal counsel. The victim has instructed the counsel to represent him or her. In the case of another person complaining on behalf of the victim, no such contact or instruction has occurred.

In the latter case, a person or an organization has taken it upon itself to author a communication on behalf of an individual or a more or less well defined group of individuals who have been the victims of human rights violations, but for one reason or another have been unable to file a complaint on their own or unable to contact legal counsel to author the communication.

If this distinction is not made, then there would be no difference between complaints being filed by a person other than the victim and an ordinary legal representation before the Commission. It is the Commission's emphasis on the fact that the author of a communication does not have to claim to be the victim of the violation that leads to the conclusion that this reasoning does not apply to ordinary legal counsel. The fact that individual victims of human rights violations, or indeed any individual, may turn to legal counsel to pursue his or her case is indeed no new or uniquely African procedural invention. There would then be no need for the Commission to strongly emphasize something which is practically taken for granted in all judicial systems.

The question may also arise as to the level of "victim" of a human rights violation, if there needs to be one or more concretely defined victims of a violation at all for a valid complaint to be filed, or if a complaint may be made regarding the general human rights situation in a country involving a large number of human rights violations, but where no individual victims are specified.

The issue of individual victims *versus* the general human rights situation is related to the category of "serious or massive violations of human and peoples' rights" mentioned in the Charter.[3] An issue for the Commission when it comes to admissibility and "serious or massive violations of human and peoples' rights" is whether an individual victim must be specified only in the case of a communication obviously relating to one or more specific individuals or whether one or more victims must also be specified in the case of a communication alleging "serious or massive violations."

In the latter case, the next issue is the degree of specification required as to the identity of the victim(s) and the kind of violations which the victims have suffered, or, put differently, whether there are limits to how generally a communication may be formulated even in the case of "serious or massive violations of human and peoples' rights."

[3] Article 58 (1) of the African Charter.

In *Ligue Camerounaise des Droits de l'Homme v Cameroon,* which concerned a number of serious and massive violations of human rights, the Commission stated that "[i]n addition to the requirements of form ... communications must contain a certain degree of specificity, such as will permit the Commission to take meaningful action."[4] This is not a very specific statement on the part of the Commission, but it indicates that there are indeed limits as to how general a communication concerning serious or massive violations of human rights may be. Another issue is whether this requirement also should be labeled a requirement of form in the context of the decision on admissibility, or whether it is a requirement relating rather to the substance of the communication; sometimes these two aspects are difficult to keep strictly separate.

Related to the question of who is the true victim of a human rights violation is also the issue of how the Commission handles amicable resolutions of the disputes before the Commission. If a case is settled amicably, an issue remaining may be whether a victim of a human rights violation still exists after settlement.

Other issues which arise in the context of amicable resolutions are, for instance, as follows: The question of whether a potential human rights violation still exists after the case has been amicably settled – and thus whether the Commission may or should conclude its consideration of the case despite the amicable settlement –, and the conditions upon which the Commission should accept that a complainant withdraws a communication due to an alleged amicable resolution and in the event the Commission finds that it should accept a friendly settlement, the procedural consequences that then should be invoked. For instance, where an amicable settlement accepted by the Commission has been reached, should the Commission declare the communications "irreceivable," "inadmissible" or "closed," or perhaps handle them in yet another procedural manner? [5]

Another issue relating to friendly settlements is the type of compensation to the alleged victim or other measures in general on the part of the state that the Commission considers sufficient for an amicable settlement to be accepted as such.[6]

The decisions of the Commission to date illustrate and provide solutions to some of the above-mentioned problems. In *World Organisation Against Torture and Others v Zaire,* the Commission clearly stated that the Charter requires that all authors of communications give their name.[7]

[4] Case 65/92, decided at the 21st Ordinary Session of the African Commission, 15–24 April 1997, para. 16.

[5] *See further* chapter 6 on amicable settlement.

[6] *See further* chapter 6.

[7] Case 25/89, 47/90, 56/91, 100/93, decided at the 19th Ordinary Session of the African Commission, 26 March–4 April 1996, para. 51.

The author of a communication, however, need not be the victim of the human rights violation or belong to the family of the victim.[8] The Commission stated that "[t]his ... is a clear response to the practical difficulties that face individuals in Africa, and in particular where there are serious or massive violations that may preclude individual victims from pursuing national or international legal remedies on their own behalf."[9] The position as taken by the Commission is very reasonable.

It was hinted by the Commission in the case that the human rights violation in question must be "serious or massive" before any person or agency other than the actual victim may file a complaint on behalf of the victim.[10] As can be seen from the other decisions of the Commission, it turns out that this is a misleading impression.[11]

The authors of the communication in the case were all NGO:s. This is a common, and interesting, phenomenon in the practice of the Commission. The degree to which NGO:s dominate as authors of the communications is a trait in the cases before the Commission uniquely African. In a recent case before the Commission, *Huri-Laws,* an NGO even authored a communication on behalf of, or represented, another NGO.[12]

It is indeed rare that the victim him- or herself actually files the complaint before the Commission, or that another individual represents the victim as legal counsel or that an individual brings a communication on behalf of the victim. Judging from the title of the cases filed, the NGO:s have been involved as authors of communications in seventy-four of the total 115 decisions before the Commission, either alone or together with individuals whose communications have been joined with those authored by the NGO:s. The fact that the representative of the victim belongs to an NGO is not always obvious from the title of the case, so if anything the figure of seventy-four decisions is a low estimate. Sometimes the

[8] *Ibid.*

[9] *Ibid.*; *see also* case 64/92, 68/92, 78/92, *Krishna Achuthan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994, para. 29; and case 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, *Malawi African Association and Others v Mauritania*, decision of 11 May 2000, paras. 78–79.

[10] Case 25/89, 47/90, 56/91, 100/93, *ibid.*

[11] *See infra* footnote 16.

[12] The communication was submitted by Huri-Laws, an NGO registered in Nigeria on behalf of the Civil Liberties Organisation, another Nigerian human rights NGO (case 225/98, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 1). It is not clear from the decision whether the filing of the communication by Huri-Laws before the African Commission was preceded by any contacts between Civil Liberties Organisation and Huri-Laws, but this seems to be the case. It can be added that the true victims on behalf of which the communication was filed were Mr. Ogaga Ifowodo and Mr. Olisa Agbakoba of Civil Liberties Organisation, rather than the Organisation itself or at least in addition to the Organisation itself.

NGO acts as a legal representative, but most commonly the NGO seems to act on behalf of the victim, i.e. independently of any previous contacts with the victim during which the victim has engaged the NGO as a legal representative. Another individual is equally permitted, as are the NGO:s, to file a complaint on behalf of the victim(s), but as just noted, this is more unusual, as is the case of individuals acting as legal representatives.[13] Sometimes both NGO:s and other individuals author different communications at least partly on behalf of the same victim(s).[14] In some cases, several different NGO:s filed communications on behalf of the same victim.[15]

The impression conveyed by the Commission in *World Organisation Against Torture,* that a case of "serious or massive" violations of human rights must have occurred if a person other than the victim of the human rights violation is to be entitled to file a complaint before the Commission, is clearly shown to be incorrect already in the case of *Jean Yaovi Degli (on behalf of Corporal N. Bikagni) and Others v Togo.*[16] The case of *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria* also illustrates the fact that the Commission accepts that a person other than the actual victim can file a communication even when the alleged violations have not been labeled "serious or massive" by the Commission.[17]

In the cases where it is clear that it is not the victim him- or herself who has authored the communication, it is often difficult to judge from the decisions of the Commission whether the author of the communication acts as a legal representative in close contact with the victim of the human rights violation, or whether the author acts on his or her own initiative on behalf of the victim. Most often it is the name of the NGO, or,

[13] *See* for instance case 96/93, *Ms. Sarr Diop v Mauritania*, decision of 11 May 2000 (part of the larger decision including also cases 54/91, 61/91, 98/93, 164-196/97, 210/98 *Malawi African Association v Mauritania*, *supra* footnote 9).

[14] *Cf. ibid.*

[15] *Cf.* case 137/94, 139/94, 154/96, 161/97, *International PEN and Others v Nigeria*, decision of 31 October 1998.

[16] Case 83/92, 88/93, 91/93, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995.

[17] Case 87/93, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; *see also*, as other examples, case 140/94, 141/94, 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, decision of 15 November 1999; case 143/95, 150/96, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, decision of 15 November 1999; case 148/96, *Constitutional Rights Project v Nigeria*, decision of 15 November 1999; case 151/96, *Civil Liberties Organisation v Nigeria*, decision of 15 November 1999; case 153/96, *Constitutional Rights Project v Nigeria*, decision of 15 November 1999; case 206/97, *Centre For Free Speech v Nigeria*, decision of 15 November 1999; and case 215/98 *Rights International v Nigeria*, decision of 15 November 1999.

if it is an individual who has authored the communication, the name of the individual that appears in the title of the decision of the Commission, sometimes "on behalf of" the victim.[18] Neither is the relationship between the author of the communication and the victim usually clear from the text of the decision itself.

When an NGO, as is most often the case, authors a communication on behalf of a largely unspecified group of victims, it is understandable that the Commission uses the name of the NGO in the title of the decision and not the name of the victims. For those studying the case law of the Commission, however, it would be more instructive if the title of the case included a reference to the events causing the communication, if not the name of the victim(s), instead of the name of the NGO making the complaint. The name of the NGO does not disclose anything about the case to an outside observer, whereas some kind of reference to the events causing the communication would provide some information. In principle, it is not the NGO as such which is the opposing party to the state, but the victim(s) on whose behalf the NGO authors the complaint. Also, by only using the name of the NGO in the title of the case, it sometimes makes it difficult to distinguish between the cases as some NGO:s have each authored several communications.

When an NGO authors a complaint on the behalf of one or more victims who are named in the decision, it is even more difficult to understand why the Commission puts the name of the NGO in the title of the decision and not the name of the victim(s). It is then even more obvious than in the situation discussed above, that it is the victim and the state who are the two parties to the procedure before the Commission, not the NGO and the state. The NGO is only acting as an extension of the victim, so to say. Normally it is not the name of the person or organization representing the victim that should appear in the title of the case, but the name of the victim(s) themselves. If a different solution is used in a particular case, it should be due to exceptional circumstances. If the victim wishes to stay anonymous, the normal procedure would be to put X, Y, Z in the title of the case instead of the real name of the victim, not the name of the representative of the victim.

Another variation on the theme of the name to be included in the title of the case before the Commission is where the name of the individual NGO official or member who has sent the communication to the Commission appears in the title of the case, not the name of the NGO itself. In the case of *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*, for example, an individual is stated as the author of the commun-

[18] *Cf.* for example case 83/92, 88/93, 91/93, *supra* footnote 16. Signe Röpke wrote in 1995 that no formal authorization by the victim is required (Röpke, *supra* ch. 3.3 footnote 139, p. 22); *see also* Malmström, *supra* ch. 3.1 footnote 4, p. 29.

ication in the heading of the decision, but it is apparent from the first paragraph of the Commission's decision that the author belongs to Amnesty International.[19] It thus would have been more in line with the Commission's normal practice to instead name "Amnesty International" as the author of the communication. In the other cases where NGO:s have been the authors of the communications, the organization itself is mentioned in the title of the case and not the individual member or official of the organization who has written the communication.

On the other hand, if it is the individual and not the organization Amnesty International which in the eyes of the Commission is the relevant actor on behalf of the victim in *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*, then the information contained in the decision of the Commission, that the author belongs to Amnesty International, is superfluous or even confusing. The best solution, of course, would be simply to entitle the case *Abdoulaye Mazou v Cameroon*, which reflects the case itself.

The question of whether there needs to be a victim at all in the conventional concrete sense, prior to the Commission treating a communication, has been answered in the negative by the Commission in its practice. The Commission accepts an *actio popularis,* given that all other requirements of admissibility are met, other than the existence of one or more concrete victims.[20] In some of the cases, only a segment of the communication constitutes an *actio popularis,* and in others the entire communication concerns an *actio popularis*, i.e. there is no concrete victim involved at all.

In the case of *Civil Liberties Organisation v Nigeria,* the complainant argued that the suspension by the government of the Nigerian constitution, the ousting of the jurisdiction of the courts to review the legality of governmental decrees, and the nullification by the government of any

[19] Case 39/90, decided at the 21st Ordinary Session of the African Commission, 15–24 April 1997.

[20] *Cf.* for instance case 25/89, 47/90, 56/91, 100/93, *World Organization Against Torture, Lawyers' Committe for Human Rights, Les Témoins de Jéhovah, Union Inter-Africaine des Droits de l'Homme v Zaire, supra* footnote 7, case 101/93, *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria,* decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995; case 102/93, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria,* decision of 31 October 1998; case 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, decision of 31 October 1998; case 129/94, *Civil Liberties Organisation v Nigeria,* decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995; case 135/94, *Kenya Human Rights Commission v Kenya,* decided at the 18th Ordinary Session of the African Commission, October 1995; case 137/94, 139/94, 154/96, 161/97, *International PEN and Others v Nigeria, supra* footnote 15; case 159/96, *Union Inter-Africaine des Droits de l'Homme and Others v Angola*, decision of 11 November 1997; and case 211/98 *Legal Resources Foundation v Zambia,* decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001.

domestic effect of the Charter in Nigeria amounted to violations of Articles 7 and 26 of the Charter.[21] This complaint was accepted as such by the Commission.

Indeed, Nigeria was eventually found guilty of the alleged violations; the attempt by the government to nullify the domestic effects of the Charter constituted a "serious irregularity," according to the Commission, without any further specification as to the article in the Charter for which the "irregularity" constituted a violation.[22] There was no mention of any more or less specified victims at all in the communication, judging from the decision of the Commission, nor in the decision itself.

Thus the Commission accepts communications constituting pure *actio popularis,* where the victims are hypothetical and collectively defined – "all Nigerians" for instance –, rather than being concrete and individually specified, or at least specified to the extent that the victims make up an identifiable group of persons who have been subjected to a "serious or massive violations of human and peoples' rights."

In *International PEN and Others v Nigeria,* one part of the claims made by the authors concerned the Civil Disturbances (Special Tribunal) Decree then in force in Nigeria.[23] The authors claimed that the decree was invalid because it was made without the participation of the people, that the composition of the Tribunal with military officers and members of the Provisional Ruling Council meant that it could not be impartial, and that the lack of judicial review of the decisions of this tribunal amounted to a violation of the right to appeal and fair trial.[24] This is a pure *actio popularis* claim that was accepted as such among other more concrete allegations of human rights violations in the same case.

In the case of *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria,* the complaint concerned the Legal Practitioners' Decree issued in 1993 establishing a new governing body of the Nigerian Bar Association, the "Body of Benchers."[25] Of the 128 members of this body, only 31 were to be nominees of the Bar Association and the rest were to be nominees of the government.[26] The functions of the Body of Benchers were (1) the prescription of practicing fees one tenth of which were payable every year to the Body and (2) the disciplining of legal practitioners.[27] In addition, the decree was to have retroactive effect.[28] The communication argued that the new governing body for the Nigerian

[21] Case 129/94, *ibid.*

[22] *Ibid.* at conclusion. One alternative would be to declare the attempt to nullify the domestic effects of the Charter a breach of Article 1 of the Charter.

[23] Case 137/94, 139/94, 154/96, 161/97, *supra* footnote 15, para. 12.

[24] *Ibid.*

[25] Case 101/93, *supra* footnote 20, para. 1.

[26] *Ibid.*

[27] *Ibid.* at para. 2.

[28] *Ibid.* at para. 3.

Bar Association violated the Nigerian lawyers' freedom of association guaranteed by the Charter.[29] This is a clear example of a pure *actio popularis*, which was accepted by the Commission, and Nigeria was eventually found guilty of having violated several provisions of the Charter.

The case of *Legal Resources Foundation v Zambia* also constitutes a pure *actio popularis*.[30] The complainant alleged that the Zambian Government had enacted into law a constitution that was discriminatory and divisive, violating the human rights of thirty-five percent of the entire population.[31] The complainant alleged that the Constitution of Zambia Amendment Act of 1996 provides, *inter alia,* that anyone who wants to contest the office of the president has to prove that both parents are/were Zambians by birth or descent.[32] Furthermore, the complainant alleged that the amended constitutional provisions are in contravention of international human rights instruments in general and the African Charter on Human and Peoples' Rights in particular.[33] The Commission considered the communication and did not comment as to the general nature of the complaints involved. The Commission agreed with the complainant that the amendments of the Zambian Constitution did in fact violate the provisions of the Charter regarding non-discrimination and the right of every citizen to participate freely in the government of his or her country.[34] The Commission did not pronounce on the issue of whether the amended constitutional provisions were in contravention of international human rights instruments other than the Charter, although it drew some inspiration from other international human rights law and practice.[35]

There have also been instances of *actio popularis* before the Commission concerning slightly more individualized victims, but in which cases the victims still cannot be considered individually specified to the degree where the communication would lose its character of *actio popularis*. "All the national officials of the Universities Academic Staff Union (UASU)" would be an example of such a communication where the victims are somewhat specified, but still in rather general terms; the victims here find themselves somewhere in between "all the citizens of Kenya" and "Mr. or Mrs. X."[36] Perhaps "certain West African nationals expelled from Angola in 1996" would be another example of some, but not very

[29] *Ibid.* at para. 4.
[30] Case 211/98, *supra* footnote 20.
[31] *Ibid.* at para. 2.
[32] *Ibid.* at para. 3.
[33] *Ibid.* at para. 5. *Cf. supra* chapter 3.2 on the sources of inspiration of the African Commission.
[34] *Ibid.* at conclusion.
[35] *Cf. supra* ch. 3.2 footnote 47.
[36] Case 135/94 *Kenya Human Rights Commission v Kenya, supra* footnote 20, para. 9.

much, specification of the victims involved.[37] Considering that the Commission then speaks of this group as "Senegalese, Malian, Gambian, Mauritanian and other nationals," one may wonder if there is even as much as "some" specification of the identity of the victims in any meaningful sense in the case after all.[38]

The situation seems to have been similar in the case of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* which was filed on behalf of "517 West Africans who were expelled from Zambia on 26 and 27 February 1992."[39] In none of these cases has the Commission discussed whether it should admit the communication due to the lack of specification of the identity of the victims. The vagueness surrounding the identity of the victims does not seem to be an issue for the Commission.

Another issue, which also arises in the context of who is the victim of a human rights violation, is the issue of the terminology used by the Commission.

From the point of view of the reality of human rights violations, the issue of terminology may not seem to be the most pressing one, but from the point of view of producing a clear and consistent body of case law, the issue of the terminology used by the Commission is also important.

The Charter only mentions "authors" of communications,[40] but the Commission uses "complainant," "victim," "author," "representative" and "counsel" more or less interchangeably in a way which may be confusing for those attempting to identify who actually filed the communication before the Commission and on the behalf of whom, and thus the actual requirements for a communication to be considered admissible by the Commission. Recent variations on the theme of "victim" is "the accused" and "the convicted person," "the petitioner," and "the client."[41]

In the latter case, the Commission speaks of "the complainant's client" in its decision in order to refer to the victim. Considering that the Commission in some decisions uses the term "complainant" in order to refer to the victim, the use of the formulation "the complainant's client" to refer to the victim is potentially confusing to the reader of the Commission's decisions. In the decision where the Commission introduces the

[37] Case 159/96 *Union Inter-Africaine des Droits de l'Homme and Others v Angola, supra* footnote 20, para. 1.

[38] *Ibid.*

[39] Case 71/92, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, para. 1.

[40] Article 56(1) of the African Charter.

[41] "The client" was introduced in case 205/97, *Kazeem Aminu v Nigeria*, decision of 11 May 2000; "the petitioner" was introduced in case 209/97, *Africa Legal Aid v The Gambia*, decision of 11 May 2000; "the accused" was introduced in case 224/98, *Media Rights Agenda v Nigeria*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000.

term "petitioner," the Commission uses this term interchangeably with "complainant" in order to refer to the author of the communication, not the victim. In one and the same decision, the Commission uses the term "complainant" in order to refer alternately to the alleged victims of the human rights violations and to the legal representative of the victims.[42]

Most important of all would seem to be that the Commission is consistent in its use of terms within each decision and from decision to decision. Then, consideration can be given to the fact that perhaps there are terms which are more appropriate than others to denote the victim, the victim's legal representative and the person or organization complaining on behalf of the victim.

The Commission often calls the author of the communication the "complainant" and the victim of the human rights violation the "victim" – thus distinguishing between "complainant" and "victim," an unhappy choice of terminology as the complainant is the victim or the victim the complainant by definition. It would be better to distinguish between the "author" of a communication and the "victim" of a human rights violation in the cases where the two are not identical, or to distinguish between the "author" and the "complainant" (who is identical with the victim).

In the some of the cases where the Commission makes a distinction between the victim and the complainant, the victim is only one specified individual. In such a case, it is particularly unnecessary or even misleading to distinguish between "the complainant" and "the victim." As just noted, the complainant *is* the victim, or vice versa. If the Commission wishes to mention the legal representative of the victim in the decision, it should use this term or just "counsel". The legal representative is not complaining for his or her own part, but is representing the victim and for this reason it is better not to call the representative "complainant."

In some cases where more than one NGO or individual is involved as authors, it may be a question of several communications having been joined in one decision, a rather common procedure. The Commission then uses the term complainant in the plural, complainants. This may be particularly confusing for a reader of the decision not familiar with the terminological inconsistencies of the Commission. This is particularly true where only one victim is specified in the communication, as a reader of the decision may then come to think that in fact there are other victims involved as well. This is because complainant is usually seen as being equivalent to the victim.

In the case of *Union Inter-Africaine des Droits de l'Homme and Others v Angola,* the Commission refers to the five NGO:s who were the authors of the communication as "the complainants" and not, for in-

[42] Case 207/97, *Africa Legal Aid v The Gambia*, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001.

stance, "the complainants' representatives."[43] In this case, at least it is not a question of only one victim, but of "certain West African nationals." Nevertheless, the use of the term "complainants" to denote the authors of the communication is confusing for the reader even here; does the Commission mean the NGO:s or does it refer to the West African nationals? Properly speaking, it is the West African nationals who are the complainants.

If the Commission wishes to emphasize the role of the "author" of the communication for some reason, it may of course use the term "author" in its decision, but normally the author is either the victim or someone representing the victim, either as legal representative properly speaking or as someone authoring the communication on behalf of the victim without having been engaged by the victim. Thus the term "author" is unnecessary, if there is not something particular concerning the author that the Commission wishes to point out. If the Commission consistently used "victim" or "complainant" on the one hand, and "representative of the victim(s)" on the other, the terminology would be clearer. To date this author has not read a decision by the Commission in which the term "author" would be indispensable. Needless to say, in the view of this author, the introduction of such terms as "the accused," "the convicted person" or "the client" is an undesirable development.

In the case of an *actio popularis* where no victims are specified or are indicated only in very general terms, it may be justified to call the author of the communication the "complainant." In the case of an *actio popularis,* the links between the actual or potential victims and the author of the communication are so weak that the author may just as well be identified as the "complainant." The author has taken upon him- or herself the task of filing the complaint irrespective of any instruction from any particular victim(s) and therefore it could perhaps be claimed that the author is the complainant at least from a practical point of view.

From the point of view of principle, however, the author of the communication in a case of *actio popularis* is not the complainant strictly speaking, but he or she is actually acting on behalf of the complainant [which is the same as the victim(s)]. The author of the communication itself does not claim to be the victim of the violation, but is normally complaining on someone else's behalf. The author then does not claim any damages for his, her or its own part due to the human rights violation, which would have been natural if the author considered him- her- or itself as one of the victims (or complainants in the true sense of the term).

In the case of a pure *actio popularis*, however, it is difficult to think of any reasonable alternative to referring to the author of the communication as the "complainant." An alternative perhaps would to state "the

[43] Case 159/96, *supra* footnote 20.

people" as the complainant (or victim) and the author of the communication as the representative of the people, or those belonging to a particular ethnic group or a particular professional group as the lawyers of Nigeria, for example. In cases where the victims are somehow specified, they are the true victims or complainants, and the author of the communication represents these victims, however vaguely defined.

There are cases in which the Commission has used a more conventional form of terminology. In *John K. Modise v Botswana (I)* the Commission correctly speaks of John K. Modise as "the complainant" and of his legal representative as "the complainant's representative."[44] This reasonable use of terminology is also followed by the Commission in *John K. Modise v Botswana (II)*.[45] In *John K. Modise v Botswana (I)*, however, the Commission refers to the complainant's legal representative sometimes as the "legal representative," as "counsel," by the name of the NGO in question, "Interights," and sometimes by the name of the person acting on behalf of Interights. This is somewhat confusing as it may give the impression that more than one person in fact is acting as representative of the complainant/victim, which may be the case but most likely was not true in *John K. Modise v Botswana (II)*.

In *Alfred B. Cudjoe v Ghana*, one of the rare cases in which an individual victim actually brought the complaint before the Commission without legal representation, the Commission correctly called the victim and author of the complaint "the complainant."[46] It thus becomes obvious that the Commission is inconsistent in its use of terminology.

After an *amicable settlement* has been reached between the alleged victim of a human rights violation and the state, there is the question, from the point of view of a discussion regarding the requirements of admissibility and the identity of the victim, the extent to which a victim of a human rights violation remains after the issue has been settled between the parties.

The same question arises in cases of withdrawals by the complainants of the communication not due at least explicitly to an amicable settlement, and in the cases of pure silence on the part of the complainants. Should the Commission consider the situation as one in which a victim objectively speaking remains, and thus continue to handle the communication despite the amicable settlement, withdrawal or pure silence on the part of the complainant? Or should the Commission discontinue the proceedings concerning the communication?

[44] Case 97/93 (I), decided at the 21st Ordinary Session of the African Commission, 15–24 April 1997, para. 24.

[45] Case 97/93 (II), decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000.

[46] Case 221/98, decision of 5 May 1999; *cf. also* case 40/90, *Bob Ngozi Njoku v Egypt*, decision of 11 November 1997.

The Commission is of the opinion that an amicable resolution does not necessarily settle the case as far as the Commission is concerned. This was laid down in *Kalenga v Zambia*, one of the first decisions by the Commission.[47] With respect to an amicable resolution, the Commission stated that it cannot abrogate its responsibility for any violations that may have occurred.[48]

In the same case, the Commission also made the important statement that when the complainant is an individual, the Commission cannot automatically interpret silence on the part of the complainant as a withdrawal of the communication.[49] This is a very reasonable standpoint on the part of the Commission. If the author of the communication expressly tells the Commission that he or she does not wish to further pursue the application, there is a strong presumption in favor of discontinuing the consideration although sometimes there may be reasons to continue the consideration in these cases as well, in particular if the author of the communication is an individual.

The issue of the Commission's use of terms may be raised in this context. The Commission seems to be using the term "complainant" in the conventional, and correct, sense in *Kalenga v Zambia*.[50] The "complainant" presumably is identical with the "victim" of an alleged human rights violation and if the complainant/victim is an individual, the Commission will not automatically interpret silence as a withdrawal of the communication.

It would be strange if the Commission had intended to establish the principle that if the legal representative of the victim, and thus the author of the communication, is an individual, the Commission cannot interpret silence as withdrawal. Normally, legal representatives are individuals, or individual members of an NGO as is often the case in Africa, and therefore the meaning of such a principle would be difficult to grasp. The fact that the legal representatives before the Commission so far have mostly been NGO:s is an unforeseen and unintended coincidence. The crucial issue cannot reasonably be whether the representative is an independent individual or an individual member of an NGO, but whether the complainant/victim is an individual.

Another aspect of this issue is whether the victim has a legal representative before the Commission or whether the victim him- or herself

[47] Case 11/88, decided at the 7th Ordinary Session of the African Commission, 18–28 April 1990, para. 12.
[48] *Ibid.* at para. 9.
[49] *Ibid.* at para. 12. *Cf. also* the case of *Maria Baes v Zaire* in which the Secretariat of the Commission informed the author of the complaint that if no response was forthcoming the case would be closed for lack of action on her part and indeed the communication was declared inadmissible (case 31/89, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995).
[50] Case 11/88, *supra* footnote 47.

tries to pursue the case without legal representation, which can be difficult for an individual to succeed with for different reasons. The Commission may be less prone to automatically interpret silence as a withdrawal of the communication if the complainant (or victim) is a private individual acting alone, than if he or she is an individual, but has a legal representative.

In reality, this is probably what the Commission means by its argument concerning the complainant being an individual. The Commission most likely wishes to distinguish cases in which the victim has a legal representative from cases in which the victim does not have a legal representative. In the former case, the victim is more vulnerable than in the latter, and there is reason to be more suspicious of the silence of a victim acting on his or her own behalf than of the silence of a victim having legal representation.

If this is the correct construction of the Commission's argument, the conclusion drawn above on the terminology used by the Commission must be altered and indeed become the opposite of that which was previously stated.

The Commission then would use the term "complainant" in the sense of "author" of the communication and not in the sense of "victim," which is fully possible even if unconventional. Even then, though, the Commission should have added "authoring the communication on his or her own behalf" to its principle concerning the individual whose silence the Commission cannot automatically interpret as withdrawal of the communication, in order to be clear about that which it actually intended by "complainant" and "individual" (at least as the reasoning of the Commission is finally understood by this author).

Irrespective of the terminology, the basic approach of the Commission is reasonable as evidenced by its statement on the withdrawal of communications, as it demonstrates an awareness of the fact that not only, and perhaps not even primarily, is the will of the victim decisive when it comes to silence on his or her part. The risk of silence and thus unintentional withdrawal, so to say, is particularly relevant when an individual is acting on his or her own before the Commission without legal representation.

The victim may be afraid to proceed with the communication. He or she may lack the resources necessary in terms of knowledge or money to pursue the case, may underestimate the chances of success, may be hindered by a deficient infrastructure, etc. Therefore, it is good that the Commission retains the decision as to whether to interpret silence as withdrawal.

In *Committee for the Defence of Human Rights in Respect of Ms Jennifer Madike v Nigeria,* the Commission in a reasonable and clarifying manner develops its view as to how to interpret the silence of the com-

plainant.[51] First, "[t]he Commission must determine if the lack of communication is due to disability, or a desire to cease pursuit of the case."[52] Then, "[w]here the complainant is an individual, the Commission cannot interpret silence as withdrawal of the communication, because individuals are highly vulnerable to circumstances that might prevent them from continuing to prosecute a communication."[53] And third, "[i]n this instance, however, the complainant is a well-known NGO. The Commission must interpret a complete lapse of communication as lack of desire to pursue the communication."[54] In particular in cases where the author of the communication is an individual who does not have a legal representative, perhaps the degree of seriousness of the alleged acts of the state can play a role when the potential will of the author to withdraw his or her communication is being assessed.

Another issue is that for practical reasons, it is almost impossible for the Commission to pursue a case without the active participation of the complainant. The Commission will most likely not have access to enough information to decide the case if it loses contact with the complainant. This is particularly likely in a case where the complainant has not had a legal representative. Thus, in the majority of the cases worthiest of continued attention by the Commission, the Commission is least likely proceed with its consideration in practice. Indeed, the Commission has never to date continued the consideration of a communication that has been considered withdrawn, for one reason or another.

Thus while the very important principle is that silence on the part of the victim is not automatically interpreted by the Commission as a withdrawal of the communication, in practice the Commission acts to the contrary.

In line with that which is stated above, it can be added that to date, neither has the Commission proceeded with a communication relating to that which the Commission has understood as an amicable settlement of any kind that has been achieved. This is true despite the proud, honorable, statement cited above that in spite of an amicable settlement, the Commission cannot abrogate its responsibility for any violations that may have occurred.[55]

So, in relation to the issue more specifically of whether there remains a victim of a human rights violation in objective and theoretical terms, after the amicable settlement of a case or after the complainant has been silent for some time and may perhaps be presumed to have withdrawn

[51] Case 62/91, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994.
[52] *Ibid.* at para. 11.
[53] *Ibid.* at para. 12.
[54] *Ibid.* at para. 13.
[55] Case 11/88, *supra* footnote 47, para. 9.

his or her communication, the answer seems to be that yes, a victim does remain and the Commission may proceed with the case in order to pronounce on any human rights violations it may judge to have occurred.

In practical terms, however, judging from its case law to date, the Commission will seldom, if ever, consider that a potential victim of a human rights violation remains after the case has been amicably settled or the communication has been withdrawn for whatever other reason.

A particular issue relating to the status of the victim of human rights violations before the Commission arises where the right to self-determination is invoked.[56] Who is entitled to represent "the people" who are the victim of the alleged denial of the right to self-determination? In *Katangese Peoples' Congress v Zaire,* the President of the Katangese Peoples' Congress, allegedly the only political party representing the people of Katanga, acts as the representative of the Katangese people.[57] The Commission implicitly accepts this; the issue of the standing of the author of the communication before the Commission is not discussed at all in the decision. In a couple of cases, the Commission has also considered communications bringing up the right to self-determination in its internal aspect – basically as a right to political participation or democracy. In neither case has the Commission questioned the standing of the complainants as representatives of the peoples who have been denied their right to self-determination.[58]

[56] Article 20 (political) and 21 (economic) of the African Charter.

[57] Case 75/92, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994.

[58] Case 102/93, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, decision of 31 October 1998; and case 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, decision of 11 May 2000. In the two cases where the right of all peoples to be equal (Article 19 in the Charter) has been raised, the Commission has not either questioned the standing of the complainants (case 54/91, 61/91, 96/93, 98/93, 164/97–196/97, 210/98, *Malawi African Association and Others v Mauritania*, *supra* footnote 9; and case 211/98, *Legal Resources Foundation v Zambia*, *supra* footnote 20).

6. Amicable settlements

6.1 When is the case settled?

In the preceding chapter, the issue of whether a victim of a human rights violation can be said to remain after a friendly resolution of the case between the parties was discussed. The amicable settlement of cases before the African Commission also raises many other issues.

Some of these issues are the conditions upon which the Commission accepts a friendly resolution, or, put differently, the conditions which the Commission finds should be fulfilled for a friendly settlement to be acceptable from the point of view of human rights. The nature of the final decision by the Commission following a friendly settlement also raises procedural issues. The Commission so far has been quite inconsistent as to the type of decision it has issued in the proceedings regarding a communication after the parties have arrived at a friendly resolution.

In addition, the type of compensation to the victim considered necessary by the Commission in order for a friendly settlement to be acceptable is an issue raised by these settlements and to some extent answered in the practice of the Commission.

As the Commission stated early that its primary task is the finding of friendly settlements to the disputes before it, the importance of friendly settlements is clear: "It is the primary objective of the Commission in the communications procedure to initiate a dialogue between the parties which will result in an amicable resolution to the satisfaction of both and which remedies the prejudice complained of."[1]

Strangely enough, nothing is said in the African Charter about friendly settlements with respect to individual communications nor in the Commission's procedural rules. With respect to the practically insignificant state communications, the Charter requires that the Commission employ all appropriate means to reach an amicable resolution before it goes on to write a report on the case.[2]

[1] Case 16-18/88, *Comité Culturel pour la Démocratie au Bénin, Badjogoume Hilaire, El Hadj Boubacar Diawara v Benin*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994, para. 35. For an initiated analysis of the allegedly false dichotomy between the amicable and judicial approaches to dispute settlement in the African context, *see* Murray (2000), *supra* ch. 2.1 footnote 1, chapter 6.

[2] Article 52 of the African Charter.

The Commission's procedural rules also deal with amicable settlements with respect to state communications, but not with respect to individual communications. This is strange considering the great weight attached by the Commission itself to the amicable resolution of cases and considering the otherwise high degree of ingenuity shown by the Commission in the creation of its procedural rules.

The Commission normally does not automatically accept a friendly settlement as such, but instead usually wishes to confirm that the friendly settlement sufficient respects the human rights before it concludes its consideration of the case based on the amicable settlement.[3]

The practice of the Commission, at least in its early days, has not been entirely consistent. First, the Commission unconditionally stated, at least with respect to cases where the complainant is an individual, that "the Commission cannot automatically interpret silence as withdrawal of the communication."[4] The Commission then unconditionally stated that "where a complainant expresses a wish to withdraw a communication, the Commission can proceed no further in its consideration."[5]

With the exception of the fact that the author of the complaint in the latter case was an NGO, which actually should not be decisive as to the issue of the principle, the two different statements by the Commission in the two cases appear contradictory.

It is true that in *Henry Kalenga v Zambia,* the Commission speaks of the silence on the part of the complainant and whether this should be interpreted as a withdrawal of the communication. In *International PEN v Burkina Faso* it discusses the explicit withdrawal of the communication by the complainant. It may be that these two situations are not comparable and that, moreover, neither of these two situations may be comparable with the situation where an amicable resolution has been found by the parties.

It could be argued, however, that in all three situations – the silence, the explicit withdrawal of the communication, and the amicable resolution – the Commission should take the same position, namely not to "abrogate its responsibility for any violations that may have occurred."[6]

In the two cases just compared, in which the Commission first refers to the silence of the complainant and then to the withdrawal of the communication by the complainant, the factual situation was more or less

[3] Case 11/88, *Henry Kalenga v Zambia*, decided at the 7th Ordinary session of the African Commission, 18–28 April 1990, para. 9. *Cf. also* case 138/94, *International PEN on behalf of Senn and Sangare v Côte d'Ivoire*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995, para. 8.

[4] Case 11/88, *supra* footnote 3, para. 12.

[5] Case 22/88, *International PEN v Burkina Faso*, decided at the 15th Ordinary session of the African Commission, April 1994, para. 8.

[6] Case 11/88, *supra* footnote 3, para. 9. For a similar viewpoint, *cf.* Malmström, *supra* ch. 3.1 footnote 4, p. 43.

identical: The alleged victim of the human rights violation had been released from prison. This was also the case in *Maria Baes v Zaire,* where the Commission states somewhat ambiguously that "[g]iven the length of time in which the case has been pending before the Commission, the fact that the Commission has learnt that the alleged victim has since been released, and that no further information has been sent from the complainant, the Commission is unable to proceed with the case."[7] The Commission does not specify which of these circumstances carried the most weight with respect to the decision of inadmissibility.

In the case of a friendly settlement, the parties to the dispute also presumably would like the Commission to discontinue the consideration of the case. However, with respect to amicable resolutions, the Commission has stated that it cannot just terminate its consideration without checking the implications of the amicable resolution from a human rights point of view.[8] In the view of this author, the same standard should apply in cases of silence from the complainant and even in the explicit withdrawal of communications.

In some instances, the wish to withdraw is the result of a friendly settlement. In those cases, the amicable resolution doctrine of the Commission will hopefully apply, i.e. there will be no abrogation in principle of the Commission's responsibility for any violations that may have occurred.[9]

In the case of *Henry Kalenga v Zambia,* concerning an amicable resolution and where silence of the complainant was noted, the Commission actually began its reasoning by invoking the principle whereby "[t]he African Commission only considers communications that are brought before it by complainants. When a complainant wishes to withdraw a communication, for whatever reason, the Commission must respect this wish."[10] This reasoning makes the decision in *Henry Kalenga v Zambia,* where the Commission found the case amicably resolved by interpreting the complainant's failure to pursue the communication as evidence of his satisfaction with the outcome, consistent with the decision in *International PEN v Burkina Faso* in which the Commission cited the explicit withdrawal of the communication as a compelling reason to terminate its consideration of the case.[11]

Since the Commission to date has never disapproved of an amicable resolution on the grounds that it violates human rights, the conclusion must be drawn that the Commission is of the opinion that the friendly

[7] Case 31/89, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995, para. 7.
[8] Case 11/88, *supra* footnote 3, para. 9.
[9] *Ibid.*
[10] *Ibid.* at para. 11.
[11] *Cf. supra* footnote 5, para. 8.

settlements concluded between the parties to the disputes before the Commission to date fulfill all the requirements for such a settlement to be acceptable from a human rights point of view.

The Commission seldom explicitly states that an amicable resolution is consistent with human rights, but it must be implicitly understood from the decisions of the Commission that in the instances where a friendly settlement has been reached, and the Commission has confirmed the settlement by discontinuing its consideration of the communication, that the Commission has found that all the necessary requirements are fulfilled. Therefore, finding the criteria for an acceptable amicable resolution can only be done indirectly through an analysis of the implicit criteria as used by the Commission to check whether a friendly settlement fulfils the acceptability requirements.

The case of *International PEN v Chad* is interesting in that it seems to set a very low threshold for the Commission to accept a friendly settlement or withdrawal of a communication.[12] In this case, International PEN withdrew its communication on behalf of an individual, as International PEN believed that the individual had either been released from prison after the current government came into power or had died in prison.[13]

The Commission then reiterated its stance that a complainant's right to bring a communication implies the corollary right to withdraw that communication, and that where a complainant expresses a wish to withdraw a communication, the Commission can proceed no further in its consideration.[14] In view of the fact that the complainants themselves believed one of the alternatives to be that the alleged victim might have died in prison, it is fairly obvious that there were well-founded suspicions of a serious violation of the Charter, assuming that the death of the victim was somehow precipitated by the detention, which would seem in general likely and also judging from the Commission's own account of the facts of the case.[15]

It is strange that in such a case the Commission nevertheless takes the formalistic position that it has no choice but to fully accept a withdrawal of the communication as the final word relating to the case. If this is the Commission's position, then it can be maintained that the Commission makes no independent evaluation of any possible human rights violations having been committed in the case of the withdrawal of a communication. This hopefully is not the position taken by the Commission.

[12] Case 55/91, decided at the 14th Ordinary Session of the African Commission, December 1993.
[13] *Ibid.* at para. 8.
[14] *Ibid.* at para. 9.
[15] *Ibid.* at para. 1.

The Commission may and should continue the consideration of a communication, even if it is withdrawn, if there remain strong suspicions of human rights violations. In practice, the withdrawal may make it difficult or even impossible to proceed with the consideration, but on the level of principle, the Commission should decide that the consideration of the case may proceed despite the withdrawal of the communication. In *Henry Kalenga v Zambia,* the Commission did state that the release of the alleged victim of a human rights violation cannot abrogate the Commission's responsibility for any violations that may have occurred.[16]

In the case of *William A. Courson v Equatorial Guinea,* the author of the complaint demanded that the consideration of the communication by the Commission should continue and that the Commission declare that the conviction and imprisonment of the alleged victim were violations of the Charter.[17] The complainant further requested that the Commission order the payment of damages to the alleged victim for the period spent in detention.[18]

As a result, the communication was not withdrawn in this case as it has been in other similar cases after the alleged victim has been released from detention.[19]

Still, the case shows that the Commission finds that it may be worthwhile to continue the consideration of a communication although the alleged human rights violation has stopped, in this case because the victim of the violation had been released from detention.

The Commission continued its consideration of *W.A. Courson v Equatorial Guinea* and decided to begin with the issue of admissibility. As we have seen, the Commission found the communication admissible despite the fact that the victim had been released.

The Commission then considered the issue of the exhaustion of local remedies. First, the Commission requested additional information concerning the exhaustion of local remedies.[20] It can be noted that the Commission declared the communication admissible before it investigated the issue of the exhaustion of local remedies.

The Commission then decided that given the fact that the alleged victim had been granted amnesty, it appeared most unlikely that any domestic Court would entertain an appeal as this "would only be a purely theoretical exercise."[21]

Although the reasoning on the part of the Commission favors the victim in this case – the Commission was prepared to admit the complaint

[16] Case 11/88, *supra* footnote 3, para. 9.
[17] Case 144/95, decision of 11 November 1997, paras. 4 and 9.
[18] *Ibid.* at para. 9.
[19] *Cf.* case 11/88, *supra* footnote 3; and case 22/88, *supra* footnote 5.
[20] Case 144/95, *supra* footnote 17, para. 11.
[21] *Ibid.* at para. 16.

despite the lack of exhaustion of domestic remedies – there are a number of arguments that could be launched against the line of reasoning of the Commission on the principle level.

In practice, it may very well be that the courts of Equatorial Guinea would under no circumstances entertain an appeal or complaint of any kind from someone like the alleged victim in this case, belonging to the political opposition, and that the Commission realized this and therefore found the communication admissible. Such an insight on the part of the Commission, however, is not evident from its decision, if not very subtly and indirectly.

One of the arguments that could be invoked against the reasoning of the Commission is that an action for damages could and should be brought to the domestic courts before the Commission should declare the case admissible.[22]

From a procedural point of view, it could be maintained against the manner in which the Commission handled the specific case of *W.A. Courson v Equatorial Guinea* that it was unnecessary to spend time waiting for information on the exhaustion of local remedies and for the actual exhaustion itself to be completed, if in the end the Commission was going to find that the appeal that had filed would not likely be entertained by any domestic court since the appeal "would only be a purely theoretical exercise."[23]

Last, the Commission proceeded to address the substantive issues, and came to the unusual and noteworthy conclusion that no provision of the Charter had been violated.[24]

The Commission appears to be saying that the author of the complaint had not provided the Commission with enough information to substantiate his claims that the Charter had been violated, despite, one would hope, a request by the Commission for additional information as to the substance of the allegations.[25]

If this is true, however, the question arises as to why the Commission declared the communication admissible in the first place. The manner in which the decision is drafted seems to indicate that the complainant did not succeed in establishing a *prima facie* violation of the Charter and if this is so, the communication should have been declared inadmissible under Article 56(2) of the Charter or even, and more correctly, not receivable under the rules of procedure of the Commission.[26]

The Commission also is not entirely consistent when it first states that it appears most unlikely for any domestic court to entertain the

[22] *Cf. supra* ch. 4.1. footnote 84 and following.
[23] Case 144/95, *supra* footnote 17, para. 16.
[24] *Ibid.* at paras. 16 and 23.
[25] *Ibid.* at paras. 18, 19, 21, 22 and 23.
[26] Under rule 104 of the Rules of procedure in combination with Article 56 of the Charter.

appeal of the victim as this would only be a purely theoretical exercise, and then immediately before the conclusion state that it "deplores the silence maintained by the parties in spite of its repeated request for information relating to the exhaustion of local remedies and other procedural aspects of the case. 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 brought before it."[27] Only the information relating to "other procedural aspects of the case" than the exhaustion of local remedies would seem to be of interest to the Commission.

The case of *International PEN v Ghana* is noteworthy in that it was obvious that the local remedies had not been exhausted by the complainant, and that the lack of exhaustion was the reason why the complainant later withdrew the communication.[28] Nevertheless the Commission cites the withdrawal of the communication as the decisive element and reiterates its formula that it cannot proceed further with its consideration in the case of withdrawal.[29]

In order to avoid getting locked into an exaggerated formalism, the Commission should rather see to the substance of the matter in such a case and declare the communication inadmissible due to the lack of exhaustion of local remedies, or even better, not receivable. Declaring the communication inadmissible due to the withdrawal of the communication is potentially confusing. The Commission adds that it reserves any judgment on whether a violation of the Charter has occurred.[30] It is unclear whether this statement signifies that the Commission *is* or *is not* prepared to pronounce on any human rights violations having occurred despite the withdrawal of the communication. In the case of *W.A. Courson v Zimbabwe,* where circumstances concerning the lack of exhaustion of local remedies and the subsequent withdrawal of the communication were identical with the circumstances in *International PEN v Ghana,* the Commission declared the "case closed" due to the withdrawal.[31] The communication was declared "inadmissible" in the case of *International PEN v Ghana.*

Another aspect of the question whether the Commission does or should continue the consideration of communications despite the withdrawal of the communication, is whether the consideration should proceed despite the death of the complainant, or victim, in the event the death is natural and has nothing to do with the subject of the commun-

[27] Case 144/95, *supra* footnote 17, para. 23.
[28] Case 93/93, decided at the 14th Ordinary Session of the African Commission, December 1993, paras. 5 and 11.
[29] *Ibid.* at para. 10.
[30] *Ibid.* at para. 11.
[31] Case 136/94, decided at the 16th Ordinary Session of the African Commission, 25 October– 3 November 1994, para. 7.

ication. Otherwise, it is quite obvious that the consideration of the communication should continue.[32]

The Commission in the case of *Monja Joana v Madagascar* has taken the clear-cut position that "[t]he death of a complainant does not necessarily extinguish a cause of action before the Commission."[33]

Strangely enough, the communication in this case was eventually declared inadmissible because of the lack of a contact address, presumably to the relatives of the (deceased) complainant, in spite of the fact that, judging from the decision, the Commission did obtain such an address after great efforts on the part of the Commission.[34] The Commission goes on to state that the heirs of the complainant may take up the cause of action arising from the violation of the complainant's rights.[35]

This may sound logical, but if the Commission were entirely consistent, it would be prepared to proceed anyway with the consideration and not make its consideration dependent on whether the heirs wish to pursue the case. It should be the suspicion of the existence of any human rights violations that should be decisive.

If we compare the situation where the complainant is deceased with the situation where the complainant wishes to withdraw the communication, the Commission has stated with respect to the latter that the Commission "cannot abrogate its responsibility for any violations that may have occurred,"[36] at least when the withdrawal of the communications is due to the amicable settlement of the dispute. The same should apply when the complainant is deceased. There is an objective human rights case, so to say, irrespective of the participation of the complainant and irrespective of whether the complainant is deceased or wishes to withdraw the communication for whatever reason.

The primary purpose of the procedure before the Commission, in the view of this author, cannot be that the complainant or his or her heirs receive compensation in some form, but that respect for human rights is monitored and that there is a sanction for states that violate human rights.

[32] *Cf. supra* footnote 15 where the situation in which the victim had been executed is discussed.

[33] Case 108/93, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, para. 31. *Cf. also* case 212/98, *Amnesty International v Zambia*, decided at the 25th Ordinary Session of the African Commission, 26 April–5 May 1999.

[34] Case 108/93, *ibid.* at para. 29: "The address of the complainant's family reached the Commission in the same letter as news of the complainant's death."

[35] *Ibid.* at para. 31. Strangely enough, the Commission again adds that before they may take up the cause of action on behalf of the deceased's relatives, the heirs of the complainant must "remedy the basic flaw of lack of specific information on the complainant, i.e., a contact address." First, the Commission has already stated that it had indeed received the address of the complainant's family. Second, the complainant himself no longer has any contact address as he is deceased.

[36] Case 11/88, *supra* footnote 3, para. 9.

It is true that the opinion of the Commission on this matter is somewhat different and more oriented towards finding a friendly settlement than towards pointing out human rights violations.[37] In *Monja Joana v Madagascar,* the Commission states that the object of the individual communications procedure under the African Charter "is to find solutions for victims of violations of human rights."[38]

In the case where the complainant is deceased, there may be reason for the Commission to decide to proceed with the case only if the alleged human rights violations are of a serious nature and, of course, if the death of the complainant is related to the content of the communication or to the fact that the complainant filed a communication. In any event, the Commission should retain the power to decide whether to continue its consideration of the communication and not let the future of the case be dependent on the wish of the complainant's heirs.

It may very well be that the Commission for different reasons decides not to pursue a case, in which the complainant is deceased, not in the least because it may be exceedingly difficult to get any necessary additional information concerning the complainant's case. However, the power to decide this should remain solely with the Commission.

The case of *International PEN and Others v Nigeria* seems to show that at least where the death of the complainant is closely related to the subject of the communication, the Commission may decide to proceed with the case despite the death of the complainant and irrespective of the wishes of the heirs.[39]

A reasoning similar to that in the case of *Monja Joana v Madagascar*[40] was applied by the Commission in *International PEN on behalf of Senn and Sangare v Côte d'Ivoire,* although to different circumstances.[41] In the latter case, the Commission began by stating that "[a]lthough the victims have been released, this does not extinguish the responsibility of the government for any violations that it may have committed in respect of their imprisonment."[42] The Commission then goes on to state that "[a] cause of action may still stand for reparations for the prejudice suffered by imprisonment."[43]

Here again the Commission, erroneously in the view of this author, seems to focus more on the compensation to the victim than on the actual human rights violation committed by the state. In the view of this author,

[37] *Cf. supra* footnote 1.
[38] Case 108/93, *supra* footnote 33, para. 23.
[39] Case 137/94, 139/94, 154/96, 161/97, decision of 31 October 1998, *cf. supra* ch. 4.1 footnote 95; *cf. also* case 212/98, *Amnesty International v Zambia*, decision of 5 May 1999.
[40] Case 108/93, *supra* footnote 33.
[41] Case 138/94, *supra* footnote 3.
[42] *Ibid.* at para. 8.
[43] *Ibid.*

at least as much emphasis should be placed on the fact that a human rights violation has been committed as on the subsequent compensation to be accorded to the victim as restitution for the violation; the Commission has a normative mission as well as a soothing and reconciling one. Moreover, as there currently is only one Commission and no Court in the African system, the Commission also has to take on a more judicial role than would be necessary if a court also existed.

As far as the states are concerned, the finding by the Commission of a violation of human rights is probably the more chilling part of the decision as opposed to the recommendation by the Commission that the state pay reparations. Therefore, an emphasis on the actual violation could have a higher "shame value" and potentially a greater deterrence effect on the state involved than as opposed to the other states in general.

Examples of situations in which the Commission has confirmed the existence of a friendly settlement can be seen from the following cases: Where the complainant, or the victim depending on the choice of terminology, has been released from detention,[44] where the government in place has attempted to remedy the injustices committed by the previous administration by repealing many of the laws causing the human rights violations and by introducing amnesty laws,[45] or where the government in place accepts the complainant's contentions and is determined to review the current (electoral) law,[46] and where the victim has been granted (almost) that which was requested and the violation of human rights on the part of the state has thus almost ceased.[47]

The victim in the last case, *John K. Modise v Botswana (I)*, more precisely had eventually been granted Botswanian citizenship by registration whereas that which he actually sought was citizenship by birth, which is irrevocable and a condition for being able to become a candidate for the presidency of the Republic.[48]

In *John K. Modise v Botswana (I)* it thus is not apparent that a friendly settlement in the conventional sense had been concluded between the

[44] Case 11/88, *supra* footnote 3; case 16-18/88, *supra* footnote 1; case 22/88, *supra* footnote 5; case 55/91, *supra* footnote 12; case 62/91, *Committee for the Defence of Human Rights in respect of Ms Jennifer Madike v Nigeria*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; case 67/91, *Civil Liberties Organisation v Nigeria*, decided at the 14th Ordinary Session of the African Commission, December 1993; and case 66/92, *Lawyers' Committee for Human Rights v Tanzania*, decided at the 14th Ordinary Session of the African Commission, December 1993.

[45] Case 16-18/88, *supra* footnote 1.

[46] Case 44/90, *Peoples' Democratic Organisation for Independence and Socialism v The Gambia*, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996.

[47] Case 97/93, *John K. Modise v Botswana (I)*, decided at the 21st Ordinary Session of the African Commission, 15–24 April 1997. The case was reopened as it turned out that the victim did not accept the friendly settlement (*cf. supra* ch. 4.2 footnote 123).

[48] *Ibid.*

parties, as the victim in this case necessarily must have been dissatisfied with the settlement as it did not meet his demands on the crucial points. The way in which the Commission drafted its decision, however, seems to indicate that the Commission was of the opinion that an amicable resolution had been found.

This conclusion was contradicted in the decision itself when the Commission "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" (*italics added*).[49] If the Commission called upon Botswana to *continue* its efforts to amicably resolve the case, the Commission could not reasonably be of the opinion that the case had already been amicably resolved.

It is strange that the Commission would even arrive at the conclusion that a friendly settlement had been found, on its own initiative and independently of the wishes of the parties, and even against the wishes of at least one of the parties as in the case of *John K. Modise v Botswana (I).*

The normal procedure would seem to be that the parties themselves, or the complainant, inform the Commission that the case has been amicably resolved, after it indeed has been amicably resolved.

A situation somewhere in between *John K. Modise v Botswana (I)*, where the victim must necessarily be dissatisfied with the result of the amicable resolution found by the Commission, and one in which the victim of the alleged human rights violation, or both parties, explicitly informs the Commission that a friendly settlement has been found, arose in *Comité Culturel pour la Démocratie au Bénin and Others v Benin.*[50] In this case, the Commission, lacking evidence to the contrary and probably on good grounds, *presumed* that a satisfactory amicable resolution had been found: "In the absence of any dissatisfaction expressed from the complainants, with whom previous correspondence has been regular, the Commission may assume that the actions taken by the government remedy the prejudices complained [sic]."[51]

In *Henry Kalenga v Zambia,* the same idea was expressed in this way: "[T]he Commission interprets the complainant's failure [to] pursue the communication as evidence of his satisfaction with the outcome."[52] In *Committee for the Defence of Human Rights in Respect of Ms Jennifer Madike v Nigeria,* the Commission put it this way: "Given the release of the individual on whose behalf the communication was brought, the likelihood is that the complainant considers the case satisfactorily resolved."[53]

[49] *Ibid.* at conclusion.
[50] Case 16-18/88, *supra* footnote 1.
[51] Ibid. at para. 40.
[52] Case 11/88, *supra* footnote 3, para. 14.
[53] Case 62/91, *supra* footnote 44, para. 13.

One could imagine a situation in which it would be risky for the Commission to assume that a fully satisfactory friendly settlement had been reached, lacking explicit approval from the complainant, except where the Commission is in the possession of strong evidence to support its position.

This leads us over to another issue raised by the amicable resolutions before the Commission, namely the result of the amicable resolution from the point of view of the Commission's procedure where the Commission accepts the terms of the settlement, which it has always done to date. Is the result that the communication is declared not receivable, inadmissible, closed or nothing at all is done but the matter simply dropped?

Is the result that the Commission makes a finding in substance and concludes that there has been no violation of the Charter or that there has been such a violation but that it has been duly compensated or erased by the friendly settlement?

The most common procedural outcome in practice when the Commission accepts an amicable resolution is that the Commission declares the communication inadmissible. If the parties agree that the case is resolved to everyone's satisfaction, sometimes confirmed by the complainant expressly withdrawing the complaint, and the Commission finds that the resolution is in line with the protection of human rights, then there really is no case remaining and the communication may be declared inadmissible under the Charter.[54] On the other hand, no one is any longer filing a complaint either, so it is questionable whether the Commission needs to declare the communication inadmissible. The original author of the communication does not wish the communication to proceed further, due to the friendly settlement.

Depending on how early on in the procedure the amicable settlement is made known to the Commission, and given that the human rights requirements are fulfilled, another possibility could be to declare the communication irreceivable instead of inadmissible.[55] If it becomes obvious to the Commission shortly after the receipt of the communication that the case has been amicably settled, it is unnecessary to even declare the communication receivable, only to declare it inadmissible later on due to the friendly settlement.

As far as this author has understood, the test of receivability is equal to a smaller preliminary test of admissibility.[56] Therefore, if a communication is not receivable, it will necessarily also be inadmissible and the sooner in the process the communication is removed from the records of the Commission, the better. This is true, not in the least, in order to save

[54] *Cf.* Article 56 of the African Charter.

[55] Also under Article 56 of the Charter in combination with the Rules of procedure of the African Commission, primarily rule 104.

[56] *Cf. supra* ch. 3.3 footnote 146.

the scarce resources of the Commission for communications requiring an in depth consideration.

An advantage with a decision on receivability or admissibility in the case of a friendly settlement could be that it is clear that there will be no *res judicata* effect as to the decision of the Commission, as it is clear that the Commission has issued no decision as to the merits of the case.

Another possibility, instead of issuing a decision on receivability or admissibility, is to simply remove the communication from the records of the Commission without any particular decision being taken, or at least without any decision on receivability or admissibility being taken. This is what the Commission seems to have done when it declares with respect to some communications which have been amicably resolved, that the "case is closed" or that the "communication is closed."[57]

The Commission has also in some instances simply found that the case has been amicably resolved without any further decision of any kind on the part of the Commission.[58] In *Henry Kalenga v Zambia,* for instance, the Commission "finds the case amicably resolved."[59]

In *Comité Culturel pour la Démocratie au Bénin and Others v Benin*, the Commission "declares that an amicable resolution has been reached."[60] In *Civil Liberties Organisation v Nigeria* the Commission "finds the communication satisfactorily resolved."[61] In *Peoples' Democratic Organisation for Independence and Socialism v the Gambia*, the Commission "holds that the ... communication has reached an amicable resolution."[62] It is not known to the present author whether the choice of wording in these decisions is supposed to have any legal significance.

It would not be unreasonable to claim that an amicable resolution approved in this way by the Commission with respect to a particular complaint would have the effect of *res judicata*, i.e. that neither the Commission, nor any other equivalent international human rights agency, will legally be able to consider the complaint anew.

A further possibility with respect to the procedural result of an amicable resolution before the Commission is that the Commission issue of substantive finding of some type. This would be going one step further than just finding the case amicably resolved in line with that which was stated earlier.

[57] *Cf.* case 22/88, *supra* footnote 5, "communication closed"; case 55/91, *supra* footnote 12, "case closed"; case 62/91, *supra* footnote 44, "closes the communication"; and case 133/94, *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti*, decision of 11 May 2000, "close the case."

[58] Case 11/88, *supra* footnote 3; case 16-18/88, *supra* footnote 1.

[59] Case 11/88, *ibid.* at conclusion.

[60] Case 16-18/88, *supra* footnote 1, at conclusion.

[61] Case 67/91, *supra* footnote 44, conclusion.

[62] Case 44/90, *supra* footnote 46, conclusion.

The Commission could come to the conclusion that a violation of the Charter has taken place but that it has been duly compensated. The Commission could also come to the conclusion that there has been no violation of the Charter, or that at the time of the decision, there no longer was any violation of the Charter taking place. In *Peoples' Democratic Organisation for Independence and Socialism v the Gambia,* the Commission seems to come to the latter conclusion, alternatively the first one.[63]

The Commission seems to say that there has been a violation of Article 13 in the case, but that the resolve of the new government to institute a new electoral system "to rectify the anormalies [sic] denounced in this communication" either compensates for the violation of the Charter or eliminates the violation previously committed.[64] The fact that the Commission makes a substantive finding is not a likely procedural result of a friendly settlement, or a good one. This is because the amicable resolutions in most of the cases to date before the Commission have not been the object of on any investigation carried out by the Commission, nor are the negotiations between the parties presided over by the Commission, so that the Commission is often largely uninformed about the more detailed circumstances behind the friendly settlements. If the Commission for some reason wishes to make a finding in substance based on a friendly settlement, the Commission must be certain that it has received all of the crucial facts on its table so that it is able to make a well-founded decision.

All in all, it remains unclear whether the Commission intends that the different procedural results arrived at by the Commission in cases of friendly settlement should have different legal consequences. Perhaps the "case closed" formula is the best procedural outcome from the point of view of the author of the communication, as it leaves the question of the legal effect of the amicable resolution the most open, as if the communication had never been filed in the first place.

In *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia,* the Commission came to the unusual conclusion of finding both a violation of several articles of the Charter and resolving to continue its efforts to pursue an amicable resolution in the case.[65] Once the Commission has found a violation of the Charter, the possibility of an amicable resolution of the dispute would seem excluded by definition, but perhaps this way of viewing the Commission's decision is too rigid. That which the Commission really seems to mean, however, is that it will continue its efforts to make Zambia somehow compensate the victims of viola-

[63] *Ibid.*

[64] *Ibid.* at para. 40. Article 13 lays down the right to participate freely in the government of one's country.

[65] Case 71/92, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, conclusion.

tions of the Charter or allow the victims to return to Zambia. Had Zambia duly compensated the victims before the decision of the Commission had been issued, there might have been a friendly settlement of the case in the strict sense of the term. The victims were 517 West Africans who had been expelled from Zambia. Of course, it is a good thing that the Commission helps to put pressure on states to compensate for their human rights violations.

In *Jean Yaovi Degli (on behalf of Corporal N. Bikagni) and Others v Togo,* the Commission also seems to have come to an unusual conclusion, but this impression may depend on the unusual drafting of the decision rather than on its actual content.[66] In this case, the Commission found that the then new Togolese government could not avoid inheriting the responsibility for the human rights violations of the former government.[67] However, nothing further is then said about any violation of the Charter in the conclusion of the decision, where the Commission generally lists the articles that have been violated in case of a violation of the Charter. The Commission only concludes with welcoming "the continued efforts of the government to remedy such violations."[68]

From this conclusion, one could receive the impression that the Commission thinks that an amicable resolution to the case is under way. On the other hand, the Commission does speak of remedying the "violations," so that implicitly the Commission seems to state that the Charter has indeed been violated and that the new Togolese government is strongly encouraged to remedy the violations. As argued above, once the Commission finds a violation of the Charter, an amicable resolution to the dispute would seem excluded by definition. In the text of its decision in *Jean Yaovi Degli (on behalf of Corporal N. Bikagni) and Others v Togo,* the Commission does explicitly find that several violations of the Charter were committed.[69]

The most reasonable interpretation of the Commission's decision in the end is that it is an ordinary decision finding Togo guilty of having violated the Charter and putting pressure on Togo to remedy the violations. The decision does not either explicitly or implicitly treat the issue of an amicable settlement. That which remains unclear in the decision is whether the victim mentioned in the title of the decision had been released from prison when the decision was made.[70] Generally, when the victim has been released, the Commission only discusses the question of damages and most often in practice the Commission finds the case satisfact-

[66] Case 83/92, 88/93, 91/93, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995.
[67] *Ibid.* at para. 49.
[68] *Ibid.* at conclusion.
[69] *Ibid.* at paras. 38–41, 44–49.
[70] *Ibid.* at paras. 47–48.

orily resolved once the victim has been released.[71] In *Jean Yaovi Degli (on behalf of Corporal N. Bikagni) and Others v Togo,* the Commission neither mentions a possible amicable resolution nor damages, which may be a sign that indeed the victim in this case had not been released from prison, or that the decision is unclear and that possibly the Commission is not entirely consistent from one case to another in its evaluation of similar circumstances.

6.2 Compensation

A final issue raised by amicable settlements is the type of compensation to be awarded the alleged victim of a human rights violation, or, the type of compensation which the Commission considers necessary in order for the Commission to find the amicable resolution acceptable. The latter consideration should be secondary to the most fundamental issue to be considered by the Commission in the case of a friendly settlement, namely whether it respects human rights.

It can be noted from the outset that the Commission has not found any particular kind or degree of compensation necessary in order to find an amicable settlement to be acceptable. Judging from the decisions of the Commission to date, the kind of compensation, apart from release, possibly granted the victim by the state party in question has never been decisive for the Commission in accepting the amicable resolution as such. By looking at the Commission's decisions, some conclusions may be drawn concerning the way in which the Commission has dealt with the issue of compensation following friendly settlements.

In *Comité Culturel pour la Démocratie au Bénin v Benin,* for instance, the Commission is rather generous towards the state.[72] The Commission found that the then new government had attempted to remedy the injustices committed by the previous administration.[73] The government had repealed many of the criticized laws, introduced amnesty laws and had released all of the individuals concerned in the particular cases under consideration.[74] No other compensation to the victims is discussed in the decision by the Commission: "In the absence of any dissatisfaction expressed from the complainants ... the Commission may assume that the actions taken by the government remedy the prejudices complained [sic]."[75]

[71] *See further infra.*
[72] Case 16-18/88, *supra* footnote 1.
[73] *Ibid.* at para. 39.
[74] *Ibid.*
[75] Case 16-18/88, *supra* footnote 1, para. 40.

Neither was any compensation discussed in the decisions in the early cases of *Henry Kalenga v Zambia*[76] and *International PEN v Burkina Faso*.[77]

In *Committee for the Defence of Human Rights in respect of Ms Jennifer Madike v Nigeria,* the Commission concludes that "[g]iven the release of the individual on whose behalf the communication was brought, the likelihood is that the complainant considers the case satisfactorily resolved."[78] If so, it seems to be saying, that the Commission then also finds the case satisfactorily resolved and does not bring up the issue of compensation.

In *Lawyers' Committee for Human Rights v Tanzania,* the Commission makes the important statement that the release from custody of the alleged victim of the human rights violation and the removal of the charges against him or her "do not necessarily remedy the prejudice suffered, nor cure a violation of the rights of an individual."[79] The Commission apparently considers, however, that in this particular case the prejudice was indeed remedied and the violation cured by the cited acts of the Tanzanian State. In fact, the Commission has in no case to date far questioned whether a particular act by the state preceding an amicable settlement has indeed been sufficient enough to remedy the prejudice suffered by the victim(s).

Just as the Commission may perform an independent evaluation of whether the human rights violation has been duly cured by the amicable resolution, the Commission may and should see to it that an adequate compensation is granted the victim for the detriment suffered. If not, the Commission should not accept the amicable settlement but instead pursue the consideration of the communication.

In *International PEN on behalf of Senn and Sangare v Côte d'Ivoire,* there was no amicable settlement, but the Commission nevertheless had the occasion to discuss the issue of compensation in cases where the human rights violation complained of has ceased.[80] The Commission began by making its "standard" statement by now that "[a]lthough the alleged victims have been released, this does not extinguish the responsibility of the government for any violations that it may have committed in respect of their imprisonment."[81]

This time the Commission adds and thereby also clarifies that "[a] cause of action may still stand for reparations for the prejudice suffered

[76] Case 11/88, *supra* footnote 3.
[77] Case 22/88, *supra* footnote 5.
[78] Case 62/91, *supra* footnote 44, para. 13.
[79] Case 66/92, *supra* footnote 44, para. 11; *cf. also* case 67/91, *supra* footnote 44, para. 11.
[80] Case 138/94, *supra* footnote 3.
[81] *Ibid.* at para. 8.

by imprisonment."[82] However, the Commission concludes its argument by stating that such reparations should be sought nationally and only if the national remedies have been exhausted may the Commission take up the issue of reparations.[83] The Commission decided that the communication was inadmissible due to a lack of exhaustion of local remedies.

A question that is raised is whether the Commission would also demand that reparations first be sought at the national level in cases concerning an amicable resolution after the communication has reached the Commission, so that the Commission will not pronounce on reparations in the context of a friendly settlement unless the complainant has pursued that particular issue all along, in addition to the issue of the human rights violation as such.

The case of *W.A. Courson v Equatorial Guinea* is interesting because it is one of the few cases where a claim for damages is presented to the Commission together with the complaint of a violation of the Charter.[84] In this case, the victim of the alleged human rights violation had been released, but the victim's legal representative explicitly requested that the Commission continue its consideration of the communication in spite of the victim's release.[85] The Commission thus could not conclude that the matter had been satisfactorily resolved by the mere release of the victim.

The Commission seems to have been prepared in principle to try the issue of damages despite the fact that it was unclear whether the local remedies had been exhausted with respect to damages.[86] Since the Commission found in the case that on the basis of the information placed before it, the Commission could not conclude that there had been a violation of the Charter. The issue of damages consequently was never tried by the Commission.

Had the Commission found that there had been a violation of the Charter, it would have been logical for the Commission to proceed and also try the issue of damages. In view of its earlier practice, however, it cannot be ruled out that the Commission would have found as to the issue of damages that the complainant would have to turn to the domestic courts first, in order for the domestic remedies to be properly exhausted before the Commission considered the matter.

In *Malawi African Association and Others v Mauritania,* the issue of compensation came up in relation to some of the communications at the stage in the proceedings regarding admissibility.[87] The Mauritanian

[82] *Ibid.*

[83] *Ibid.* at paras. 9–10.

[84] Case 144/95, *supra* footnote 17, para. 9.

[85] *Ibid.* at para. 4.

[86] *Cf.* the different stance of the Commission in case 138/94, *supra* footnote 3, para. 9.

[87] Case 54/91, 61/91, 96-98/93, 164-196/97, 210/98, decision of 11 May 2000. The relevant communications were the ones numbered 164-196/97: *Collectif des Veuves et Ayants-droit v Mauritania.*

government called on the Commission not to be seized of these communications as the deplorable situation giving rise to the communications had been surmounted.[88] The Commission replied in a straightforward manner that "the fact that the Mauritanian State had paid compensation to the beneficiaries of the victim [sic] of the alleged violations (which are in any case not denied by the State) cannot invalidate the Commission's deliberations."[89] This could be interpreted as if the Commission does not think that compensation alone is enough in this case of very serious human rights violations in order to redress the prejudice suffered by the victims and their beneficiaries. Otherwise, the Commission could have considered the matter as amicably settled with respect to those beneficiaries who had received compensation. The kind of human rights violations complained of in these communications had stopped by the time of the decision of the Commission.

In the conclusion of its decision in *Malawi African Association and Others v Mauritania,* the Commission recommends Mauritania to take appropriate measures to ensure the payment of a compensatory benefit to the widows and beneficiaries of the victims of the violations cited in the decision. The Commission does not make any distinction between the communications in which Mauritania claimed that it had already paid compensation and those in which Mauritania had made no such claim. Thus it is unclear if the Commission considered whether Mauritania had in fact paid any compensation, or any adequate compensation, to some of the victims' beneficiaries. If the Commission was of this opinion, it should not have recommended that Mauritania compensate the beneficiaries of these victims once more (although the crimes were so serious that the beneficiaries of the victims would probably deserve to be compensated several times). In principle, however, the Commission seems to say that even if the human rights violation has stopped and even if compensation has been paid by the state having committed the violation, this does not necessarily stop the Commission from pursuing its consideration of the case under the Charter.

[88] *Ibid.* at para. 60.
[89] *Ibid.* at para. 61.

7. The procedure under Article 58 as created by the Commission

The strange thing with the African Charter is that it does not provide for any real procedure for a substantive consideration of the individual communications by the Commission once they have passed the test of admissibility.[1] After being declared admissible, the communications sink into a black hole, judging solely from the text of the Charter, in which they are most certain to disappear without bothering any of the states whose human rights violations have been reported.[2]

Considering this strange trait in the Charter, it can be considered even stranger, but promising, that the African Commission nevertheless tries the substance of the individual communications according to a relatively traditional procedure as usually invoked with documents similar to the Charter. The Commission has had to construct a procedure on its own, interpreting the Charter very creatively in order to find legal support within the Charter for the establishment of a true procedure for the consideration of individual communications. It could be claimed that the Commission has gone further than merely interpreting the Charter in this respect, as the Commission has added a procedure to the Charter for which there is no legal support in the Charter itself. In any event, the

[1] On the individual communications procedure, *see also* Murray (1997a), *supra* ch. 2.2 footnote 17; Chidi Anselm Odinkalu, "Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment," *Transnational Law and Contemporary Problems*, vol. 8, 1998, pp. 359–405; Odinkalu and Christensen, *supra* ch. 2.1.1 footnote 8; Malmström, *supra* ch. 3.1 footnote 4; Röpke, *supra* ch. 3.3 footnote 139; the official publication Communication Procedure of the African Commission, OAU, ACHPR, Information Sheet No. 3; and the more user-oriented Guidelines on the Submission of Communications, OAU, ACHPR, Information Sheet No. 2.

[2] The present author does not agree with the view of Odinkalu and Christensen that "[q]uite clearly the Commission's power to consider non-state communications derives from the combined effect of Articles 45, 46, 55, and 57 of the Charter," *supra* footnote 1 at p. 244. The mere fact that the Commission's power would have to be derived from a number of different articles which moreover deal with the issue in more or less implicit terms, would seem to contradict the conclusion that there is a clear basis in the Charter for the consideration of non-state complaints.

state parties to the Charter seem to have accepted the interpretation or new creation by the Commission so that the entire individual communications procedure has become an established and integral part of the African Charter system, including the stage in the procedure where the substance of the communication is considered and the Commission decides whether a violation of the Charter has been committed by the state.[3]

It has been no easy task for the Commission to construct a procedure for the consideration of individual communications. The Commission has constantly suffered from a lack of resources of all kinds, and it would have been greatly helpful to the Commission if it had not needed to divert some of these valuable resources to establishing a procedural structure which should have been included in the Charter from the very beginning.

Not only has the Commission had to use its scarce resources to think out the procedure, it has also had to defend its construction in the face of states arguing that there is no support for the procedure in the Charter. Had such a procedure been included, the Commission naturally would not have had to waste resources on arguing in favor of the existence of such legal support before setting about considering the substance of the complaints before it.

Also, on a general level, the more support the Commission receives within the Charter for its activities, the better off it is, as the Commission needs all the legal and moral (and economic) support it can get in order to be able to achieve anything on the crisis-ridden African continent; therefore, a strong Charter would have been useful for the Commission.

The African states have so far only been mildly interested in supporting the activities of the Commission at the same time as the most dreadful human rights crimes are perpetuated daily throughout the African continent. The lack of a true individual communications procedure in the Charter is no doubt a reflection of the similarly absent interest in actual human rights protection on the part of the African states, at least as of the time the Charter was drafted.

As to the subject of conducting a substantive consideration of the individual communications following the establishment of the admissibility by the Commission, the Charter evasively states that when it appears after the 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 [OAU] Assembly of Heads of State and Government to these special cases."[4]

From a legal point of view, this reduces the competence of the Commission to a narrow spectrum of human rights violations, namely those that are "serious or massive." Normally, the Commission would act on

[3] *Cf.* Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

[4] Article 58(1) of the African Charter.

all kinds of alleged human rights violations, those that are less or more serious or massive. The term "special cases" in the Charter would also seem to indicate that the Commission should take action only in exceptional cases. Most communications to the Commission to date concern violations that are serious or massive or both, so that in practice the competence of the Commission has not been as restricted as it could have been feared from a reading of the Charter. The term "'a series of' serious or massive," furthermore, seems to indicate that the Commission may act only when there is a *series* of human rights violations, and not in cases of a single human rights violation (which in fact may be serious or massive).[5]

The fact that the Commission is to draw the attention of the OAU Assembly to the special cases, according to the Charter, does not seem to constitute a particularly forceful or potentially effective measure on the part of the Commission, so that the Charter can be said to circumscribe the competence of the Commission in this respect as well. This beginning in the procedure for the consideration of individual communications under the Charter does not bode well for its continuation.

As the next step in the consideration of the communication according to the Charter, "[t]he Assembly of Heads of State and Government of the OAU may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations."[6] From a legal point of view, this is an unprecedented low as far as the mechanisms for the implementation of human rights conventions are concerned.

It is very unlikely that the OAU Assembly will ever request the Commission to make an in-depth study of serious or massive human rights violations carried out in one of its member states. To the knowledge of this author, such a request has never been made.[7] Given that the OAU Assembly would not likely request the Commission to make such a study, the likelihood of the Assembly taking effective measures against the state in which the human rights violations have been conducted is similarly unfortunately low. It is equally unlikely that the OAU Assembly would seriously press the state or states involved to compensate the victims of the violations for the damages or injuries suffered. On the

[5] Also, if read carefully, Article 58 (1) specifies that there must be a violation of human *and* peoples' rights for Article 58 to be applicable (not human *or* peoples' rights). If taken literally, this formulation would rule out practically all individual communications from a substantive consideration as very few if any concern peoples' rights. The overwhelming majority of communications concern individual "human rights." The African Commission, however, has not interpreted Article 58(1) to mean that there must be a violation of human *and* peoples' rights before Article 58 is applicable.

[6] Article 58(2) of the African Charter.

[7] This has been confirmed (in early 2002) by the information officer at the Secretariat of the Commission, Mr. Jan Jalloh.

contrary, if the OAU Assembly had a stronger commitment to human rights protection, it could be a very useful ally to the Commission.

Finally, the Charter mentions cases of emergency and prescribes equally feeble measures for the Commission to take in response to such cases as with respect to the presumably more normal "series of serious or massive violations of human and peoples' rights," mentioned earlier (presumably more normal because they are mentioned separately from the cases of emergency in the text of the Charter, otherwise a "series of serious or massive violations of human rights" would also seem to constitute a case of emergency more often than not). The Commission is entitled, under the Charter, after it has duly noticed a case of emergency, to submit the case to the Chairman of the OAU Assembly of Heads of State and Government "who may request an in-depth study."[8] This gives rise to the same kind of reflections on the inefficacy of the prescribed measures as does the previous paragraph in the Charter concerning the possibility of a request by the OAU Assembly for an in-depth study.[9] Considering the fact that what is treated are cases of emergency – which indicates something very serious – the procedure for their consideration laid down in the Charter almost constitutes an insult to the cause of protecting human rights.[10]

The conclusion of the analysis of the Charter's text must be that its drafters simply did not wish there to be any true individual communica-

[8] Article 58(3) of the African Charter.

[9] So far, the OAU Assembly has never requested an in-depth study with respect to a case of emergency (confirmed in early 2002 by the information officer at the Secretariat of the Commission, Mr. Jan Jalloh). The only case in which the emergency provision has been invoked by a complainant so far was in case 83/92, 88/93, 91/93 *Jean Yaovi Degli (on behalf of Corporal N. Bikagni), Union Inter-Africaine des Droits de l'Homme, Commission International de Juristes v Togo,* decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995. The author of communication 91/93 requested the Commission to consider the case as a case of emergency under Article 58(3) but judging from the decision of the Commission, the Commission did not comply with this request (para. 21). *Cf. further* Evelyn Ankumah, "The 'Emergency' Provision of the African Charter on Human and Peoples' Rights," *RACHPR*, vol. 4, 1994, pp. 47–55.

[10] The African Commission continuously discusses the creation of a special mechanism for the handling of cases of emergency, but the discussions in the Commission have born no definitive legal and/or procedural fruit as yet. The Commission has drawn up a list of different measures to be taken by the Commission with respect to emergency situations (Mechanisms for urgent response to human rights emergencies under Article 58 of the African Charter on Human and Peoples' Rights, 26th Ordinary Session, 1–15 November 1999, DOC/OS(XXVI)/120). Whether this list is merely a proposal or has been formally adopted by the Commission is not clear from the document itself. The list of measures, if followed by the Commission, involves a significant number of constructive reactive and preventive actions on the part of the Commission and of its partner NGO:s in response to situations of emergency. *Cf. also* Expert Consultation on Mechanisms for Urgent Response to Human Rights Emergencies Under Article 58 of the African Charter on Human and Peoples' Rights, Nairobi, Kenya, 23–25 July 1996, ACHPR, 26th Ordinary

tions procedure under the Charter. The Commission, however, has not contented itself with this discouraging conclusion.

As already mentioned, the Commission has taken the matter in its own hands and through a number of decisions, has developed its views as to the individual communications procedure under the Charter. Of course, the very fact that the Commission does try the substance of the individual communications at all seems to show that the Commission is of the view that it is justified in doing so under the Charter, even if the Commission does not explicitly discuss the existence of such a procedure in its initial decisions.

The only thing in the Charter somewhat resembling the procedures for the consideration of individual communications in comparable human rights agreements is the rule that prior to any substantive consideration, all communications shall be brought to the knowledge of the state concerned by the chairman of the Commission.[11] This rule shows that even the drafters of the Charter thought that there should be some kind of substantive consideration of the individual communications.[12]

In *Commission Nationale des Droits de l'Homme et des Libertés v Chad,* the Commission began its consideration of the communication by observing that it reveals the existence of a series of serious or massive violations of human and peoples' rights.[13] First, this is an exact reproduction of segments of Article 58 of the Charter as cited above.[14] Second, this statement by the Commission could give the impression that it is of the opinion that a communication has to give evidence of a series of serious or massive violations of human and peoples' rights in order to even be admissible. This is because the Commission makes the statement in the context of deciding whether the communication is admissible. The same statement appears in the same context in *Organisation Mondiale Contre la Torture and Others v Rwanda.*[15] The Commission, however, it

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Session, 1–15 November 1999, DOC/OS(XXVI)/120; and Chidi Anselm Odinkalu, "Establishing an Early Intervention Mechanism for Human Rights Emergencies under the African Charter: An Interim Report," submitted to the Workshop on NGO Participation in the Work of the African Commission organized by the ICJ and the ACHPR, Banjul, The Gambia, October 1997.

[11] Article 57 of the Charter.

[12] According to Röpke, however, a former intern at the Secretariat of the African Commission, "'[s]ubstantive' consideration in Article 57 is interpreted by the Commission as meaning the consideration on [sic] the *admissibility* of a case" (*supra* ch. 3.3 footnote 139, p. 16).

[13] Case 74/92, decided at the 18th Ordinary Session of the African Commission, 2–11 October 1995, para. 27.

[14] *Cf. supra* footnote 4.

[15] *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes (C.I.J.), Union Inter-Africaine des Droits de l'Homme v Rwanda*, case 27/89, 46/91, 49/91, 99/93, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, para. 48.

turns out, does not consider it a requirement for admissibility that the communication concerns a series of serious or massive violations of human and peoples' rights. From the way in which the Charter is drafted, this is a logical conclusion as the Charter does not mention this as a condition for admissibility.[16]

It is less logical, however, that all but the extremely serious "special cases" are left hanging in the air according to the Charter, once the substantive deliberations of the Commission under Article 58(1) have sifted the wheat from the chaff so to speak. There is no procedure for handling the "minor" cases within the Charter once the Commission has declared them admissible. The drafters of the Charter seem to have thought that the OAU Assembly and the state concerned should not be bothered by anything less than special cases revealing the existence of a series of serious or massive violations of human and peoples' rights. It should be remembered that the protection of human rights concerns much more than massacres; an individual can have a rightful claim to make without his or her life or limb being at stake and without being part of a group whose rights have been similarly violated.

In *World Organisation Against Torture and Others v Zaire*, the Commission states that when it first determined that the communications, taken together, showed evidence of serious or massive violations of human rights in Zaire, it brought the matter to the attention of the Assembly of Heads of State and Government of the OAU, under Article 58(1) of the Charter.[17] There is nothing further in the Commission's decision concerning whether the OAU Assembly reacted to this information provided by the Commission. There most likely was no reaction.

In *Krishna Achuthan on behalf of Aleke Banda and Others v Malawi*, the Commission is more detailed about the observations it submitted to the OAU Assembly.[18] A year before its final decision, the Commission sent the following observations to the OAU Assembly: The Commission deplored the attitude of the Malawi government in apparently ignoring the Commission's inquiries (something which is very common among the states accused of violations of the Charter); Malawi is found guilty of massive and serious violations of human rights (a somewhat inadequate

[16] Article 56 of the Charter.

[17] Case 25/89, 47/90, 56/91, 100/93, decided at the 19th Ordinary session of the African Commission, 26 March–4 April 1996, paras. 5 and 21. It must be presumed that the Commission meant serious "and" massive violations which is that which is described anyway in the decision. It would be strange to draw the attention of the OAU Assembly to the "serious 'or' massive violations of human rights in Zaire," as the Commission writes. Obviously the Commission is quoting the text of the Charter.

[18] *Krishna Achuthan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa*, case 64/92, 68/92, 78/92, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994, paras. 16–21.

observation on the part of the Commission since its consideration of the communication is supposed to result in the finding whether Malawi, in this case, is guilty and the final decision was taken a year after the observations were submitted to the OAU Assembly; not even Malawi should be considered guilty before the procedure is finished); the Commission is heartened to learn of Malawi's progress toward democracy; the Commission requests assurances that all political prisoners will be set free and that torture, killings and other inhuman treatment are things of the past; and, finally, in the absence of the assurances requested, the Commission's findings shall be published after consideration by the Assembly (this is also an inadequate observation by the Commission because the findings of the Commission are published also in the cases where the states are found not guilty, or when the states and the victims have arrived at a friendly settlement of some kind; of course the Commission thinks that the prospect of the publication of a decision where Malawi is found guilty of serious human rights violations is more frightening to Malawi than a decision saying that Malawi has done all it possibly can to redress the wrongs of the past).

No reaction by the OAU Assembly to these observations is noted in the final decision of the Commission in *Krishna Achuthan on behalf of Aleke Banda and Others v Malawi.*

In *Center for the Independence of Judges and Lawyers v Algeria et al.,* one can trace a certain confusion by the Commission as to the admissibility requirements on the one hand and the substantive consideration of the communication on the other.[19]

It must be understood from the decision, that the Commission thinks that in cases of a series of serious or massive violations of human rights, a certain vagueness in the communication can be accepted concerning for instance the victims' identity and the place(s) and time(s) when the incidents complained of occurred.[20] Thus one could say that the more serious the violations complained of, the less the specificity demanded from the author of the communication. In this particular case, however, the Commission did not think that "the exception given by Article 58," as the Commission writes, was applicable.[21] The reason for this seems to have been that although the communication did appear to concern a series of serious and massive violations, the communication in this case was still too vague and concerned too many states at one time: "[C]onsidering the sum of all violations is not possible," the Commission writes.[22]

[19] Case 104/94, 109-126/94, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994.
[20] *Ibid.* at para. 10.
[21] *Ibid.* at para. 11.
[22] *Ibid.* at para. 12.

The case of *Center for the Independence of Judges and Lawyers v Algeria et al.* also illustrates some of the initial problems faced by the Commission, namely that the communications often are of a very rudimentary quality from a formal legal point of view, or that the Commission itself, or its Secretariat, cannot distinguish general reports as to the human rights situation in different countries from "true" communications. The *Center for the Independence of Judges and Lawyers* had sent a report to the Commission concerning the harassment and persecution of judges and lawyers in several different countries. It is not clear from the Commission's decision whether the authors of the report meant the report to constitute a communication for consideration, which perhaps they did not. As a general trend, the communications are becoming more solid from a legal point of view, and the Commission is becoming more and more skilful in handling the communications, which may be a sign of learning on both sides.

In the decisions concerning *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* and *Media Rights Agenda and Constitutional Rights Project v Nigeria,* the Commission also notes that it has drawn the attention of the Chairman of the OAU to the grave violations of human rights in Nigeria.[23] In *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* the Commission more precisely states that it "decided to 'invoke Article 58 of the Charter,' by writing to the Chairman of the OAU."[24] We will return to the issue of the significance of the Commission's formulation later. In *Media Rights Agenda and Constitutional Rights Project v Nigeria,* the Commission only states that the Chairman of the OAU should be informed of the situation in Nigeria, there is no mention of Article 58.[25]

In *Sir Dawda K Jawara v The Gambia,* the Commission was faced with the argument on the part of The Gambia that the Commission is only permitted under the Charter to only take action in those cases which reveal a series of serious or massive violations of human rights.[26] In the case at hand, the allegations made in the communication concerned a significant number of very serious human rights crimes by any standard (such as the right to life, freedom from torture, the right to liberty and security of one's person, and the right to a fair trial), but neither the Gambian Government nor the Commission seem to have thought that they qualified as "a series of serious or massive violations of human rights."

In the view of this author, a human rights violation may be "serious" even if it is not "massive" in the sense that it embraces a large number of

[23] Case 102/93, decision of 31 October 1998, para. 15, and case 105/93, 128/94, 130/94, 152/96, decision of 31 October 1998, para. 23.
[24] Case 102/93, *supra* at para. 15.
[25] Case 105/93, 128/94, 130/94, 152/96, *supra* footnote 23, para. 23.
[26] Case 147/95, 149/96, decision of 11 May 2000, para. 41.

victims (if this is a correct interpretation of the terms, to the knowledge of this author this prerequisite has never been elucidated upon by the Commission).[27] Since the Charter states that the violations should be "serious 'or' massive," it would seem sufficient if the violations are only "serious" for the Commission to take action, that is even if the violations are committed solely against one, or a few, individuals. In this case, a number of victims were involved in addition to the person making the complaint, The Former Head of State of the Republic of The Gambia. Not enough victims, however, it appears, in order for the Commission to consider the case to concern "a series" of serious or massive violations of human rights. This is also a compulsory requirement under the Charter for the Commission to take action on an individual communication.

The relationship between the prerequisites of "a series," "serious," or "massive" human rights violations as listed in Article 58 has not been to date clarified in the practice of the Commission. Considering the Commission's bold interpretation of the Charter in general, which has resulted in several ingenious ways of circumventing that which is actually written in the Charter (or, the worst pitfalls of the Charter if one wants to be even more critical), the issue of the particular significance of each of the three prerequisites just mentioned may not actually be so significant.

The Commission refuted the preliminary argument of The Gambia in such an elegant manner that the counter-argument of the Commission deserves to be quoted in full. The argument of The Gambia was that the Commission is allowed under the Charter to take action *only* as to cases that reveal a series of serious or massive violations of human rights.

"This is an erroneous proposition," the Commission writes. "Apart from Articles 47 and 49 of the Charter, which empower the Commission to consider inter-state complaints, Article 55 of the Charter provides for the consideration of 'communications other than those of States Parties'. Further to this, Article 56 of the Charter stipulates the conditions for consideration of such communications /---/. *In any event, the practice of the Commission has been to consider communications even if they do not reveal a series of serious or massive violations.* It is out of such useful exercise that the Commission has, over the years, been able to build up its case law and jurisprudence" (*italics added*).[28]

[27] In the words of the Commission, in a different context: "To deny a fundamental right to a few is just as much a violation as denying it to many." (case 143/95, 150/96, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, decision of 15 November 1999, para. 32.).

[28] *Ibid.* at para. 42. *Cf. also* Guidelines on the Submission of Communications, *supra* footnote 1, p. 11. On the Commission's practice in the very cases revealing serious or massive violations *see further* Rachel Murray, "Serious or massive Violations Under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms," *NQHR*, vol. 17, 1999, pp. 109–133.

The Commission is stating that irrespective of that which is written in the Charter, the practice of the Commission has been to consider even "ordinary" individual communications, and that's that. There thus is a procedure for the consideration of individual communications under the Charter and the application of this procedure by the Commission is not limited to instances of a "series of serious or massive violations of human and peoples' rights."

The Commission should be praised for this dynamic and creative way of approaching the Charter, and of, in fact, saving it. The Commission is correct when it states that it is through "such useful exercise" that the Commission has been able to build up its case law considerably substantiating the African Charter system. Inversely, if the Commission had not taken the liberty of constructively interpreting the Charter, there would have been no case-law, at least no meaningful case law anyway, and the African Charter system would have remained as weak, from a legal point of view, as was its design by its drafters. The Commission has performed a great achievement against all the odds. It is also a rare achievement in the sense that, to the knowledge of this author, no other similar agency has been placed under such a similarly impoverished human rights document as the Charter and succeeded in making sense of it.

The Commission's procedural rules deal with the substantive consideration of the individual communications.[29] The procedural rules are somewhat ambiguous. In the view of this author, they must be interpreted to mean as the Commission first considers the communication and makes its decision and then the decision, or "observations," of the Commission are communicated to the Assembly of the OAU, who then may request the Commission to undertake an in-depth study and submit a factual report accompanied by its findings and recommendations.[30] The Assembly of the OAU has never to date requested the Commission to undertake an in-depth study after the Assembly has received the decisions of the Commission. The interpretation of the rules of procedure, and indirectly of the Charter, suggested here is illogical from a procedural point of

[29] Section IV – Procedures for the Consideration of Communications, rules 119 and 120.

[30] Rule 120 of the African Rules of procedure: "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 has 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 Article 58 sub-paragraph 2 of the Charter. The Commission may entrust this function to a Special Rapporteur or a working group."

view, but satisfactory from the point of view of human rights. The Commission independently performs its consideration of the substance of the individual communications prior to the OAU Assembly being given the opportunity to request a further in-depth study. The result of this interpretation, that there may be first a decision and then afterwards an in-depth study on the case, is illogical bordering on the absurd, as the study should be conducted before the decision if there is to be any sense in for the study. The practice of the Commission, however, in combination with the way in which the procedural rules are drafted, leads to this interpretation, which is still more satisfactory than the alternative ways in which the Charter could be interpreted for that matter.

So what conclusion may be drawn from the Commission's cases concerning its views as to the individual communications procedure under the Charter, and Article 58 on the "series of serious or massive violations of human and peoples' rights" in particular? For one thing, it becomes obvious that the Commission does not consider itself limited to take action only in cases of serious or massive violations. As concerns the measures provided for in Article 58 – the obligation to draw the attention of the OAU Assembly to the serious and massive violations – the Commission seems to consider this an additional possibility in cases of particularly serious human rights violations. Instead of constituting the only way to proceed with individual communications, the Commission makes use of this alternative in exceptional cases. Thus, when the Commission "decides to invoke Article 58 of the Charter," this is understood by this author to mean that the Commission has decided to exercise the possibility it has in exceptional cases to bring the case to the attention of the OAU Assembly.[31] The Commission has turned the Charter upside-down (at least).

The "ordinary" cases are handled in a way which resembles the way communications are handled under other comparable human rights conventions, without there quite honestly being any explicit support for this in the Charter. Now that the states which are parties to the Charter seem largely to have accepted this practice, as well as other creative practices by the Commission, it can be argued that the practice has become an integral part of the Charter, not only from a practical but also from a legal

[31] *Cf. supra* footnote 24. The practice of the Commission would seem to confirm the view of Odinkalu and Christensen that the Article 58 procedure only relates to "special cases" in respect of which, in the words of those authors, the drafters of the Charter thought it fit to make additional provisions, *supra* ch. 2.1.1 footnote 8, at p. 244. Whether this is a correct interpretation of the intentions of the drafters, however, remains highly doubtful. Röpke also speaks in terms of "Article 58-cases" on the one hand and "the ordinary procedure" on the other, although she adds that, in 1995, it is still uncertain whether Article 58 should be viewed as an entirely different procedure (Röpke, *supra* ch. 3.3 footnote 139, p. 33); *cf. also* Malmström, *supra* ch. 3.1 footnote 4, pp. 30–31.

point of view. Thanks to the practice of the Commission, the contents of the Charter have slowly changed to the better from the point of view of human rights, something which may come as a surprise to some of the states who may have thought that they would get off lightly when they became parties to the Charter.

Another conclusion that may be drawn at this stage is that the time really is ripe for a revision of the text of the Charter.[32] The need for revision was also noted in an evaluation report commissioned by the Swedish International Development Agency ("SIDA") and carried out by the Nordic Africa Institute in 1998.[33] The Commission has built up what could be almost be labeled a "shadow Charter," parallel to and much more useful than the actual Charter. Since this is the actual practice of the Commission, there could be a point in amending the contents of the Charter so that it corresponds, or at least better corresponds, to that which actually is done. There are many other aspects of the Charter than the ones discussed in this study, where the Commission has gone far beyond the text of the Charter in its practice. Irrespective of how far the state parties are prepared to go in amending the Charter, the case law of the Commission offers a rich source of constructive ideas for a revision.[34]

The African states perhaps would be more willing today than previously to strengthen their commitment to the protection of human rights by strengthening the Charter. There are signs that the states, and the OAU to some extent,[35] are becoming more co-operative vis-à-vis the

[32] And also for the Commission's procedural rules for that matter.

[33] Lennart Wohlgemuth, Jonas Ewald and Bill Yates, *An Evaluation of the Three Banjul-Based Human Rights Organisations: The African Commission on Human and Peoples' Rights, The African Centre for Democracy and Human Rights Studies, The African Society of International and Comparative Law*, Commissioned by the Swedish International Development Agency (SIDA), December 1998, p. 24.

[34] The actual practice of the Commission – as opposed to the written Rules of procedure – likewise on many points offers a rich source of inspiration for a revision of the Commission's procedural rules. *Cf. also* Anselm Chidi Odinkalu, Proposals for Review of the Rules of Procedure of the African Commission of Human and Peoples' Rights, *HRQ*, vol. 15, 1993, pp. 533–548, written prior to the previous revision in 1995 of the original Rules of procedure from 1988.

[35] For instance, in 1999, the OAU augmented the number of days of the biannual Sessions of the Commission from ten to fifteen. Also in 1999, the OAU's First Ministerial Conference on Human and Peoples' Rights was held in Mauritius. *Cf.* the Grand Bay (Mauritius) Declaration and Plan of Action, OAU First Ministerial Conference on Human Rights in Africa, 12–16 April 1999, Grand Bay, Mauritius, CONF/HRA/DECL(1); Gino J. Naldi, "The OAU's Grand Bay Declaration on Human Rights in Africa in Light of the Practice of the African Commission on Human and Peoples' Rights," *ZaöRV*, vol. 60, 2000, pp. 715–735. Incidentally, the Charter of the AU (*cf. supra* ch. 2.1 footnote 2) allows humanitarian intervention in Article 4 (h) ("The Union shall function in accordance with the following principles: – – – (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."

Commission and, perhaps, the states could consequently be expected to be prepared, at last, to sharpen the contents of the Charter.[36]

Even if the states show signs of becoming more interested in the issue of human rights, one remaining problem is the numerous rebel movements who show no such interest. The states may be willing to protect human rights, but they have no means of controlling the actions of guerilla groups. Still, according to the Commission, the states are responsible for the actions of third parties in their territory. This was first stated in *Commission Nationale des Droits de l'Homme et des Libertés v Chad,* in which the Commission demanded much of the Chadian state: "Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter."[37]

Now that the African states have agreed to create the AU, they may be interested in supplementing the economic dimension of the union with a strong humanitarian dimension in the form of a revised Charter.[38] Numerous difficulties are associated with amending an international convention, however, so that in the end it may be better to leave the Charter as it is and let the Commission provide any amendments.

[36] Compared with the period in which the Charter was drafted, the attitude of the African states seems to have developed considerably in favor of human rights, *cf.* Edward Kannyo, "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background," in *Human Rights and Development in Africa*, Ed. by Claude E. Welch, Jr., and Ronald I. Meltzer, 1984, pp. 128–151. One sign that the states are becoming more interested in the Commission may be that, to the knowledge of this author, the first inter-state communication has been filed before the Commission, communication 227/99 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (*see* the Final Communiqué of the 30th Ordinary Session of the ACHPR, 13–27 October 2001, para. 20). On different views of human rights in Africa generally, *cf. Africa, Human Rights and the Global System. The Political Economy of Human Rights in a Changing World*, ed. by Eileen McCarthy-Arnolds, David R. Penna, and Debra Joy Cruz Sobrepeña, 1994.

[37] Case 74/92, *supra* footnote 13, para. 41. *See also* case 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others v Sudan*, decision, probably, of 11 May 2000 (the decision is not dated), para. 50; and case 54/91, 61/91, 96/93, 98/93, 164-196/97, 198/97, 210/98, *Malawi African Association and Others v Mauritania*, decision of 11 May 2000, para. 140.

[38] On the AU, *cf. supra* ch. 2.1 footnote 2.

8. The presumption of truth

Under the African Commission's procedural rules, if the state party involved does not submit its explanations or observations within the deadline fixed by the Commission, the Commission will act on the evidence before it.[1] This rule applies to the stage in which the Commission substantively considers the communication.

There is a similar rule relating to the preceding stage in which the admissibility of the communication is determined.[2] That rule states that the Commission shall decide on the issue of admissibility if the state party fails to submit a written response within three months from the date of notification of the text of the communication. The significance of this rule seems to be identical with the rule relating to the procedure for the substantive consideration of the communication: If the state does not answer, the Commission will issue a decision anyway. The information available to the Commission will then originate solely from the author of the complaint, and the likely outcome of the proceedings will thus be that the Commission finds the state guilty of having violated the Charter. This outcome however is not guaranteed even if only information from the complainant is available to the Commission. We will return to the reasons for this uncertainty later.

There is no rule similar to the African rule of presumption in the rules of procedure of the former European Commission or in the rules of procedure of the UN HRC'ttee. On the other hand, there is no rule stating that the UN HRC'ttee, or the former European Commission, could not decide a case if the state did not respond to their requests. In the Rules of Court of the European Court of Human Rights, there is a rule which is somewhat similar to the rule of presumption:[3] "Where, without showing sufficient cause, a party fails to appear, the Chamber may, provided that it is satisfied that such a course is consistent with the proper administration of justice, nonetheless proceed with the hearing."

In the rules of procedure of the Inter-American Commission, there is

[1] Rule 119(4) of the Rules of procedure.

[2] Rule 117(4) of the Rules of procedure.

[3] Rule 64 of the Rules of Court of the European Court of Human Rights as in force at 1 November 1998. The Rules of Court can be found for instance on the home page of the Council of Europe (http://www. coe.int).

a rule stating that the facts reported in the individual petitions will be presumed true if the government does not provide the pertinent information in time.[4]

Since the two different rules in the African Commission's procedural rules appear to imply the same thing, it would seem more practical to have one rule of presumption governing all the stages of the consideration of a communication rather than having two rules stating the same thing.

The situation would be different if the point was that one kind of rule of presumption should apply to the admissibility stage and another kind of rule applies at the substantive consideration stage. Judging from the text of the Commission's procedural rules, however, no such difference between the rules exists.

The Inter-American rule constitutes a stronger presumption in favor of the petitioner than the African rule, as the facts presented by the complainant shall be considered to be *true* if the state party concerned does not provide any contradictory information.[5] The only condition is that the other evidence must not lead to a different conclusion.[6]

Under the African rules of procedure, the Commission will "decide on the issue" or "act on the evidence before it," which does not necessarily mean that the facts presented in the individual communication are presumed to be true. The point of the African rule may be to emphasize the fact that the handling of the communication will actually continue even if the state does not answer the Commission's requests for additional information. Otherwise, the states might believe they could effectively stop the communications procedure by not responding to the Commission's requests.

If the Commission acts on the evidence before it, however, it has no choice but to trust the information provided by the author of the communication, as long as it is not manifestly false or absurd. The Commission could undertake its own investigation of the case, but under the current circumstances of scarce resources, it is unlikely that it would make any further private investigation into the case. Thus, the result in practice of the presumption rule may also be that the Commission regards the information provided by the complainant as true if the state party does not contradict it. The Commission's rule, thus in practice, becomes a true rule of presumption.

The difficulty for the Commission so far has not been so much the credibility as such of the information provided by the authors of the complaints, but the amount and precision of the information provided; insufficient quantity and quality of the information as provided in the

[4] Article 39 of the Rules of procedure of 1 May 2001, *see also* Article 38(1) of the Rules of procedure for the time period set by the Commission.

[5] *Cf. ibid.*

[6] Article 39 of the Rules of procedure of the Inter-American Commission *in fine*.

communication may lead to a decision of no violation by the Commission even if the information provided is credible. It is specified in the two rules of presumption that it is when the *state* does not provide the Commission with the necessary information that the rule of presumption enters into action. Time limits are also fixed for the individual authors of communications, but nowhere is it stated that if the author of the communication does not provide any additional requested information, the Commission will make its decision anyway or act on the evidence before it.[7] This also applies to the corresponding rule in the rules of procedure of the Inter-American Commission. In most instances, the author of the communication can probably be expected to be co-operative and willing to promptly answer all requests for additional information by the Commission. It may be that the author is not always able to do so, however, because of different difficulties having to do with a lack of knowledge or other resources. According to the Commission's procedural rules, a time limit is set for the complainant, but nothing is stated as to that which will happen if the complainant does not respond within that time limit. Contrary to the case regarding no response from the state party concerned, the rules of procedure allow the Commission to wait some extra time for the complainant to answer its requests. At some point, however, the Commission will have to make its decision, even if the complainant has not provided the Commission with all the necessary information or explanations.

The Commission most likely will act on the evidence before it, even in the case where the complainant does not provide the Commission with the requested additional information. If the complainant does not look after his or her interests, this may result in a decision where it is found that the state concerned has not violated the Charter, or, if the Commission is still at the stage of deciding the preliminary issue of admissibility, that the communication is inadmissible. This hypothesis seems to be supported by the Commission's decision of "no violation" in the case of *William Curson (acting on behalf of Severo Moto) v Equatorial Guinea*.[8] The communication in *Maria Baes v Zaire* was also declared inadmissible due to the fact that the complainant, despite several requests, had not provided the Commission with information sufficient to find the communication admissible.[9]

If neither the state nor the complainant responds to the Commission's requests for additional information, it may be difficult for the Commis-

[7] The time limit for the author of the communication at the admissibility stage is regulated in Rule 117(1) and at the stage of the substantive consideration of the communication, the time limit is regulated by Rule 119(3).

[8] Case 144/95, decision of 11 November 1997.

[9] Case 31/89, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995, para. 7.

sion to decide the case at all. The Commission so far, however, has never closed a case for the stated reason that it has not received additional information from either of the parties sufficient enough to decide the case.

Regarding the African rule of presumption, one may ask if it actually is a rule of presumption in the true sense of the term. It first states that the Commission "'shall decide' on the issue of admissibility"[10] and then that the Commission will "act on the evidence before it" with respect to the substantive consideration[11] in the event the state concerned does not comply with the time limits set by the Commission. Apart from the fact of emphasizing that a decision will be made whether or not the state provides its information, the African rule does not include any presumption that the facts provided by the individual will indeed be deemed true.

A rule stating that a decision will be issued even if the state does not provide its viewpoints is better than not having such a rule, or even having a rule explicitly stating that no decision can be made until both parties have submitted their statements. It is a pity, however, that the Commission was not so inspired by the practice of the Inter-American Commission that it adopted the Inter-American rule of presumption in its entirety.

As the Commission's procedural rules are currently formulated, they seem to be halfway between the Inter-American rule and no presumption rule at all. Perhaps the formulation "act on the evidence before it" in the African rules of procedure relating to the substantive consideration of the communication could be interpreted to imply a certain presumption of truth regarding the evidence provided by the complainant.[12]

It could be hoped at least that the Commission interprets its presumption rule in this manner. Perhaps the circumstance that the Commission uses two different locutions with respect to the issue of admissibility and the substantive consideration respectively – "shall decide" and "act on the evidence before it" – indicates that the Commission wanted the latter rule relating to the substantive consideration to have a different and more far-reaching significance than the former rule.

An actual presumption of truth strengthens the position of the individual considerably and is a powerful weapon in the hands of the Commission in order to for non-cooperative states to act, compared with a situation in which no such presumption is applied. There is an important difference between simply continuing the consideration of the communication and presuming that all of the facts submitted by the complainant are true.

Obviously, the chances increase that the individual will win the case if everything he or she has stated is regarded as true. If the Commission

[10] Rule 117(4) of the Rules of procedure.
[11] Rule 119(4) of the Rules of procedure.
[12] Rule 119(4) of the Rules of procedure.

simply continues its consideration of the communication without any rule of presumption, it may come to the conclusion, based on the same facts, that the complainant's evidence is insufficient and that no violation of the Charter has been satisfactorily proven.

The Commission has cited the presumption rule many times in its practice. In its relatively early decision in *World Organisation Against Torture and Others v Zaire,* the Commission makes an interesting statement of principle concerning its understanding of the presumption rule:[13] "In the present case, there has been no substantive response from the Government of Zaire, despite the numerous notifications of the communications sent by the African Commission. 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, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given."[14]

This statement is noteworthy for a number of reasons. Unfortunately, the Commission has not been entirely consistent in its subsequent practice.

First, the Commission states that it must treat the facts provided by the author of the communication as given. This must be understood as that the Commission presumes the facts to be true and thus that the rule of presumption in the African context is also a presumption of truth.

Second, the Commission states that it may apply the presumption of truth after it has notified the state of the communication several times ("after repeated notifications"). This must be understood as that the Commission is of the opinion that it is only in the case where the state has received several notifications that the Commission may apply the presumption of truth. This is not correct under the Commission's procedural rules. The rules allow for a decision to be made on the facts provided by the complainant directly after the first time limit has expired for the state;

[13] Case 25/89, 47/90, 56/91, 100/93, decided at the 19th Ordinary Session of the African Commission, 26 March–4 April 1996, para. 60.

[14] *Ibid. Cf. also* case 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, *Malawi African Association and Others v Mauritania*, decision of 11 May 2000, para. 92; case 140/94, 141/94, 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, decision of 15 November 1999, para. 47; case 143/95, 150/96, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria,* decision of 15 November 1999, para. 28; case 148/96, *Constitutional Rights Project v Nigeria*, decision of 15 November 1999, para. 14; case 151/96, *Civil Liberties Organisation v Nigeria*, decision of 15 November 1999, para. 24; case 206/97, *Centre for Free Speech v Nigeria*, decision of 15 November 1999, para. 17; case 215/98, *Rights International v Nigeria*, decision of 15 November 1999, para. 31; case 225/98, *Huri-Laws v Nigeria*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 54; case 232/99, *John D. Ouko v Kenya*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 21; and case 204/97, *Mouvement Bourkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, decided at the 29th Ordinary Session of the African Commission 23 April–7 May 2001, para. 42.

no repeated notifications are necessary. Indeed, in the view of this author, the Commission is far too generous towards the states as far as renewed time limits are concerned. This leniency towards the states prolongs the proceedings before the Commission considerably and unnecessarily.

Third, the Commission in *World Organisation Against Torture and Others v Zaire* refers to a number of earlier decisions in which the rule of presumption is supposed to have been already applied.[15] Only in some of these decisions does the Commission explicitly refer to the rule of presumption. If the decisions are read carefully, it is evident that the Commission must have made use of the rule of presumption albeit implicitly; the Commission pursues its consideration of the communication despite the silence on the part of the state. In many cases, the Commission also explicitly refers to the rule of presumption when continuing its consideration of the communication despite the lack of response from the state. If the cases in which the Commission implicitly uses the rule of presumption are added to the cases in which the Commission explicitly turns to the rule of presumption, it becomes clear that the Commission is forced to make use of the rule of presumption quite often in order to be able to proceed with its consideration of individual communications.[16] This in its turn means that the Commission often has to decide cases on the basis of deficient information. From the practice of the Commission, it does seem as if the states are becoming more co-operative and that they thus provide the Commission with more information relating to the communications.

In *Krishna Achuthan on behalf of Aleke Banda and Others v Malawi,* the Commission uses the exact same phrase as in *World Organisation Against Torture v Zaire* on the subject of the presumption of truth.[17] In *Krishna Achuthan on behalf of Aleke Banda, and Others v Malawi,* the Commission correctly adds that "[t]his principle of proceeding with consideration conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights."[18]

[15] Case 25/89, 47/90, 56/91, 100/93, *supra* footnote 13, para. 60; the cases referred to are case 59/91, *Louis Emgba Mekongo v Cameroon*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; case 60/91, *Constitutional Rights Project v Nigeria*, decision of 3 November 1994; case 64/91, which has not been found by the present author but which is presumed to mean case 64/92, 68/92, 78/92, *Krishna Achutan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; case 87/93, *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria*, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994; and case 101/93, *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria*, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995.

[16] In 22 cases in all so far, according to this author's inexact calculations (18 cases of explicit reference and 4 cases of implicit reference).

[17] Case 64/92, 68/92, 78/92, *supra* footnote 15, para. 33.

[18] *Ibid.* at para. 34.

In *International PEN, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria,* the Commission almost repeats the same phrase again as to the presumption of truth but makes an interesting twist.[19] The Commission states that the Nigerian government had not presented any written submissions in the cases concerned and had not refuted the allegations in its oral presentation.[20] The Commission then goes on to state that it is the well-established jurisprudence of the Commission that where allegations go entirely unchallenged, the Commission will proceed to decide on the facts presented.[21] In this case, however, in contrast to the earlier ones cited in which the Commission applied the rule of presumption, the Nigerian government had in fact participated at least in the oral part of the proceedings, and if it did not refute the allegations it may be understood as implicitly accepting them. The rule of presumption should rather be resorted to when the state has not provided any information at all. If the state participates but does not refute that which the complainant states, this is a different situation from where the state does not say anything at all. True, the rules of procedure only speak of information provided "in writing," but since the Commission in practice allows oral contributions to the procedure as well, oral contributions should count just as much as written contributions.

In *Sir Dawda K. Jawara v The Gambia,* the Commission in an unusual manner did not accept all the facts provided by the complainant as given.[22] The Commission probably was of the opinion that the information provided by the complainant was so deficient that it could not serve as a basis for a decision despite the silence of the government of The Gambia on this point, reasoning as follows: "The complainant alleges that the Military perpetrated a reign of terror, intimidation and torture when it seized power. While there is evidence of intimidation, arrests and detentions, there is no independent report of torture."[23] The term "independent" in this context is a little ambiguous; the information is usually provided by either of the two parties to the case and thus never "independent." Continuing and somewhat clarifying its reasoning, the Commission states that "[t]o date, the Commission has received no evidence from the complainant. In the absence of proof therefore, the Commission cannot hold the government to be in violation of Article 5."[24] This would seem to mean that pure allegations from the author of the complaint are not

[19] Case 137/94, 139/94, 154/96, 161/97, decision of 31 October 1998.
[20] *Ibid.* at para. 81.
[21] *Ibid. Cf. also* case 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, decision of 31 October 1998, para. 86.
[22] Case 147/95, 149/96, decision of 11 May 2000.
[23] *Ibid.* at para. 55.
[24] *Ibid.* at para. 56.

sufficient in order for the Commission to be able to make a decision based on the rule of presumption; the complainant needs to substantiate his or her allegations in some way. It may be difficult for the Commission to exactly specify the substantiation needed in general.

In *Constitutional Rights Project v Nigeria* to which the Commission refers in *Sir Dawda K. Jawara v The Gambia,* the Commission also states concerning allegations of torture that "[w]ithout specific information as to the nature of the acts themselves, the Commission is ... unable to find a violation of Article 5."[25] Specific information, however, is something different than evidence and it would be considerably easier for the complainant generally to provide the Commission with specific information about the acts to which he or she has been subjected than to provide the Commission with evidence proving that acts of torture have been carried out for instance. It remains a little unclear that which the Commission is demanding, but at least it demands specific information concerning the nature of the acts complained of in the communication. This is no unreasonable request on the part of the Commission.

In its decision on *Kazeem Aminu v Nigeria,* the Commission first states that the allegation of torture has not been substantiated and thus that the presumption of truth cannot be applied.[26] The Commission still comes to the conclusion that Article 5, among others, has been violated. Either the Commission bases this conclusion on information not included in its decision or the conclusion constitutes a mistake.

In its comprehensive decision in *Amnesty International and Others v Sudan,* the Commission adds an interesting qualification to its earlier presumption of truth: "If the government provides no evidence [to] contradict an allegation of human rights allegation made against it, the Commission will take it as proven, or at the least probable or plausible."[27] This qualification has not been again brought up in any other decision taken by the Commission to date.

[25] Case 60/91, *supra* footnote 15, para. 27; *cf. also* case 205/97, *Kazeem Aminu v Nigeria,* decision of 11 May 2000, para. 16.

[26] Case 205/97, *ibid.*

[27] Case 48/90, 50/91, 52/91, 89/93, decision, probably, of 11 May 2000 (the decision is not dated), para. 52; *cf. also* para. 75.

9. Recommendations by the Commission

As is obvious from the preceding chapters of this study, the Commission has been very inventive with respect to each step it takes in its consideration of a communication. This is also true, not in the least, with respect to the last step in which the Commission, after having found the state guilty of one or more violations of the Charter, typically recommends different measures to be taken by the state in order to remedy the wrongs committed.

There are numerous instances of decisions in which the Commission has included recommendations to the state party. The Commission has become more inclined over the years to make recommendations which are becoming more and more numerous and detailed.

The decisions in which the recommendations by the Commission are made regard either the substance or the admissibility of the communication. The recommendations are sometimes combined with imaginative and original suggestions for resolutions to the dispute and offers of help on the part of the Commission.[1]

There is nothing in the Charter that suggests that the Commission may make recommendations to the states as a result of its consideration of individual communications. The term "recommendation," however, is mentioned in the context of the in-depth study that the OAU Assembly may ask the Commission to undertake after the Commission has drawn the attention of the Assembly to the special cases revealing the existence of a series of serious or massive violations of human and peoples' rights.[2]

[1] Unfortunately, the states do not always put the recommendations of the Commission into effect, indeed it is only exceptionally that they do so. This of course is a problem for the Commission and has even been described as "one of the major factors of the erosion of the Commission's credibility" (Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach, 24th Ordinary Session, 22–31 October 1998, DOC/OS/50b (XXIV), para. 2; the document can be found in *Documents of The African Commission on Human and Peoples' Rights*, *supra*. ch. 2.1 footnote 1, p. 758).

[2] *Cf.* Article 58(1) and (2).

The Commission may make a factual report, at the request of the Assembly, accompanied by its findings and recommendations.[3]

Under the promotional mandate of the Commission found in the Charter, giving its views or making recommendations to governments is included as one of the possible activities of the Commission.[4] Although this is laid down in the context of the promotional mandate and not the protective one, this passage can be used as an argument supporting the Commission's capacity to make recommendations also in the context of individual communications.

In *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia,* the Commission comes to the unusual conclusion of finding several violations of the African Charter at the same time as it "resolves to continue efforts to pursue an amicable resolution in this case."[5]

In *John K. Modise v Botswana (I),* the Commission seems to come to the equally unusual conclusion of finding that an amicable solution had been found between the parties, at least partly, and that with respect to the remaining portion, the complainant had not exhausted local judicial remedies. The Commission then "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 of Human and Peoples' Rights."[6] Here, the parts of the communication which have not been included in the amicable settlement are not admissible under the Charter according to the Commission's statement on exhausting local remedies. The Commission still pronounces on the desirability of a friendly settlement of the affair as a whole. It is apparently not impossible, but still an unusual kind of pronouncement on the part of the Commission, or any such similar agency.

If the communication is not admissible, the Commission normally does not make any pronouncement on the way in which the case should be resolved. In principle, of course, there is nothing wrong with the Commission wishing a dispute to be resolved to the satisfaction of both parties.[7]

As a general rule, everyone would wish that the governments concerned always made genuine attempts at settling the matters amicably in each case before the Commission, and also as speedily as possible. In the particular case of *John K. Modise v Botswana (I),* the Commission should have found that Botswana had violated several articles of the Charter, according to the view of this author, instead of finding that local remedies had not been properly exhausted on the points. The Commission then

[3] Article 58(2).

[4] Article 45(1)(a) *in fine.*

[5] Case 71/92, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, *cf. supra* ch. 6.1 footnote 65.

[6] Case 97/93 (I), decided at the 21st Ordinary Session of the African Commission, 15–24 April 1997.

[7] *Cf. supra* ch. 6.1 footnote 1.

could have made a more precise recommendation as to that which Botswana ought to do to compensate the victim of the human rights violations, instead of generally requesting that the government try to settle the matter amicably.

In fact, this is what the Commission did in its subsequent decision in the same case, *John K. Modise v Botswana (II)*.[8] In the latter decision, the Commission first found that Botswana had violated a number of articles in the Charter and then the Commission "[urged] the government of Botswana to take appropriate measures to recognise Mr. John Modise as its citizen by descent and also compensate him adequately for the violations of his rights occasioned," something which Mr. Modise had been striving for all along.[9]

In *Louis Emgba Mekongo v Cameroon,* the Commission held that there had been a violation of the Charter, finding that the complainant was entitled to reparations for the prejudice he had suffered.[10] It is an unusual measure on the part of the Commission to find that the state is to pay reparations. Such a decision seldom occurs in the practice of the Commission. There is nothing in the Charter to suggest that the Commission has such powers.

Since the Commission constitutes the sole level of control in the enforcement system under the Charter until an African Court is established, this could be an argument in favor of the Commission's competence to prescribe reparations to be paid by the state. If the Commission does not prescribe reparations under the African Charter system, at the present time, no one else will.[11]

The decision of the Commission, however, is not formally binding, irrespective of the stated opinion of the Commission itself. It is not possible to execute it in the African state concerned, unless of course the state agrees to execute the decision voluntarily. It is true that the Commission proudly states that "[a]s the only existing body with the power to examine communications, mandated by Article 45.2 to ensure the protection of human and peoples' rights under the conditions laid down by the present Charter, the Commission considers that its decisions with regard to these communications are legally binding upon the states parties

[8] Case 97/93 (II), decided at the 28th Ordinary Session of the African Commission from 23 October–6 November 2000; *cf. supra* ch. 4.2 footnote 126.

[9] *Ibid.* at conclusion.

[10] Case 59/91, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994. On reparations prescribed by the Commission, *see also* Gino J. Naldi, "Reparations in the Practice of the African Commission on Human and Peoples' Rights", *Leiden Journal of International Law*, vol. 14, 2001, pp. 681–693.

[11] *Cf.* the European Convention Article 41 (Article 50 in the version in force before 1 November 1998); the American Convention Article 68(2); and the Additional Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights Article 27.

concerned."[12] Until the state parties to the Charter have quite clearly accepted this proposition, it remains a doubtful proposition from a legal point of view to say the least. The fact that the Commission considers its decisions to be legally binding on the state parties concerned does not necessarily mean make so.

With respect to the human rights courts, the state parties have agreed that the judgments of the courts are legally binding and may be executed in the country concerned.[13] The American Convention is most specific in stating that a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against that state.[14]

In the view of this author, the Commission's decisions are not legally binding. The Charter of course is legally binding. It could be argued that the parties to the Charter are obliged to comply with the decisions of the Commission as an offshoot of the Charter.[15] The Charter does provide for a Commission with the task, *inter alia*, of ensuring the protection of human and peoples' rights.[16]

Another argument that can be made is that as it is the Commission itself who has created the procedure for the consideration of individual communications that it follows, it is less self-evident that the decisions of the Commission should be considered true offshoots of the Charter and therefore legally binding.[17] This complicating factor, however, will not be discussed further here.

In *Jean Yaovi Degli (on behalf of Corporal N. Bikagni), Union Inter-Africaine des Droits de l'Homme, Commission Internationale de Juristes v Togo,* the Commission concludes the decision by welcoming the continued efforts of the government to remedy the human rights violations in question.[18] This is a form of recommendation, that the Togolese government should indeed continue to try to remedy the violations of the Charter cited.

[12] Decisions of the African Commission on Human and Peoples' Rights 1986–1997 Pursuant to Article 55 of the African Charter on Human and Peoples' Rights, *supra* ch. 3.3 footnote 147, p. 5.

[13] The European Convention Article 46; the American Convention Article 68(2); and the Additional Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights Article 30.

[14] Article 68(2) of the American Convention.

[15] *Cf.* Murray (2000), *supra* ch. 2.1 footnote 1, pp. 53–55; *cf. also* Murray (1997a), *supra* ch. 2.2 footnote 17, at p. 433; and Naldi (2001), *supra* footnote 10, pp. 684, 691–692, who makes a distinction between the decisions of the Commission, which he considers binding, and the statements of the Commission on reparations, which he does not consider binding.

[16] Article 45(2) of the Charter.

[17] *Cf. supra* chapter 7.

[18] Case 83/92, 88/93, 91/93, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995, conclusion.

An unusual aspect of this decision is that in the very conclusion, the Commission only recommends that the government should continue its efforts to remedy the violations; the Commission does not find in the conclusion itself that Togo has actually committed violations of a number of articles in the Charter. The Commission indirectly finds that violations of the Charter have taken place in the part of the decision preceding the final conclusion. The Togolese government also acknowledged that the human rights violations complained of had indeed occurred.

In *Alhassan Abubakar v Ghana,* the Commission did that which it did not do in *Jean Yaovi Degli and Others v Togo.* It first finds that Ghana has violated the Charter (the right to liberty and the right to be tried within a reasonable time by an impartial court) and then "urges the Government to take steps to repair the prejudice suffered."[19] From the choice of words used, it would seem as if the Commission is recommending the government to pay some form of reparations to the victim of the human rights violation.

In *Union Inter-Africaine des Droits de l'Homme and Others v Angola,* the Commission is very explicit: "With regards to damages for prejudice suffered, it urges the Angolan government and the complainants to draw all the legal consequences arising from the present decision."[20] It is obvious that the Commission considers itself competent to find the state party liable to pay damages.

In *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria,* the Commission recommended that the Government of Nigeria should free the complainants, who had been sentenced to death under the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987 and still were in prison.

In the case of *Monja Joana v Madagascar,* the Commission, while considering the admissibility of the communication, makes a statement which seems to explain the Commission's practice to make recommendations to the state parties: "The object of the communications procedure under Article 55 of the African Charter is to find solutions for victims of violations of human rights."[21] The solution generally is that the state redresses the wrongs it has committed or repairs the damage it has caused the victim. Thus, in order to find solutions, the Commission must recommend the state to take the necessary measures.

In *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon,* the Commission recommends that the government of Cameroon draw all

[19] Case 103/93, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, conclusion.

[20] Case 159/96, decision of 11 November 1997, conclusion.

[21] Case 108/93, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, para. 23.

the necessary legal conclusions to reinstate the victim in his rights.[22] A curiosity with this decision is that it was not arrived at until seven years after the receipt by the Secretariat of the Commission of the communication. The victim had been removed from his position as a magistrate, which was one of the complaints. However, reinstating a person in his or her former position after more than seven years may be difficult.

The case of *Bob Ngozi Njoku v Egypt* is unusual in several respects. After having considered the communication, the Commission comes to the unusual conclusion that no provision of the African Charter on Human and Peoples' Rights had been violated.[23] The Commission "... therefore declares the communication closed," which is also unusual. Normally a decision finding that no violation of the Charter has taken place is a decision of "no violation." Declaring the communication closed would perhaps be justified if the complainant had withdrawn the communication. Also unusual in this case was the fact that the Commission was provided with sufficient enough information, and so the decision of "no violation" was not a result of a lack of information provided by the complainant and the local remedies had also been duly exhausted before the case reached the Commission.[24]

In the context of a discussion on the recommendations made by the Commission, *Bob Ngozi Njoku v Egypt* is unusual because in spite of the fact that the Commission finds that Egypt has not committed any violations of the Charter, the Commission still proceeds to make some form of recommendation. The Commission "[g]ives mandate to Commissioner Isaac Nguema to pursue his good offices with the Egyptian government with a view to obtaining clemency for Mr. Ngozi Njoku on purely humanitarian grounds."[25] The Commission is not alien to making rather unconventional recommendations or proposals for actions in its decisions.

In the case of *International PEN and Others v Nigeria,* the Commission makes a very far-reaching recommendation, not to say perhaps even issues an order.[26] Among other things, the Commission decides that there has been a violation of Article 6 in relation to the detention of all the victims under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree no. 14 (1994). The Commission then surprisingly states that "[t]he government therefore has the obligation to annul these Decrees."[27]

First, this statement illustrates that the Commission does consider its

[22] Case 39/90, decided at the 21st Ordinary Session of the African Commission, 15–24 April 1997, conclusion.
[23] Case 40/90, decision of 11 November 1997.
[24] *Cf. supra* ch. 4.1 footnotes 19 and 20.
[25] Case 40/90, *supra* footnote 23, conclusion.
[26] Case 137/94, 139/94, 154/96, 161/97, decision of 31 October 1998.
[27] *Ibid.* at conclusion.

decisions to have binding legal force.[28] Second, the Commission's decision is exceptionally far-reaching in that it demands that Nigeria annul the decrees that have given rise to the complaints.

No other human rights commission or court would go as far as the Commission in this respect. Not even the European Court of Justice, with its very far-reaching powers under the Treaty on the European Community, would go as far as the Commission.[29] It is one thing to make a decision with respect to reparations to compensate for violations committed, and quite another to demand that the state annul the decrees, implying that a logical consequence of a violation of the Charter is that the state has the legal obligation to annul the decree in question.

Indirectly, of course, a finding that a state has violated the Charter, or any other human rights convention, would normally lead the state to change the law which has caused the human rights violation. For an agency such as the Commission or an international court of human rights to explicitly state this as a legal obligation for the state, however, is exceptional.

In *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria,* the Commission similarly decided that the decree should be annulled because based on the decree, there had been violations on several points of the Charter.[30] The decree this time was the Legal Practitioners' Decree. In a different case, *Civil Liberties Organisation and Others v Nigeria,* the Commission similarly requests the government of Nigeria to bring its laws in conformity with the Charter by repealing the offending decree (the name of the decree is not mentioned in the decision).[31]

This case is also interesting as it shows that the Commission allows pure *actio popularis* complaints, i.e. complaints lacking any specific individual victim or victims.[32] Combining the far-reaching legal consequences that the Commission finds, flowing from its decision that a violation of the Charter has occurred, together with the Commission's acceptance of an *actio popularis,* this results in the very interesting situation that the Commission becomes a type of constitutional court of all African states.

In *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria*, for instance, the complainants complained of the Legal Practitioners' Decree *in abstracto*. The Commission then found that the Decree was in violation of the Charter in several respects and held that

[28] *Cf. supra* footnote 12.

[29] The Treaty Establishing the European Community, originally of 25 March 1957, can be found for instance on the home page of the European Union (http://europa.eu.int).

[30] Case 101/93, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995, conclusion.

[31] Case 218/98, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, conclusion

[32] *Cf. supra* ch. 5 footnote 20.

"[t]he Decree should therefore be annulled."[33] Thus the Commission seems to look upon itself as a constitutional court with the competence to declare laws unconstitutional, i.e. that the laws violate the Charter.

From the point of view of human rights, this function of the Commission may be very good, but the question is whether the Commission has correctly understood its role in relation to the Charter in this respect. A further question is whether the state parties to the Charter accept that the Commission functions as a constitutional court. Even if the states would accept this in theory, contrary to expectation, the next question would be whether they would accept this in practice, i.e. whether they are actually willing to annul the laws that the Commission finds violate the Charter.

The recommendation of the Commission in *Constitutional Rights Project v Nigeria* is very concrete. The Commission "decides that the Government of Nigeria should free the complainants."[34] Before this, the Commission declares the existence of several violations of the Charter (right to a fair trial and the duty of the state to guarantee the independence of the courts).

The question is whether the victims of the human rights violations in *Constitutional Rights Project v Nigeria* were still alive at the time the Commission rendered its decision. The victims had been sentenced to death more than three years before the decision by the Commission, and the Nigerian government had not responded to the Commission's request for interim measures (in the form of stays of execution).[35] Neither the victims nor the Nigerian government had sent representatives to defend their case at the session where the Commission examined the communication. It is not clear from the Commission's decision what had happened to the victims since the communications were filed three years previously.

In the case of *Civil Liberties Organisation v Nigeria,* the Commission did not make any recommendation, but the conclusion contains a general condemnation, in addition to the finding that Nigeria had violated the right to have one's cause heard and the duty of the state to provide the people with a court system.[36] The Commission lastly finds that "the act of the Nigerian government to nullify the domestic effect of the Charter constitutes a serious irregularity."[37] Nigeria, interestingly, had purported to override parts of the Charter by means of national law, which of course is impossible.[38] The declaration made by the Commission could be read as a form of recommendation to Nigeria, and potentially to other African states, to stop any such futile attempts.

[33] Case 101/93, *supra* footnote 30, conclusion.
[34] Case 60/91, decision of 3 November 1994, conclusion.
[35] *Ibid.* at para. 7.
[36] Case 129/94, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995.
[37] *Ibid.* at conclusion.
[38] *Cf.* the Vienna Convention on the Law of Treaties, Article 27.

In *Constitutional Rights Project and Civil Liberties Organisation v Nigeria,* the Commission makes a more straightforward recommendation.[39] After having found several violations of the Charter again by Nigeria, the Commission then "appeals to the government of Nigeria to release all those who were detained for protesting against the annulment of the elections; and to preserve the traditional functions of the court by not curtailing their jurisdiction."[40] The latter part of the recommendation expresses in positive terms the inverted recommendation contained in *Civil Liberties Organisation v Nigeria,* which actually concerned the right to have one's case heard by a court.[41]

In several cases, the Commission has sent a mission to the state accused of serious human rights violations as a means of investigating the human rights situation in the state concerned and, presumably, of trying to make the state settle the matter with the victim(s).[42] The recommendations contained in the decision by the Commission then are based both on the facts presented in the communication and on the Commission's own inquiry on the spot.[43] To the knowledge of this author, in no case so far has the Commission succeeded in achieving a friendly settlement as the result of a mission. The mission usually consists of three members of the Commission. In the case of *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti,* there was an amicable settlement but it had been reached before the arrival of Commissioner Kemal Rezag-Bara, who only had to confirm the amicable resolution of the case.[44]

[39] Case 102/93, decision of 31 October 1998.

[40] *Ibid.* at conclusion.

[41] Case 129/94, *supra* footnote 36.

[42] *Cf.* case 83/92, 88/93, 91/93, *Jean Yaovi Degli (on behalf of Corporal N. Bikagni), Union Inter-Africaine des Droits de l'Homme, Commission Internationale de Juristes v Togo*, decision of 31 October 1998; case 140/94, 141/94, 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, decision of 15 November 1999; case 143/95, 150/96, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, decision of 15 November 1999; case 148/96, *Constitutional Rights Project v Nigeria*, decision of 15 November 1999; case 151/96, *Civil Liberties Organisation v Nigeria*, decision of 15 November 1999; case 153/96, *Constitutional Rights Project v Nigeria*, decision of 15 November 1999; case 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others v Sudan*, decision, probably, of 11 May 2000 (the decision is not dated); case 54/91, 61/91, 98/93, 164-196/97, 210/98, *Malawi African Association and Others v Mauritania*, decision of 11 May 2000; and case 223/98, *Forum of Conscience v Sierra Leone*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000. In two cases Commissioners have acted as mediators: in case 73/92, *Mohammed Lamine Diakité v Gabon*, decision of 11 May 2000, Commissioner Isaac Nguéma; and in case 133/94, *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti*, decision of 11 May 2000, Commissioner Kamel Rezag-Bara.

[43] *Cf.* Article 46 of the Charter allowing the Commission to "resort to any appropriate method of investigation."

[44] Case 133/94, *supra* footnote 42.

In the case of *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,* the Commission combined a mission and the finding of several violations of the Charter with the following rather unnecessary recommendation: The Commission "[i]nvites the government to take all necessary steps to comply with its obligations under the Charter."[45]

It must be presumed that the Commission in each decision implicitly invites the government to comply with the decision of the Commission. As noted earlier, the Commission even finds its decisions to be legally binding.[46] For the Commission to state explicitly that it "invites" the government to follow its decision hints that the Commission does not take for granted that the government will follow the decision. This in its turn indicates to the government that there is a choice; the government can either follow or not follow the decision. It would be better for the Commission and for the Charter if the existence of such a choice was not suggested in the decisions of the Commission.

Perhaps the recommendation by the Commission in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* was not meant as an invitation to the government to follow the Commission's decision in this specific case, but was instead meant as a call to Nigeria to comply with its obligations under the Charter generally. If so, this exhortation goes beyond the framework of the particular communications under scrutiny by the Commission in this case.

Nothing hinders the Commission from making such general statements in combination with its findings that several specific violations of the Charter have demonstrably occurred. The Commission knew from its mission that there were many more human rights violations taking place in Nigeria than evidenced by the communications being considered by the Commission. The mandate of the Commission, furthermore, is broad enough to include almost any promoting or protective measure in relation to the Charter on the part of the Commission. The Charter even states that the Commission shall, should the case arise, "give its views or make recommendations to Governments."[47]

In judicial proceedings, normally the court does not consider or state anything not directly related to the current procedure. This usually also applies to quasi-judicial bodies such as the Commission. In order to "legalize" its procedure as much as possible, which the Commission seems to strive for by different means, the Commission should refrain from making general statements in connection with its decisions on particular communications to the largest degree possible.

[45] Case 140/94, 141/94, 145/95, *supra* footnote 42, conclusion.
[46] *Cf. supra* footnote 12.
[47] Article 45(1)(a) of the African Charter.

Otherwise, it may seem as if the Commission does not distinguish between instances of violations of the Charter which have been proven during a proper legal (however quasi-judicial) procedure and of human rights violations taking place or allegedly taking place in a state on a general level. Of course, both may be serious, but the tools at the disposal of the Commission for approaching the respective situations are and should be different. There otherwise is a risk that the respect for the decisions of the Commission on individual communications will diminish in the event the decisions are not viewed as based exclusively on a detailed objective scrutiny of the circumstances of one or several particular instances of alleged human rights violations in individual cases. According to the view of this author, the Commission should take great care in constructing a system for the consideration of communications which is as judicial as possible, as this is the best, if not the only, way of securing respect for the Commission's final decisions. These decisions should be of a different quality than declarations or recommendations in general.

As part of its promotional mandate, the Commission should make as many declarations and recommendations as it possibly can, and should never hesitate to give its views to the African governments. The Commission should also strive to be well-balanced in performing these activities, but there is no need for the same kind of judicial strictness here as there is within the framework of the individual communications procedure. In its promotional activities, the Commission should be clearly biased in favor of human rights and it does not have to wait for proper proof to be presented before it is able to make a recommendation to a government.

With respect to the case of *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,* if the purpose of the Commission was to make a concluding recommendation to the Nigerian government to comply with the Charter in general, a better place to do this would perhaps have been in the report issuing from the mission or in a separate declaration adopted by the Commission referring to the findings of the mission.

The situation is similar in the case of *Constitutional Rights Project and Civil Liberties Organisation v Nigeria,* which was also included among the cases discussed by the Commission with the Nigerian government on the Commission's mission to Nigeria.[48] The Commission found there that several articles of the Charter had been seriously violated, and then "recommends that the Government of Nigeria brings its laws in line with the Charter."[49] As in the previous case, this recommendation could refer to the specific instances of violations of the Charter complained of

[48] Case 143/95, 150/96, *supra* footnote 42.
[49] *Ibid.* at conclusion.

in the communications or it could be a general recommendation that Nigeria implement the Charter properly and if necessary change any laws accordingly.[50]

As noted earlier, the numerous cases against Nigeria illustrate another aspect of the individual communications procedure which will only briefly be touched upon here, namely the great importance of NGO:s.[51] Almost all of the cases against Nigeria have been filed by NGO:s, which also appear in the title of the communications in the records of the Commission. The fact that the Commission uses the names of the representatives of the victims in the title of its decisions, instead of the name(s) of the victim(s) for instance, or reference to the events causing the communication, has been criticized by this author elsewhere in this study.[52] The NGO:s bring complaints on behalf of individual victims and they also bring *actio popularis* complaints against particular laws for instance, without referring to any particular individuals who have been negatively affected by the application of these laws. Thus the NGO:s are important as watchdogs guarding the public against human rights violations and drawing the attention of the Commissions to cases where violations have occurred.

The NGO:s are also important for the Commission because they provide the Commission with cases to settle, and thereby provide the Commission with the opportunity of building up its case law concerning the Charter. If there were no NGO:s, African or international, providing the Commission with communications, there would be very few cases before the Commission at all, and thus there would have been very few decisions by the Commission where it interprets and develops the provisions of the Charter.[53] So far, one could say that the Commission is dependent on the NGO:s for its protective activities.

In *Constitutional Rights Project v Nigeria,* the Commission found (in 1999) that Nigeria had seriously violated the right to liberty and security of one's person by keeping eleven soldiers of the Nigerian army in prison despite the fact that they had been found innocent twice, in 1990 and then again in 1991, and moreover had been granted state pardons in 1991.[54] As a recommendation, or stronger, the Commission also "urges the Government of Nigeria to respect the judgements of its courts and free the 11 soldiers."[55] In principle, it should be sufficient that the Com-

[50] *Cf. also* case 224/98, *Media Rights Agenda v Nigeria*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, conclusion.
[51] *Cf. supra* ch. 2.1.1 footnote 6.
[52] *Cf. supra* ch. 5 footnote 18 and subsequent text.
[53] *Cf. supra* ch. 5 footnote 12 and subsequent text.
[54] Case 148/96, *supra* footnote 42.
[55] *Ibid.* at conclusion.

mission finds that Article 6 of the Charter has been violated by the illegal detention of the eleven soldiers for the Nigerian government to understand that it should free the soldiers. However, perhaps in order to lend more weight to its words, the Commission also explicitly urges the government to free the imprisoned soldiers.

In *Civil Liberties Organisation v Nigeria,* the Commission ended with a rather detailed recommendation to Nigeria: The Commission "appeals to the Government of Nigeria to permit the accused persons a civil re-trial with full access to lawyers of their choice; and improve their conditions of detention."[56] Even if a little unnecessary, the detailed instructions to the government of Nigeria can work as a reminder or check-list for the government in case it does not fully realize the measures which it needs to take in order to remove or make up for its human rights violations. The recommendation of the Commission also shows in concrete terms the implementation which the Charter demands of the legal and judicial systems.

In *Constitutional Rights Project v Nigeria,* with circumstances similar to the two previous cases, the Commission "appeals to the Government of Nigeria to charge the detainees, or release them."[57] In *Centre For Free Speech v Nigeria,* the Commission "urges the government of Nigeria to order for the release of the four Journalists," who were illegally detained.[58]

In the cases of *Mohammed Lamine Diakité v Gabon* and *Association pour la Défence des Droits de l'Homme et des Libertés v Djibouti,* the Commission took the rather unusual measure of letting one Commissioner play an active role as mediator in order to bring about a friendly settlement between the parties, in both cases without result but for different reasons.[59] In the case against Gabon, the Commission states in its decision that "[t]he case was deferred on many occasions to allow parties to settle the matter amicably with the assistance of Commissioner Isaac Nguema."[60] These attempts did not succeed, however, and in the end the communication was declared inadmissible for the non-exhaustion of local remedies. In the case against Djibouti, Commissioner Rezag-Bara went on a mission to Djibouti to try to find an amicable resolution to the dispute only to find that an amicable settlement had already been concluded.[61] Such active mediating measures on the part of the Commission may be useful but are rare in the practice of the Commission, at least judging from that which is recorded in the decisions of the Commission.

[56] Case 151/96, *supra* footnote 42, conclusion.
[57] Case 153/96, *supra* footnote 42, conclusion.
[58] Case 206/97, decision of 15 November 1999, conclusion.
[59] Cases 73/92 and 133/94, *supra* footnote 42.
[60] Case 73/92, *ibid.* at para. 10.
[61] Case 133/94, *supra* footnote 42, paras. 10–11.

If there are secret mediating efforts among the Commissioners, this author is not aware of them.

In *Sir Dawda K Jawara v The Gambia,* similarly to earlier cases, the Commission first finds that The Gambia has violated a great number of provisions of the Charter. The Commission then again "urges the government of the Gambia to bring its laws in conformity with the provisions of the Charter."[62] The most reasonable interpretation of the latter statement by the Commission must be that the Commission urges The Gambia to follow the Commission's decision and to change its laws on the points where the Commission has found that they violate the Charter in order to remove and prevent further human rights violations.

In *Kazeem Aminu v Nigeria,* the Commission similarly "requests the government of Nigeria to take necessary measures to comply with its obligations under the Charter."[63] The decision is unusual in two respects, one less and one more important.

From the less important point of view, the decision is unusual in that the Commission states that the allegations of torture and inhuman treatment, which make up part of the complaint, have not been substantiated and that consequently "[in] the absence of specific information on the nature of the acts complained of, the Commission is unable to find a violation as alleged."[64] Still, in the conclusion the Commission finds that there has been a violation of Article 5, prohibiting torture and inhuman treatment among other things. This is confusing for the reader of the decision. Usually, if the Commission makes this kind of mistake it is the other way round; in the text of the decision the Commission finds that a certain article of the Charter has been violated, but in the conclusion this article is not mentioned, presumably by mistake.

From the more important point of view, the decision in *Kazeem Aminu v Nigeria* is unusual in that the Commission invokes a statement made by the representative of Nigeria in another case as a piece of evidence in this case.[65] On the issue of the exhaustion of local remedies "the Commission held that local remedies would not only be ineffective, but are sure to yield no positive result. Secondly, the Commission noted that the complainant's client is in hiding and still fears for his life. In this regard, the Commission calls in aid the statement of the representative of Nigeria in Communication 102/93 about the 'chaotic' situation that had transpired after the annulment of the elections ..., the validation which the complainant's client is agitating for."[66] The Commission has never

[62] Case 147/95, 149/96, decision of 11 May 2000, conclusion.
[63] Case 205/97, decision of 11 May 2000.
[64] *Ibid.* at para. 16. *Cf. supra* ch. 8 footnote 26.
[65] *Ibid.* at para. 13.
[66] *Ibid.; see* case 102/93, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, decision of 31 October 1998, para. 57.

before invoked statements made in earlier proceedings as evidence in later proceedings. It is a doubtful practice from the point of view of a proper judicial procedure.

In its comprehensive decision in *Amnesty International and Others v Sudan*, the preparation of which included a mission to Sudan, the Commission finds numerous serious violations of the Charter and then adds a sentence which has become rather common in its later decisions, although a little reinforced this time: "[The Commission] [r]ecommends *strongly* to the Government of Sudan to put an end to these violations in order to abide by its obligations under the African Charter on Human and Peoples' Rights"(*italics added*).[67]

The decision in the case of Sudan is noteworthy for its good quality in many respects. First, and interestingly, the fact that the report of the mission to Sudan was adopted by the Commission, which also decided to publish the report, is stated in the decision.[68] This information has not been provided in the other decisions which also have been founded partly on the investigations of the Commission on the ground.

The publication of the mission report by the Commission is commendable from the point of view of human rights protection. It shows that the Commission has the courage to challenge the state in which the mission has taken place, which can be expected to be against the publication of the report. It is also commendable that the Commission itself makes the decision to publish the report, independently of the view of the OAU Assembly of HSG on the matter. As we know, the Annual Activity Report of the Commission is not published until the OAU Assembly has given the Commission the green light.[69]

Since the publication of the Activity Report is regulated in the Charter, it is more difficult for the Commission to get around the fact that it has to have the permission of the OAU Assembly for the publication of this report. The publication of mission reports is not regulated in the Charter, since the Charter does not specifically provide for missions. Thus it is (legally) easier for the Commission alone to decide to publish such a mission report, even if it may still be politically difficult for the Commission to do so.

A legal argument that could be invoked against the publication by the Commission of a mission report is the rule in the Charter saying that "[a]ll measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government [of the OAU] otherwise decide."[70] Since the missions

[67] Case 48/90, 50/91, 52/91, 89/93, *supra* footnote 42, conclusion.

[68] *Ibid.* at para. 26.

[69] Article 59(3) of the African Charter.

[70] Article 59(1). This sub-paragraph is similar to the corresponding provision in resolution 1503 (*cf. supra* ch. 3.1 footnote 4). It may be that the sub-paragraph in the African

of the Commission are partly undertaken as a reaction to communications alleging particularly serious human rights violations, it could be argued that the missions constitute a measure taken within the provisions of the chapter on individual ("other") communications in the Charter and that as a consequence the reports of the missions should be confidential until the OAU Assembly otherwise decide.

On the other hand, it could also be argued that the missions are also partly, or mainly, undertaken within the promotional mandate of the Commission.[71] As the first in the list of promotional activities of the Commission is "[t]o collect documents [and] undertake studies and researches on African problems in the field of human and peoples' rights."[72] This would seem to cover the missions by the Commission to investigate the human rights situation in different countries, including the further particulars of certain individual communications.

Often, individual communications spring from situations of more general unrest in the country concerned. By investigating the general human rights situation, the Commission also indirectly and almost necessarily investigates the more exact particulars of some individual communications. The general situation thus may be difficult to separate from the individual case; these two perspectives on the alleged human rights violations taking place are intimately intertwined. Against any claims for the confidentiality of mission reports, it could be argued that the mission takes place within the promotional mandate of the Commission and that any reference to individual communications is unavoidable because of the close relationship of the general with the individual situation.

If a mission of the Commission takes place specifically to investigate the more exact particulars of one or several individual communications, this argument is then more difficult to make. Since there seems to have been no protests on the part of the African states against the publication by the Commission of its mission reports to date, the Commission may perhaps count on this tolerance also extending to more "individualized" missions of the Commission.

If nothing else, the Commission could annex such "individualized" mission reports to its eventual decisions on the respective communications. The report then would be published simultaneously with the decision of the Commission as part of the Annual Activity Report of

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Charter is modeled upon the paragraph in resolution 1503, but the African Charter ended up being even stricter than resolution 1503: "8. [The Economic and Social Council] *[d]ecides* that all actions envisaged in the implementation of the present resolution by the Sub-Commission on Prevention of Discrimination and Protection of Minorities or the Commission on Human Rights shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council."

[71] *Cf.* Article 45 of the African Charter.

[72] Article 45(1)(a) of the African Charter.

the Commission, provided, however, that the OAU AHSG would permit this.

Another issue is that the Charter states that the Chairman of the Commission will publish the Annual Activity Report of the Commission after the OAU Assembly has considered it. The Charter does not explicitly state that the Assembly has to consent to the publication of the Activity Report, only that it be *considered* by the OAU Assembly. So far, however, this provision has been interpreted by the Commission as necessitating the consent of the Assembly for the publication of the Annual Activity Report. As long as the Commission receives the consent of the Assembly, which it always has to date, there are no problems. However, the question is what the Commission would do if the Assembly refused to accept the publication of a particular Activity Report, perhaps because it contains an embarrassing decision or mission report. The Commission could use the fact that the Charter only states "consider" in its favor if the Commission would want to argue that it is not dependent on the consent of the Assembly to the publication of its Annual Activity Report after all.

Second, and at least equally interestingly, the decision of the Commission in *Amnesty International and Others v Sudan* takes up the delicate issue of the narrower framework for the content of the (judicial) discussion set by the individual communication versus the broader viewpoints that the Commission would also like to convey with respect to the human rights situation in general in the country concerned, perhaps based on the experiences of a mission as in the case of Sudan.[73]

The reasoning of the Commission relating to this balancing act, in the case of Sudan, is worth quoting in full: "The Commission is cognisant of the fact that it has found many violations of the Charter on the part of the Government. In concrete terms, this shows that the citizens of Sudan have endured a lot of suffering. To change so many laws, policies and practices will of course not be a simple matter. However, the Commission must emphasize that the people of Sudan deserve no less. The government is bound by its international obligations and the Commission's findings are specific enough to permit their implementation. This decision does not constitute the Commission's viewpoint on the overall human rights situation in Sudan. It is based on the allegations of violations committed by Sudan after its ratification of the African Charter on Human and Peoples' Rights and on verifications carried out in this regard, while not failing to note that the situation has improved significantly."[74]

As we can see, the Commission emphasizes that it is not pronouncing itself on the overall human rights situation in Sudan, but only on verified

[73] *Cf. supra* footnote 47 and subsequent text.

[74] Case 48/90, 50/91, 52/91, 89/93, *supra* footnote 42, para. 83.

allegations of human rights violations in individual cases. The recommendation that Sudan put an end to these violations and that Sudan abide by its obligations under the Charter, by which the Commission ends its decision, is basically unnecessary, as in the earlier cases.[75] With or without any recommendation on the part of the Commission, Sudan is self-evidently legally bound to abide by its obligations under the Charter.

In spite of the fact that the Commission found Sudan guilty of a number of violations of the Charter, it would seem from the reasoning concerning the facts and merits of the case that the Commission could have found Sudan guilty on additional counts. It appears that Sudan had also violated the right to work, the right to health and the right to education.[76]

In the case of *Malawi African Association and Others v Mauritania,* the Commission is more detailed than previously in making recommendations to the Mauritanian government.[77] The Commission also finds that Mauritania has violated a large number of provisions of the Charter, even more than in the case of Sudan. Still, it would seem that the Commission could have found Mauritania guilty of having also violated the right to national (and international) peace and security.[78] In the text of the decision, but not in the conclusion, the Commission finds that the unprovoked attacks on villages – be they performed by rebel forces or the Mauritanian public forces – constitute a denial of the right to live in peace and security.[79]

After the statement concerning the numerous violations of the Charter, come not less than six different recommendations. At the end, the Commission also makes an addition to its recommendations that it has never made in the case of any previous recommendations. The Commission assures the Mauritanian State of its full co-operation and support in the application of the recommended measures; the question is whether the Commission can count on the co-operation of Mauritania. The Commission under any circumstances is prepared to take a very active part in the strengthening of human rights in Mauritania. The recommendations of the Commission to the Mauritanian government are:[80]

> "– To arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned.

[75] *Cf. supra* footnote 45.
[76] Articles 15, 16, and 17 respectively.
[77] Case 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, *supra* footnote 42.
[78] Article 23(1) of the Charter.
[79] Case 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, *supra* footnote 42, para. 140. The same would seem to apply to the case of Sudan.
[80] Case 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, *supra* footnote 42, conclusion.

– To take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation of the deprivations of the victims of the above-cited events.

– To take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations.

– To reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all the legal consequences appertaining thereto.

– As regards the victims of degrading practices, carry out an assessment of the status of such practices in the country with a view to identify with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication.

– To take appropriate administrative measures for the effective enforcement of Ordinance no 81-234 of 9 November 1981, on the abolition of slavery in Mauritania.

The Commission assures the Mauritanian State of its full cooperation and support in the application of the above-mentioned measures."

These are very detailed instructions from the Commission, also showing the seriousness of the crimes committed by Mauritania. The detailed instructions can be of help for a state with good intentions as to rectifying a bad human rights situation. Co-operation with the Commission could also be of great help as it has significant experience and knowledge of human rights and measures to protect human rights. The support and co-operation of the Commission will presumably mostly be moral and metaphysical considering the lack of resources by the Commission and its Secretariat. If the Commission had better resources, it could engage more actively in the important activities of following up and assisting in the implementation of its decisions.

Practically all of the decisions on the merits contained in the 14th Annual Activity Report of the Commission include recommendations to the state.[81] Several conclusions can be drawn from this. First, the Commission now regularly makes recommendations to the state party, which was not the case when the Commission began its practice. Second, in all the decisions on the merits in the 14th Annual Activity Report, the Commission finds that the state has violated the Charter, at least on some of the points alleged in the communication. This is illustrative of the fact that most of the cases that are tried on the merits result in a finding of a violation of the Charter by the Commission. Third, more and more cases are being tried on the merits as opposed to being declared inadmissible.

[81] *Cf. supra* ch. 3.2 footnote 45.

In the 14th Annual Activity Report, three out of twelve communications were found inadmissible. Nine were thus decided on the merits and in all of these cases the Commission was of the opinion that there had been violations of the Charter. All three communications that were declared inadmissible were rejected due to the lack of exhaustion of local remedies.

In *Avocats Sans Frontières v Burundi,* the Commission made the wide-ranging but certainly justified recommendation that Burundi, in addition to drawing all the legal consequences of the decision in this case, brings its criminal legislation in conformity with its treaty obligations emanating from the Charter.[82] There is nothing wrong with the Commission doing this, but perhaps general recommendations should be kept separate from the quasi-judicial procedure carried out with respect to individual communications as a matter of judicial policy. Certainly, as noted above, the promotional mandate of the Commission encompasses making recommendations to the governments.[83]

In *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso,* the Commission first recommends that the Republic of Burkina Faso draw all the legal consequences of the decision and then the Commission specifies the measures Burkina Faso which should take "in particular."[84] The kind of measures listed constitute rather obvious responses to the (serious) violations committed, but from a pedagogic point of view it may be a good idea to list the measures which indeed constitute a minimum for the state to take in order to rectify its human rights violations. The measures listed by the Commission in the case are:

> "– Identifying and taking to court those responsible for the human rights violations cited above;
>
> – Accelerating the judicial process of the cases pending before the courts; and
>
> – Compensating the victims of the human rights violations stated in the complaint."

The decision in *Legal Resources Foundation v Zambia* is particularly interesting because it contains a recommendation that constitutes a true procedural innovation and also a very useful one. The Commission urges Zambia to take the steps necessary to bring its laws and Constitution into conformity with the Charter and then "[r]equests the Republic of Zambia to report back to the Commission when it submits its next country report

[82] Case 231/99, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, conclusion.

[83] Article 45(1)(a) *in fine*.

[84] Case 204/97, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, conclusion.

in terms of Article 62 on measures taken to comply with this recommendation."[85] This request is an effective means of indirectly forcing Zambia to take the measures necessary or to face the risk of being shamed the next time it presents its state report. The Commission should use this way of pressuring the states to take the recommended measures more often.

[85] Case 211/98, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, conclusion.

10. The important role of the Courts

This chapter concerns that which the African Commission has said in its decisions concerning the role of the judiciary in African society, not so much the actual role as the role that the Commission thinks that the judiciary ought to play. The Commission regards the courts primarily from a human rights perspective, thus emphasizing the role of the courts in the protection of human rights. There are many laws other than those relating to human rights and many other roles that the judiciary can play in society other than that of protecting human rights, but the discussion here will be limited to the role of the courts in protection of human rights.

The absence of national courts, or the weaknesses within the existing national courts, is relevant to the individual communications procedure before the Commission in several respects. If the national courts functioned better, the communications probably would be of a better quality, as the issues raised would have passed through a number of national institutions before finally arriving at the Commission. If there were functioning national judiciaries, the Commission would not also have to perform the role of a court of first instance, a role that it explicitly does not wish to assume, and should not have to play. If there were functioning national courts, the Commission would then also have had reliable and important partners of co-operation in the different member states, in addition to the NGO:s, who would assist the Commission in carrying the Charter into effect. In the case of the courts, by the application of the national laws in accordance with the African Charter, as expounded by the Commission in its case law, significant assistance would have been rendered to the Commission.[1]

As no court originally was attached to the African Charter system, an alleged indication of the skepticism of the drafters of the Charter with respect to judicial methods for the resolution of disputes, the emphasis of the Commission on the judiciary is interesting. The members of the Commission may be lawyers, and thus particularly prone to sympathize

[1] *See further* Frans Viljoen, "Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa," *JAL*, vol. 43, 1999, pp. 1–17; *cf. also* Lone Lindholt, *Questioning the Universality of Human Rights. The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique*, 1997. In comparison *cf. further The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Ed. by Christof Heyns and Frans Viljoen, 2001.

with judicial methods for resolving conflicts, but they are also African, belying the argument often raised at the beginning of the Charter's existence that judicial methods for resolving conflicts are not in line with African culture. Perhaps instead strong judiciaries are, or were, not in line with the wishes of the African governments, which is different from the African culture.

As an aside, there is a reference to "the values of African civilization" in the preamble of the Charter which could have been a powerful tool in the hands of the Commission had it felt a need to reinterpret the basically Western human rights laid down in the Charter in an "African" way. The Commission, however, has chosen a different path. The Commission largely recognizes the applicability of traditional, Western, human rights in African society, while making some but surprisingly few practical or pragmatic concessions to the difficult circumstances reigning in many African countries.[2] And, as we will see more of below, the Commission likes courts. On the whole, the Commission has never to date in any decision made any reference to African culture as an argument for the inapplicability of the Charter, or that the right invoked in the communication would have to be modified in order to fit the African culture. On the contrary, the only time the Commission has referred to African culture in a decision so far is in *Constitutional Rights Project and Civil Liberties Organisation v Nigeria.* There it used the African legal culture in order to reinforce a "Western" way of interpreting the Charter: "The African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding its expression through the laws of each country. The government has conceded that the right to habeas corpus is important in Nigeria, and emphasised that it will be reinstated 'with the democratisation of society'."[3] The Commission also states that *habeas corpus* is a fundamental facet of common law legal systems. The issue in the case was whether *habeas corpus* was protected under Article 6 in the Charter, a protection that is not obvious. By

[2] The African Commission largely subscribes to that which Issa G. Shivji labels the dominant tendency – as opposed to the revolutionary tendency in human rights discourse, in *The Concept of Human Rights in Africa*, 1988. For a perspective sympathizing with Shivji's, *cf.* Brendalyn P. Ambrose, *Democratization and the Protection of Human Rights in Africa*, 1995. For a different, but critical perspective, *cf. also* Josiah A.M. Cobbah, "African Values and the Human Rights Debate: An African Perspective," *HRQ*, vol. 9, 1987, pp. 309–331; for another perspective *cf.* Thomas M. Franck, "Is Personal Freedom a Western Value?," *American Journal of International Law*, vol. 91, 1997, pp. 593– 627; for a reconciling perspective, *cf.* Bonny Ibhawoh, "Between culture and constitution: evaluating the cultural legitimacy of human rights in the African state," *HRQ*, vol. 22, 2000, pp. 838–860; and Lakshman Marasinghe, "Traditional Conceptions of Human Rights in Africa," in *Human Rights and Development in Africa*, ed. by Claude E. Welch, Jr., and Ronald I. Meltzer, 1984, pp. 32–45.

[3] Case 143/95, 150/96, decision of 15 November 1999, para. 26. *Habeas corpus* allows the claim for release of someone kept in detention.

interpreting the Charter in a "culturally sensitive way" with Nigerian law as the point of reference, the Commission came to the conclusion that the right to *habeas corpus* was indeed included in Article 6. Hopefully, the Commission only allows local legal traditions to have this important influence on the way in which it interprets the Charter when the local traditions extend a stronger protection of human rights than the Charter itself. On the other hand, interpreting the Charter in a way sensitive to the differing legal traditions in the different party states appears to be a good solution given the great variety of legal traditions in Africa.

There are many other means of carrying the protection of human rights into effect, of course, other than the ordinary national courts, including other kinds of judicial or quasi-judicial means. There are international institutions too, for instance, such as the Commission, which is not a judicial body properly speaking but a quasi-judicial one as its decisions are not legally binding for the state concerned. Bold as it is in its interpretation of the Charter, the Commission itself has come to the conclusion that its decisions are in fact legally binding on the states concerned, but this conclusion, as noted earlier, even if interesting is not correct.[4] As was noted in the beginning of this study, there is an African Court of Human and Peoples' Rights in the making as well. Its statute was adopted by the OAU in 1998, but to date the statute has not been ratified by enough states to enter into force.[5]

On the national level, there may also be quasi-judicial institutions of different kinds engaged in the protection of human rights, such as the national commissions for human rights, more or less independent from the Government.[6] There may also be other mechanisms for dispute resolution concerning human rights other than the courts, including customary ones, which may be just as effective, or more, considering the poor state of the judiciary generally on the African continent. The Commission has not had reason to address the roles of institutions other than the courts in the context of human rights protection.

On the international level, there are numerous quasi-judicial institutions for the protection of human rights other than the Commission, most well known is the UN HRC'ttee which receives individual communications concerning violations of the UN CCPR. This is also a venue for Africans who want to make complaints concerning human rights violations. There are several other more specialized bodies on the global level that oversee the application of different human rights conventions and receive individual complaints, but we will not go deeper into that subject here. Naturally, there are also the regional Inter-American Commission and Court of Human Rights, as well as the European Court of Human Rights.

[4] *Cf. supra* ch. 9 footnote 12.
[5] *Cf. supra* ch. 2.6 footnote 42.
[6] *Cf. supra* ch. 2.1.1 footnote 3.

It may be interesting to recall, connected to the discussion of the African cultural element of the Charter, that the Commission is greatly inspired by the decision-making in both the regional and the global systems for the protection of human rights: Their decisions are sometimes quoted in the decisions of the Commission and representatives of all three regional mechanisms meet regularly in order to discuss common problems relating to the individual communications procedure.[7]

The Charter itself is quite resolute on the subject of the role of the courts. The Charter states that the "[s]tates 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."[8] In addition, the Charter establishes the right to have one's cause heard, which includes, among other things, the right to appeal to "competent national organs" and the right to be tried by an "impartial court or tribunal," both of which criteria have been commented upon by the Commission in its decisions.[9]

Articles 7 and 26 overlap on one point, namely in that they both stress the impartiality and the independence of the courts respectively. This of course is one of the fundamental aspects of a court in order for it to function as a true court and not as a prolongation of the executive branch. Incidentally, it is also an aspect of the Commission itself that has often been mentioned by the Commission.

In one of the first in a row of cases where the Commission has had occasion to pronounce on the role of courts in society, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, the Commission stated that the "ouster clauses," discussed earlier in this study, created a legal situation in which the judiciary could not provide a check on the executive branch of government.[10]

The Commission seems to consider the ability of the courts to exercise a check on the executive branch of government to constitute a fundamental characteristic of a society governed by the rule of law. This statement was made within the context of determining whether it was possible to exhaust local remedies before turning to the Commission, which the Commission found it was not. The statement however has wider implications in favor of a strong judiciary.

The Commission has later explicitly used the term "rule of law" in the context of a slightly different discussion than the one in which the role of the judiciary was discussed in the Nigerian case just cited. The

[7] *Cf. supra* ch. 3.2 and ch. 2.1.2 footnote 15 respectively.
[8] Article 26 of the Charter.
[9] Article 7 (1) (a) and (d) of the Charter respectively.
[10] Case 102/93, decision of 31 October 1998, para. 41. On ouster clauses *cf. supra* ch. 4.1 footnote 43 and following.

term "rule of law" was used by the Commission in *Amnesty International and Others v Sudan* while considering the fact that there is no derogation clause in the Charter.[11] This in itself is a very interesting and progressive trait in the Charter, which will not be discussed further here. A derogation clause permits the parties to a human rights convention to suspend the effect of certain articles in the convention during times of emergency or civil war.

In the case against Sudan, the Commission stated that "[t]he legitimate exercise of human rights does not pose dangers to a democratic state governed by 'the rule of law'."[12] Only recently, the Commission has started making explicit references also to "democracy" in its decisions. There is no reference to the demands of democracy in the Charter, nor is there any explicit reference to "the rule of law."

The position of the Commission on the role of courts is gratifying from the point of view of the law and the protection of human rights. It can also be noted that in Western democracies, it may be doubtful whether the judiciary provides an effective check on the executive branch of government.

Another statement of principle made by the Commission on the role of courts probably is favorable to the cause of human rights, but may be a bit too far-reaching. The Commission states in *Media Rights Agenda v Nigeria* that "Special Tribunals should not try offences that fall within the jurisdiction of regular courts."[13] This statement was made in the context of a discussion of trial by military tribunals, but the Commission phrases its statement in general terms. If the Commission solely refers to military tribunals and states that military tribunals should not try ordinary offences, the statement does not have the far-reaching implications referred to above. If, on the other hand, the Commission meant that which it stated, namely that special tribunals generally shall not have jurisdiction over matters that fall within the jurisdiction of regular courts, then there is not much room for special tribunals on the whole. At times, special tribunals can consider matters of labor law, commercial law, tenancy rights, just to name a few examples that are not particularly controversial. Perhaps the Commission's statement was only meant to concern special *military* tribunals.

If this is what the Commission meant, then it was arguing that the establishment of special military tribunals to try issues falling within the jurisdiction of the regular courts comes close to having the same effect as the "ouster clauses" condemned many times by the Commission as explicitly removing the jurisdiction of the regular courts from different

[11] Case 48/90, 50/91, 52/91, 89/93, decision, probably, of 11 May 2000 (the decision is not dated), para. 79.

[12] *Ibid.*

[13] Case 224/98, decided at the 28th Session of the African Commission, 23 October–6 November 2000, para. 62.

matters.[14] In *Media Rights Agenda v Nigeria*, the Commission does not mention the term "ouster clause," but the facts seem to come close.

In another case, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, the Commission commented on the complaint that the "ouster clauses" denied the alleged victims the right to challenge the acts affecting them, commenting in particular on the defense invoked by the Nigerian government, pertinently called "surprising" by the Commission, that "'[i]t is in the nature of military regimes to provide for ouster clauses,' because without such clauses the volume of litigation would make it 'too cumbersome for the government to do what it wants to do'."[15]

In answer to this the Commission states the following: "This argument rests on the assumption that ease of government action takes precedence over the right of citizens to challenge such action. It neglects the central fact that the courts are a critical monitor of the legality of government action, which no lawful government acting in good faith should seek to evade. The courts' ability to examine government actions and, if necessary, halt those that violate human rights or constitutional provisions, is an essential protection for all citizens."[16] This is a very strong and very important statement of principle on the part of the Commission in favor of the role of the courts.

After having stated further that "[g]overnment by force is in principle not compatible with the rights of peoples to freely determine their political future,"[17] the Commission says "[a] government that governs truly in the best interest of the people, however, should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law."[18] After this, the Commission held that the ouster of the courts' jurisdiction violates the right to have one's cause heard under Article 7(1).[19]

In this case, the Commission does not mention Article 26 of the Charter, which would also appear to be violated by the ouster of the jurisdiction of the courts on a large scale.[20]

The connection between Articles 7 and 26 is made in another deci-

[14] *Cf. supra* ch. 4.1 footnote 43 and following.

[15] Case 105/93, 128/94, 130/94, 152/96, decision of 31 October 1998, para. 78.

[16] *Ibid.* at para. 79.

[17] *Ibid.* at para. 80. *Cf.* the right to self-determination in Article 20 of the African Charter.

[18] *Ibid.* at para. 81.

[19] *Ibid.* at para. 82.

[20] Neither is Article 26 mentioned in the case of *Civil Liberties Organisation and Others v Nigeria* where it would seem rather obvious that Article 26 has been violated, as well as Article 7 which is cited (case 218/98, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001).

sion by the Commission, in *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria*. The Commission correctly stated that "[t]he right [of] the individual in Article 7 must be met by the duty of the government to provide the structures to enable the right to be exercised. By failing to provide courts which operate independently of the executive the Government of Nigeria has violated Article 26."[21]

A little more specifically, the Commission found, concerning another communication against Nigeria, *Constitutional Rights Project v Nigeria*, that for the same reason that Article 7(1)(d) was violated because the tribunal in question could not be considered impartial, "the State has failed in its duty to ensure the independence of the courts and, as such, has violated Article 26."[22] Thus, according to this decision by the Commission, if Article 7(1)(d) is violated because of a lack of impartiality, Article 26 is automatically also violated.[23]

In its decision relating to Malawi, *Krishna Achutan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi*, the Commission discusses another aspect of the judiciary, namely that the courts shall not only be impartial but also competent.[24] The Commission describes the kind of court in Malawi by which two of the complainants were tried: "The traditional courts in Malawi [...] are composed of judges that are not required to have any legal training and cases can be brought on government directives. The ordinary rules of evidence are not applicable and judges do not have security of tenure."[25]

The Commission continues: "Under Articles 7.1.a and c [of] the African Charter, individuals have a right to be tried not only by a court that is impartial, but also one that is competent.[26] Although Article 26 does not explicitly state the requirement that states should ensure that courts are competent, this follows from the other Articles and the spirit of the Charter. To fail to ensure that judges have legal training and that rules of evidence are applied illustrates that the government has neglected its duty to provide courts that are of a sufficient competence to satisfy Article 26 of the Charter."[27]

[21] Case 87/93, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994, para. 33.

[22] Case 60/91, decision of 3 November 1994, para. 39.

[23] *Cf. also* case 224/98, *Media Rights Agenda v Nigeria*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 66; and case 225/98, *Huri-Laws v Nigeria*, decided at the 28th Ordinary Session of the African Commission, 23 October–6 November 2000, para. 46.

[24] Case 64/92, 68/92, 78/92, decided at the 16th Ordinary Session of the African Commission, 25 October–3 November 1994, para. 45; Article 7(1)(a) of the African Charter.

[25] *Ibid.* It is not clear what the term "traditional" means in this context. It may mean "normal" or "ordinary" or it may mean courts based on custom and customary law.

[26] It is unclear to this author why the Commission also refers to sub-paragraph 7(1)(c) in this context since competence is only explicitly mentioned in sub-paragraph 7(1)(a).

[27] Case 64/92, 68/92, 78/92, *supra* footnote 24, para. 46.

This is also a strong and important statement by the Commission on the quality of the courts that the state parties to the Charter are under the obligation to provide.

In line with and developing a little upon its previous pronouncements on the state of lawlessness then prevailing in Nigeria, the Commission in *Civil Liberties Organisation v Nigeria* makes the following highly critical statement on the subject of the Constitution (Suspension and Modification) Decree No. 107 of 1993, which in addition to suspending the Constitution with a view to the future also specified that no decree promulgated after December 1983 could be examined in any Nigerian court: "The ousting of [the] jurisdiction of the courts of Nigeria over any decree enacted in the past ten years, and those to be subsequently enacted, constitutes an attack of incalculable proportions on Article 7 ... An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed."[28]

Then comes an almost passionate, and justified, appeal in favor of the courts in human rights protection: "While Article 7 focuses on the individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions the protection of *the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of state power* (*italics added*)."[29]

The important role of the courts in human rights protection can hardly be stated in stronger terms than this. The fact that most African states willingly or unwillingly lack effective judiciaries then stands out as an all the more serious deficiency in the African system for the protection of human rights at large.

In its most recent decisions, the Commission continues along the same lines, pleading for the cause of the African courts, mostly Nigerian as it were, but also for other countries.

The situation in *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* was particular in that the Nigerian government forestalled the outcome of pending court proceedings by issuing decrees proscribing the newspapers and magazines on trial from being published and circulated for a six month period which could be further extended.[30] The Commission found violations of several Articles in the Charter.

On the subject of the role of the courts, the Commission stated the following: "To have a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction

[28] Case 129/94, decided at the 17th Ordinary Session of the African Commission, 13–22 March 1995, para. 17.

[29] *Ibid.* at para. 19.

[30] Case 140/94, 141/94, 145/95, decision of 15 November 1999, para. 12.

being exercised by competent national organs. A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favor. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequence for the protection of individual rights. Citizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights."[31]

In *Civil Liberties Organisation v Nigeria,* which related to an alleged plot to overthrow by force the Federal Military Government of Nigeria with resulting secret trials and life-long detention under inhuman and degrading conditions for the accused criminals, the Commission again took advantage of the opportunity to elaborate its view on the important role of the courts.[32]

First, the Commission commented once again on the insidious ouster clauses. The Commission referred back to the row of decisions it had already taken concerning the situation in Nigeria. "In all of the above-cited cases," the Commission stated, "the ouster clauses in addition to being prima facie evidence of admissibility, were found to constitute violations of Article 7. The Commission must take this opportunity, not only to reiterate the conclusions made before, that the constitution and procedures of the special tribunals violate Articles 7(1)(a) [the right to appeal to competent national organs] and (c) [the right to defence] and 26, but to recommend an end to the practice of removing entire areas of law from the jurisdiction of the ordinary courts."[33]

The Commission then in a highly interesting and important manner from the point of view of principles, refutes the argument of the Nigerian government that as a developing country Nigeria cannot afford a full court system. The position taken by the Commission on the issue of courts *versus* development is evidently of great significance for the entire African continent.[34]

All the better from the point of view of the law and the protection of human rights, the Commission clearly took sides with the courts and did not consider the Nigerian argument that there were not enough resources in order to maintain a functioning regular court system valid.

Since all the members of the Commission are African lawyers, it cannot be claimed that this view has been forced upon the African human rights system from the outside.

[31] *Ibid.* at para. 33.

[32] Case 151/96, decision of 15 November 1999.

[33] *Ibid.* at para. 17.

[34] On the issue of human rights *versus* development *cf. supra* ch. 4.1 footnote 34 (case 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, decided at the 20th Ordinary Session of the African Commission, 21–31 October 1996, para. 34) and case 159/96, *Union Inter-Africaine des Droits de l'Homme and Others v Angola*, decision of 11 November 1997, para. 16.

The Commission states that "[i]n oral statements before the Commission, the Nigerian Government has claimed that 'as a developing nation, we do not have enough resources to man these law courts very well.' ... This was given as a justification of 'special' tribunals. Another justification given was that a breakdown of law and order had caused a high volume of cases ..."[35]

The Commission continues critically: "The Commission's previous decisions found that the special tribunals violated the Charter because their judges were specially appointed for each case by the executive branch, and would include on the panel at least one, and often a majority, of military or law enforcement officers, in addition to a sitting or retired judge."[36] Further, the Commission found that "[t]he system of executive confirmation, as opposed to appeal, provided for in the institution of special tribunals, violates Article 7(1)(a) [the right to appeal]."[37]

And, most importantly, from the point of view of the issue of whether developing countries are also under the obligation to provide their citizens with a functioning court system, the Commission concludes "[i]f the domestic courts are overburdened, which the Commission does not doubt, the Commission recommends that Government consider allocating more resources to them. The setting up of a parallel system has the danger of undermining the court system and creates the likelihood of unequal application of the laws."[38] If the resources are lacking, it would seem better to allocate the scarce resources to the already existing court system than to create a parallel system, with all the resources it will consume, just as the Commission observes. The reason as to why the Nigerian Government in this case set up a parallel system of tribunals is probably more that it does not like independent courts than that it cannot afford them.

In *Constitutional Rights Project v Nigeria,* the Commission had reason to develop its views in detail as to the elements which constitute a court, or at least a "competent national organ" under Article 7(1)(a).[39] In contrast to the other cases involving Nigeria, there were no political components in this communication, which was submitted on behalf of a number of persons, accused of "ordinary" offences, even if serious, ranking from armed robbery to kidnapping.[40]

[35] *Ibid.* at para. 18

[36] *Ibid.* at para. 21; the Articles in the Charter invoked by the Commission are Article 7(1)(d) on the right to be tried by an impartial court and Article 26 on the independence of the courts.

[37] *Ibid.* at para. 22. The tribunal's decision was only subject to confirmation by the Provisional Ruling Council, the highest decision making body of the military government (para. 2 of the Commission's decision).

[38] *Ibid.* at para. 23. *Cf.* the comment by the Commission on the burdens of colonialism, *supra* ch. 4.1 footnote 34.

[39] Case 153/96, decision of 15 November 1999.

[40] *Ibid.* at para. 1.

The Commission comments on the State Security (Detention of Persons) Act: "Persons may be detained indefinitely if the detention is reviewed every six weeks by a panel of nine persons, six of whom are appointed by the president, the other three being the Attorney-General, the Director of the Prison Service, and a representative appointed by the Inspector-General of Police. The panel does not have to agree that continued detention is necessary: the detention will be renewed unless the Panel is satisfied that the circumstances no longer require the continued detention of the person."[41] The Commission then observes that the detainees were arrested between May and June 1995, "nearly two years ago."[42]

By the time of the decision of the Commission, four and a half years had passed since the arrest of the detainees. The Commission states that "[t]here is no evidence that they have been tried or even charged," which must be interpreted to mean that even as long as four and a half years after the arrest of the victims of the alleged violation of the Charter they had still not been tried or charged.

The Commission states further, "[e]ven if the required reviews of detention as provided for by the Act, are being held, the Panel which conducts the review cannot be said to meet judicial standards as [a] majority of its members are appointed by the President (the Executive) and the other three are also representatives of the executive branch. The Panel does not have to justify the continued detention of individuals, but only issue orders in the case of release."[43]

The Commission concludes that "[t]his Panel cannot thus be considered impartial. Consequently, even if recommendations from the meetings of this Panel are responsible for the detainees' continued detention, this detention must be considered arbitrary, and therefore in violation of Article 6."[44]

As to the competence of the Panel, the Commission is equally skeptic, and rightly so: "The meetings of the Review Panel cannot be considered a competent national organ. Since it appears that the right to file for habeas corpus is also closed to the accused individuals, they have been denied their rights under Article 7(1)(a)."[45]

Another case against Nigeria, *Centre for Free Speech v Nigeria*, also concerned, *inter alia*, the composition of the military tribunal trying and convicting a number of journalists for having reported stories on the al-

[41] *Ibid.* at para. 13.

[42] *Ibid.* at para. 14. It is unclear as to what "nearly two years ago" refers. If the point of departure is the time when the decision was made by the Commission (1999), it should be "more than four years ago" that the detainees were arrested (1995).

[43] *Ibid.* at para. 15.

[44] *Ibid.* at para. 16.

[45] *Ibid.* at para. 18.

leged coup attempt in 1995.[46] Using a mild understatement the Commission found that "[i]t could not be said that the trial and conviction of the four Journalists by a Special Military [T]ribunal presided over by a serving military officer who is also a member of the PRC [probably the Provisional Ruling Council], the body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the Charter."[47] The Commission also finds a violation of Article 26 of the Charter by the lack of guarantees of a fair hearing.[48]

In *Sir Dawda K Jawara v The Gambia*, mentioned earlier, the Commission also eloquently pronounces on the important role of the courts in human rights protection: "The rights and freedoms of individuals enshrined in the Charter can only be fully realised if governments provide structures which enable them to seek redress if they are violated. By ousting the competence of the ordinary courts to handle human rights cases, and ignoring court judgements, the Gambian military government demonstrated clearly that the courts were not independent. This is a violation of Article 26 of the Charter."[49]

In *Amnesty International and Others v Sudan,* the Commission dwelt at great length on the issue of the role of the judiciary, of which almost nothing was left in Sudan.[50]

The Commission states a number of important principles as to the role of the courts. The Commission begins by stating as to the general issue of the right to have one's case heard under Article 7 items (a)–(d): "All of these provisions are mutually dependent, and where the right to be heard is infringed, other violations may occur such as detentions being rendered arbitrary. Especially sensitive is the definition of 'competent', which encompasses facets such as the expertise of the judges and the inherent justice of the laws under which they operate."[51]

Pronouncing on the arbitrary execution of twenty-eight army officers, the Commission states: "It is not sufficient for the government to state that these executions were carried out in conformity with its legislation. The government should provide proof that its laws are in accordance with the provisions of the African Charter, and that in the conduct of the trials the accused's right to defence was scrupulously respected. In this

[46] Case 206/97, decision of 15 November 1999. *Cf.* case 151/96, *supra* footnote 32, for the trial and conviction of those accused of plotting to overthrow the military government.
[47] Case 206/97, *ibid.* at para. 16.
[48] *Ibid.*
[49] Case 147/95, 149/96, decision of 11 May 2000, para. 74.
[50] Case 48/90, 50/91, 52/91, 89/93, *supra* footnote 11. *Cf. also* case 204/97 *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, decided at the 29th Ordinary Session of the African Commission, 23 April–7 May 2001, in which the issues of the subordination and the corruption of judges constitute a portion of the claims.
[51] Case 48/90, 50/91, 52/91, 89/93, *ibid.* at para. 62.

case, the very fact that the accused's choice is subject to the assent of the [Special] Court before which he is to appear constitutes a violation of the right to be represented by counsel of one's choice, as provided for in article 7 of the African Charter ..."[52]

On the subject of the closely related Article 26 the Commission states that "[t]he government confirms the situation alleged by the complainants in respect of the composition of the Special Courts. National legislation permits the President, his deputies and senior military officers to appoint these courts to consist of 'three military officers or any other persons of integrity and competence'. The composition alone creates the impression, if not the reality, of lack of impartiality and as a consequence, violates Article 7.1(d). The government has a duty to provide the structures necessary for the exercise of this right. By providing for courts whose impartiality is not guaranteed, it has violated Article 26."[53]

On the important role of competent judges, the Commission continues: "The dismissal of over one hundred judges who were opposed to the formation of special courts and military tribunals is not contested by the government. To deprive courts of the personnel qualified to ensure that they operate impartially thus denies the right to individuals to have their case heard by such bodies. Such actions by the government against the judiciary constitute violations of Articles 7.1(d) and 26 of the Charter."[54]

Another interesting aspect of the role of the courts particular to Sudan (and any other country applying Islamic law) is the application of the Shari'a law. The Commission states: "There is no controversy as to Shari'a being based upon the interpretation of the Muslim religion. When Sudanese tribunals apply Shari'a they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish."[55]

This also indirectly constitutes an important declaration of principle as to the cultural relativity of human rights, or rather their non-relativity according to the Commission. When the courts in an African country apply Shari'a, they must do so in accordance with any other existing international obligations in the field of human rights, among other fields the Commission finds, neither more nor less.

[52] *Ibid.* at para. 66. The right to be defended by a counsel of one's choice is laid down in Article 7(1)(c).
[53] *Ibid.* at para. 68.
[54] *Ibid.* at para. 69.
[55] *Ibid.* at para. 73.

The Commission gives the definite impression, despite the reference to African civilization and its historical tradition in the preamble of the Charter, that it would not be impressed by cultural relativist arguments when these would restrict the states' human rights undertakings, which is usually the case with cultural relativist arguments when put forward by state representatives.[56]

In *Malawi African Association and Others v Mauritania*, finally, the Commission also had reason to pronounce on the important role of impartial courts.[57] There were a number of faults with the criminal procedure applied during the trials of the victims in the Mauritanian case.[58]

As far as the constitution of the "court" itself was concerned, it suffered from numerous faults, indeed there was nothing correct as to the "court" involved. The court itself was a "Special Tribunal" staffed exclusively by military men.[59] Within the Special Tribunal there was a special section responsible for matters relating to state security.[60] The state security section was headed by a senior military officer who is not required to have legal training.[61] The Commission found: "Withdrawing criminal procedure from the competence of the Courts established within the judicial order and conferring onto an extension of the executive [sic] necessarily compromises the impartiality of the Courts, to which the African Charter refers. Independent of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principles of impartiality and independence of the judiciary ..."[62]

Concerning the state security section and Article 26 in particular, the Commission finds that "[b]y establishing a section responsible for matters relating to State security within the Special Tribunal, the Mauritanian State was reneging on its duty to guarantee the independence of the courts."[63]

[56] The reasoning of the Commission would seem to fulfil the hopes that the Commission only takes local culture into account when this serves to strengthen the human rights protection of the Charter; *cf. supra* footnote 3 and subsequent text. In the Introduction to its Mauritius Plan of Action 1996–2001 the Commission writes that "[t]he *universal* character of human rights requires close collaboration between the African Commission and its partners within and outside Africa" (*italics added*). In case 102/93, *supra* footnote 10, para. 48, the Commission states that "[a] basic premise of international human rights law is that certain standards must be constant across national borders, and governments must be held accountable to these standards." Universalism thus seems to be the definite human rights ideology of the African Commission.

[57] Case 54/91, 61/91, 96/93, 98/93, 164-196/97, decision of 11 May 2000.

[58] Some of these have been discussed *supra* in the context of admissibility and the exhaustion of local remedies, *cf.* ch. 4.1 footnote 56.

[59] Case 54/91, 61/91, 96/93, 98/93, 164-196/97, *supra* footnote 57, para. 98.

[60] *Ibid.*

[61] *Ibid.*

[62] *Ibid.*

[63] *Ibid.* at para. 100.

After having studied all these cases, consisting of serious violations of Article 26 of the Charter, among others, conducted by unscrupulous regimes, one may ask oneself why some of these governments even pretend that the conduct regular court proceedings under an acceptable, if not regular, set of laws. Even the worst of regimes establish special tribunals that render judgements in accordance at least with governmental decrees, if not laws, promulgated in some orderly fashion. One could ask why these regimes bother with the appearances, why they do not just put their opponents in prison on the spot and then kill them, as these governments usually end up doing anyway after some more or less phony criminal procedure.

Most African regimes, even the most terrible ones, seem to want to give the impression that their countries are governed by the rule of law and that this rule is administered by a system of (relatively) independent courts. One may wonder why this is so.

Perhaps the arbitrary exercise of pure power is also frightening to the cruelest of military dictators. This might explain why even these regimes pretend to be acting under the law.

These regimes perhaps instead would like to exercise power freely and arbitrarily, but believe that the people would not accept a completely arbitrary rule. The dictators therefore pretend that there is some law governing the state and that this law is upheld by the courts in order to keep the people from general insurrection.

It perhaps may also be a question of international public relations. Military dictators wish to make as good an impression as they can on the surrounding world, which may be useful with respect to issues such as trade and development assistance (even if the surrounding world may also be rather unscrupulous in these respects).

Perhaps, alternatively, even military dictators are aware of and even think that states should be governed by the rule of law and that this law should be applied by independent courts and this might be the reason why they care to pretend that their states fulfill such criteria. They seem to want to be able to justify their action with the rule of law language.

If the "inner vision" of a good regime is one of the "rule of law" in a genuine sense, even among the many terrible dictators who have been accused of the most horrendous crimes in the communications to the Commission, this is at least a starting-point. It indicates the existence of some form of conscience on the part of the leaders, which is not much but still a better position to start from for the Commission than a complete lack of such conscience.

The Commission may even through the case-law in some ways be able to influence the opinions of the leaders in Africa, on the role of courts and on other matters relating to the rule of law and the protection of human rights. This study is based on that presumption. On an even

more fundamental level, the study is based on the presumption that the system of laws and the judicial and quasi-judicial, national and international institutions entrusted with its implementation have an important role to play in society.[64]

[64] *Cf. also* for instance *State and Constitutionalism. An African Debate on Democracy*, Ed. by Issa G. Shivji, 1991; The Evolving African Constitutionalism, Special Issue, *The Review of the International Commission of Jurists*, No. 60, June 1998; Okechukwu Oki, "Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa," *Vanderbilt Journal of Transnational Law*, vol. 33, 2000, pp. 573–644.

11. Conclusion

The African Commission has interpreted its mandate and the African Charter in a bold and imaginative way. The Commission has created a mechanism for the consideration of individual communications comparable to the ones used by other similar treaty bodies, regional and global. It has solved a large number of initial procedural issues in a creative and sensible way, for instance with respect to the severity of the application of a requirement of exhaustion of local remedies. The Commission's decisions generally are better argued and better written today than they were in the beginning of its existence.

The way in which the Commission has solved its procedural problems can also be called pragmatic. From a normative point of view, the solutions chosen by the Commission are almost surprisingly characterized little by African culture or values, but rather tend to be adapted to the practically difficult circumstances reigning generally in Africa on the ground.

Despite its great progress, it would seem as if the Commission still has a lot to learn from, or let itself be inspired by, the way communications are handled and decisions are drafted in the other international systems for the protection of human rights. The Commission has already shown an unrivalled openness with respect to the practice of other human rights bodies and it would seem to be in the Commission's own interest to retain its open attitude. The other regional systems for the protection of human rights should be the most natural sources of inspiration. Nothing in the practice of the Commission suggests that the Commission is of the view that the human rights problems or solutions in Africa have more an African than a universal nature.

The time seems ripe for the Commission to start drafting its decisions in an even more stringent way, more reminiscent of the way in which decisions are drafted in the corresponding systems elsewhere. The decisions need to be clearer both in substance and form. Well written decisions would make it easier for all those interested in the case-law of the Commission to learn the Commission's attitudes towards different provisions in the Charter. To draft the decisions more stringently would seem to be a relatively easy and cheap method of spreading the message of the Commission in Africa and around the world. A higher degree of consist-

ency between the different decisions of the Commission would also be desirable both as concerns style and contents.

The time also seems ripe for the Commission to manage the procedure for the consideration of individual communications in a more stringent manner from a practical point of view. True, the time it takes for a communication to be processed by the Commission from the beginning to the end has decreased, but it still seems as if the Commission is too lax, for instance in allowing time limits to be repeatedly exceeded by the parties, just to give one example of factors prolonging the procedure before the Commission and ultimately risking an erosion of the respect for the Commission. Another such factor would be the postponing of decisions by the Commission on individual communications from Session to Session, only explained by a "lack of time" in the final decision when it eventually arrives. Also, the intricate and in all probability unnecessarily time-consuming manner in which the handling of the communication is opened by the Commission, with the decision on receivability preceding the decision on admissibility, is a factor which impairs the procedure for handling individual communications by the Commission.

Unfortunately, the party states disrespect the Commission's decisions on individual communications. However, there is still hope for the Commission if it remains respected by the individual citizens, if not by the states. The Commission is dependent on communications coming in and should to its utmost make its own procedure as expedient as possible. The individual communications are the fuel of the Commission's protective activities.

There is reason to believe that the states find it embarrassing to be found guilty of violations of the Charter, even if they do not pretend to follow the recommendations of the Commission. In the long run, thus, it is meaningful to send communications to the Commission even if the states currently do not respect its decisions, because there is reason to believe that in time they will. It is therefore crucial that the persons potentially bringing communications to the Commission are not discouraged by flaws in the Commission's own procedure. There seems to be sufficiently enough discouraging factors outside of the Commission to make people doubt whether it is meaningful to turn to the Commission with their grievances.

Inversely, if the procedure with the Commission is viewed as speedy and effective, and if the Commission's keeps up the rather critical stance towards the governments which it has developed over the years, more people than today may be induced to turn to the Commission with their complaints. The more communications that reach the Commission, the more important it will become. And, at least that is one of the hypotheses of this study, the harder the pressure will become on the states to actually follow the Commission's recommendations.

Outside powers, and the OAU/AU for that matter, could be of great assistance in putting pressure on the African states to follow the Commission's decisions and the Charter generally. Outside powers could make it a condition for trade and aid that the African states to carefully implement the Charter and that they follow the Commission's recommendations in cases where they still are found guilty of violations of the Charter. Outside powers could bring up the Charter in political and diplomatic contacts with the African states. Since the Charter is a regional human rights convention and has been ratified by all the members of the OAU/AU at that, the Charter should be the most obvious human rights instrument to be brought up by outside powers in their contacts with African states. Bringing up the Charter should not be as controversial as bringing up any other international human rights instrument, as the latter could be claimed to be of Western origin and therefore inherently alien or imperialistic.

The OAU/AU could assist the Commission in countless ways in getting the African states to fulfil their obligations under the Charter in general and more specifically to comply with the recommendations adopted by the Commission in individual cases. There are signs that the fear of interference in that which has earlier been considered to belong to the internal affairs of states is decreasing within the OAU/AU. This, in combination with what seems to be a stronger commitment to human rights on the part of the OAU/AU, inspires hope for the future.

The remaining complications in the procedure for handling individual communications give rise to ideas not only for action but also for research. More comparative studies of the international human rights implementation mechanisms generally and comparisons between the regional systems for the protection of human rights in particular would seem useful both theoretically and from a practical point of view. Also, more research on the national aspects of human rights protection both before and after the procedures before the Commission would seem essential.

After the proceedings have been concluded before the Commission, there is the problem of the lack of execution of the Commission's recommendations. On that point, research into the problem of how to make states follow such recommendations would seem necessary. Ideas as to the enforcement of the Commission's decisions could probably also be obtained from comparative studies with the other systems for the protection of human rights. Before the communication is potentially filed with the Commission, there is the issue of the national judiciaries in the different African countries as well as whether these local courts can actually carry out the bulk of the legal groundwork involved in enforcing the respect for human rights. The national level of course is indispensable to any sustainable system for the protection of human rights. More research into the current state and capacity of the national judiciaries in Africa would

seem necessary in this respect as well as research into ways of creating stronger and better functioning national judiciaries.

In this context, it would seem useful to inquire into whether customary institutions for dispute settlement would be suitable at all for matters concerning human rights, and if so, to what extent they could be utilized for purposes of human rights enforcement. The role that institutions other than courts can play in human rights protection should also be investigated, as the national commissions on human rights established in more and more African countries. If customary institutions are engaged in human rights protection, an advantage would seem to be that the concept of universal human rights is mixed with customary law conceptions and that thereby perhaps the two systems of thought can somehow amalgamate, at least on certain points, for the benefit ultimately of human rights.

Considering the still relatively poor state of the procedure for the consideration of individual communications before the Commission and the huge proportions of the human rights problems in Africa, one possible conclusion of this study could have been that the Commission should turn away from the protective aspects of its mandate and concentrate on the promotion of human rights instead. This, however, is not the conclusion drawn here. On the contrary, the conclusion of this study is that the protective mandate of the Commission is indispensable to its function as the guardian of the Charter, and that it is the decisions of the Commission on individual communications, if anything, which have any prospects of troubling the offending states to the degree that they may change their human rights policies. It is only the protective measures of the Commission which have any bite in relation to the party states. Indeed, one could go so far as to claim that the protective parts of the mandate of the Commission constitutes its fundamental *raison d'être*. Although important in the long run for building up a human rights consciousness among the African population, the purely promotional efforts of the Commission are basically harmless to the states. To the benefit of the Commission's protective activities, in addition it can be stated that the Commission's decisions become promotional indirectly when knowledge of their content as to the individual communications is spread.

If ever a priority has to be chosen due to scarce resources, it is the hope of this study that the Commission will concentrate on strengthening the procedure for carrying out its protective activities rather than giving precedence to the promotional aspects of its mandate. Likewise, it may be hoped that outside actors of all categories understand the importance of supporting the Commission's protective activities and further, of course, that in time resources will no longer be scarce and the Commission will be given every chance to carry out every aspect of its mandate in full.

Appendix

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

PREAMBLE

The African States members of the Organisation 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 Organisation 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 civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attitudes 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 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, language, religion or political opinions;

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 and 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 Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

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 and social origin, fortune, birth or any 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 of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   b) The right to be presumed innocent until proved 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 of 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, 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 or 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 the 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 or in the general interest of the community 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. State 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 recognized 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 recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of 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. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the State 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 spoilation, 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. State 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. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so 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 Organisation of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, State Parties to the present Charter shall ensure that:
   a) any individual enjoying the right of 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

State 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 corresponding obligations and duties are understood.

Article 26

State 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 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, and to maintain relations aimed at promoting, 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 strengthened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by 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 Organisation 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 personshaving 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 State 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 State 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 he Organisation of African Unity shall invite State Parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organisation 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 one 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 Organisation 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 case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organisation 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 unanimous opinion of 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 Organisation 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 Organisation 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 Organisation 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 a casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall neither participate in 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 privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organisation 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 Organisation 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 on 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 formulae and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.
   c) cooperate 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 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 Organisation of African Unity or any other person capable of enlightening it.

COMMUNICATION 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. This 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 is 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 Organisation 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 State 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 on its activities.

Article 55

1. Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of State Parties to the present Charter and transmit them to 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

Communications 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 requests anonymity,
2. Are compatible with the Charter of the Organisation 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 Organisation 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 those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation 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 Chapter shall remain confidential until 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 he Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by 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 Organisation 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 Organisation of African Unity, African practices consistent with international norms on 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, from 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 Organisation of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organisation 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 the Member States of the Organisation 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 Organisation of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organisation 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 by that State of the instrument of ratification or adherence.

Article 66

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

Article 67

The Secretary General of the Organisation of African Unity shall inform members of the Organisation 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 Organisation of African Unity. The Assembly

of Heads of State and Government may only consider the draft amendment after all the State 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 State 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

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The possibility of individual complaints gives teeth to a human rights convention. This book concerns the way in which individual communications under the African Charter on Human and Peoples' Rights are handled by the African Commission on Human and Peoples' Rights. The African Commission has faced considerable procedural problems in its effort to enforce the rights and freedoms of the Charter. These problems by now have been mostly solved, often in imaginative and original ways. This book takes up some of the problems as well as the solutions found by the African Commission.

The actual role of the courts in the African states, as it appears from the communications submitted to the Commission, as well as the desired role of the judiciary in the view of the African Commission is also explored.

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