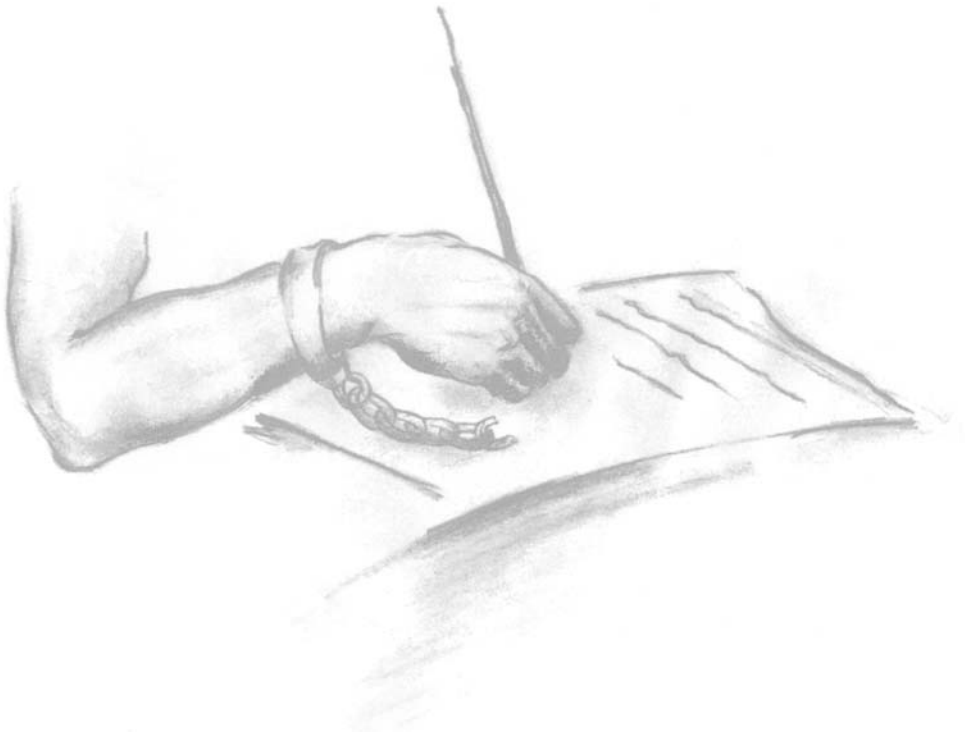


PART A

BACKGROUND TO THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM



I. Institutional Development: From OAU to AU

As in other regional human rights systems, African inter-governmental institutions have adopted regional mechanisms relevant to the prohibition against torture in Africa. The attitudes of these institutions to human rights generally and, in particular, to the prohibition against torture have evolved in the light of regional political values that have changed since the independence of most African States in the 1960s. The relevant regional inter-governmental institutions in Africa are the OAU (1963 - 2001/2) and the AU (since 2001/2). It is necessary briefly to introduce these two institutions.

The Organization of African Unity (OAU) was established in May 1963 under a Charter with treaty status adopted by the then newly independent African States.¹ Among its objectives, the OAU Charter mandates the African States in the OAU ‘to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa’² and ‘to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights’.³ However, the OAU Charter also commits Member States to abide by a number of bedrock principles, including the principle of the sovereign equality of all Member States and the principle of non-interference in the internal affairs of States.⁴

The OAU Charter established the Assembly of Heads of State and Government (‘AHSG’ or ‘Assembly’) as the ‘supreme organ of the Organization’.⁵ The Assembly met once a year and was composed - as its name suggests - of Heads of African Member States and Governments. Its resolutions were carried by a two-thirds majority of the Members.⁶ Other principal institutions included a Council of Ministers and a General Secretariat. The Secretariat was established in Addis Ababa, Ethiopia under the administrative leadership of a Secretary-General. The Council of Ministers consisted of ministers of foreign affairs, who met twice annually and prepared the agenda of the AHSG. The Secretariat

1 Charter of the Organization of African Unity, 479 U.N.T.S. 39, entered into force on 13 September 1963, reprinted in 2 I.L.M. 766 (1963) [hereinafter ‘OAU Charter’].

2 *Ibid.*, art. II(1)(b).

3 *Ibid.*, art. II(1)(e); Universal Declaration of Human Rights, 10 Dec. 1948, GA res. 217A (III), UN Doc A/810 at 71 (1948).

4 OAU Charter, *supra* note 1., arts. III(1)-(2).

5 *Ibid.*, arts. VII(1), VIII.

6 *Ibid.*, art. X(2).

was given responsibility for the operations of the OAU.⁷ It supported the operations of both the OAU and of regional human rights institutions in Africa.⁸

For most of the life of the OAU, the question of how Governments treated their nationals was regarded as a domestic matter over which other African Governments or institutions had little influence. The OAU's narrow prohibition against 'interference' in the domestic affairs of Member States and Governments enabled many African Governments to persecute and eliminate their perceived opponents through torture and other summary and arbitrary means, without complaints from other African Governments. This complicit inaction was at its utmost in the 1970s when the continent saw the ascendancy of many brutal regimes. Thus African Governments failed to condemn the systematic elimination of opponents of the regimes of Idi Amin in Uganda, Jean Bedel Bokassa in Central African Republic, Sekou Toure in Guinea and Macias Nguema in Equatorial Guinea, while vocally condemning the violations in apartheid South Africa.

Justifiable resentment both within and outside Africa against such double standards inspired the adoption of the African Charter on Human and Peoples' Rights.⁹ With the entry into force of the African Charter in 1986 and the establishment of the African Commission on Human and Peoples' Rights ('African Commission') in 1987, there came into existence a continental mechanism for

7 *Ibid.*, art. VII.

8 The OAU only adopted rules on consultative arrangements with civil society organizations in 1993. Under these rules, there are two forms of consultative arrangements: observer status and a more specialised co-operation agreement. Only African NGOs may seek observer status with the OAU, unlike the more specialised co-operation agreement, which may also be concluded with non-African NGOs. In order to qualify for observer status, an NGO would have to show that its objectives and activities conform to the fundamental principles and objectives of the OAU, as elaborated in the Charter; that it is an African organization, registered and headquartered in Africa and that the majority of its membership is composed of Africans. It must also demonstrate that it has a secure financial basis and that the majority of its funding comes from African sources. Criteria for Granting OAU Observer Status as Amended by the Twenty-Ninth Ordinary Session of the Assembly of Heads of State and Government, AHG/192, Rev. 1 (XXIX), arts. 1(a)-(c) (1993). An NGO wishing to apply for observer status must submit a written request to the Secretary General at least 6 months before the next meeting of the Council of Ministers and include its charter and rules and regulations, a current membership list, sources of funding, its last account balance and a memorandum of the organization's activities, past and present. For further discussion, refer to Part D, Sections XI-XII of this volume. Under the AU Constitutive Act, the Economic and Social Council (ECOSOCC) is the organ for organizing civil society relations with the AU. The AU established its ECOSOCC in 2004. ECOSOCC is undertaking a review of rules for AU-civil society consultation.

9 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 entered into force on 21 October 1986, reprinted in (1982) 21 ILM 58 [hereinafter 'African Charter', 'the Charter'], included as Annex 1 to this volume.

monitoring the behaviour of African Governments in the treatment of their own people.¹⁰

At its 36th Ordinary Session in July 2000 in Lomé, Togo, the Summit of the Assembly of Heads of State and Government of the OAU adopted a new foundational treaty – the Constitutive Act of the African Union.¹¹ The AU Constitutive Act entered into force in 2001, and the African Union formally succeeded and superseded the OAU when its inaugural meeting was held in July 2002.

Unlike the OAU Charter before it, the AU Constitutive Act contains explicit commitments on human rights and States Parties thereto undertake to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments’.¹² It establishes a new ‘right of the Union to intervene in Member States pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity’¹³ as well as the right of Member States to request intervention from the Union to restore peace and security.¹⁴ In addition, the treaty commits Member States to the promotion of gender equality,¹⁵ promotion of democratic principles, human rights, rule of law and good governance¹⁶ and to ‘respect for the sanctity of human life’.¹⁷

The organs of the African Union mirroring those of the now defunct OAU include the AU Assembly (similar to the OAU AHSG), an AU Executive Council (similar to the OAU Council of Ministers) and the AU Commission,¹⁸ which replaced the Secretariat of the OAU.¹⁹ The position of OAU Secretary-General is replaced with that of the Chairperson of the AU Commission.

10 The African Commission on Human and Peoples’ Rights is established under art. 30 of the African Charter. It was inaugurated on 2 November 1987. See First Activity Report of the African Commission on Human and Peoples’ Rights 1987-88, ACHPR/RPT/1st, para. 4.

11 The Constitutive Act of the African Union, adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo, CAB/LEG/23.15 [hereinafter ‘AU Constitutive Act’], entered into force on 26 May 2001.

12 *Ibid.*, arts. 3(e)-(h).

13 *Ibid.*, art. 4(h).

14 *Ibid.*, art. 4(j). The States Parties to the AU Constitutive Act reject ‘unconstitutional changes of governments’. *Ibid.*, art. 4(p). They also undertake not to allow governments that come to power through unconstitutional means to participate in the activities of the Union. *Ibid.*, art. 30.

15 *Ibid.*, art. 4(l).

16 *Ibid.*, art. 4(m).

17 *Ibid.*, art. 4(o).

18 *Ibid.*, art. 5.

19 *Ibid.*, art. 20.

The Assembly, Executive Council and AU Commission play various roles in supporting and reinforcing the effectiveness of regional human rights mechanisms in Africa. These political institutions of the African Union play a significant role in implementing regional human rights norms.²⁰ For instance, AU political organs such as the AU Assembly and Executive Council have treaty responsibility for ensuring that States Parties comply with the decisions of the African Commission.

Under the AU Constitutive Act, numerous supranational governance structures have been added to the institutional design of the OAU. Since its inception, the AU has established a Peace and Security Council (PSC), a Pan-African Parliament (PAP), an Economic, Social and Cultural Council (ECOSOCC) and accorded a significant role to the ambassadors of the Member States based in Addis Ababa, in the form of the Permanent Representatives' Committee (PRC).

The PSC exists to respond on a continuous basis to conflicts in Africa, and to advise the AU Assembly on matters pertaining to peace-keeping and possible intervention. The PAP and ECOSOCC are deliberative organs, the PAP consisting of members of parliament from the AU Member States, and ECOSOCC of civil society organisations. At this stage, the PAP only has advisory powers, but its mandate includes oversight of activities of the AU executive. The PRC meets much more regularly than the Assembly or the Executive Council, and plays an increasingly important role in exploring issues in greater depth and in preparing the agenda of the Executive Council.

The main human rights body remains the African Commission, established under the main human rights treaty in the African system, the African Charter. Its main features are now discussed.

20 For a description of the organs of the OAU and their functions in the promotion and protection of human rights, see, M. Garling and C. A. Odinkalu, *Building Bridges for Rights: Inter-African Initiatives in the Field of Human Rights*, INTERIGHTS report (2001), 45-51.

II. The African Charter on Human and Peoples' Rights

The African Charter²¹ is the premier instrument governing the protection of human rights on the African continent.²² The Charter was adopted by the OAU in Nairobi, Kenya in June 1981 and entered into force five years later, on 21 October 1986. In March 1999, the African Charter attained full ratification by all African States, with the deposit of Eritrea's instrument of ratification.²³ In other words, all 53 Member States of the AU are parties to the African Charter.²⁴

The African Charter contains features that distinguish its contribution to the regional protection of human rights. An early commentator on the Charter observed that it was 'modest in its objectives and flexible in its means'.²⁵ Reflecting the challenges of the continent, the Charter integrates protection of civil, political, economic, social and cultural rights in one document, without distinguishing the manner in which these rights are implemented. For example, the right to education and to the best attainable health are included on par with the right to freedom of speech and association. In an important finding, the Commission underlined that socio-economic rights form an integral part of the Charter and emphasised that they can be 'made real' in the same way as any other right.²⁶

21. African Charter, *supra* note 9.

22. Since the adoption of the Charter, African States have concluded other treaty instruments for the protection of human rights in Africa, including the African Charter on the Rights and Welfare of the Child, adopted by the Assembly of Heads of State and Government of the OAU, Kampala, Uganda, 1990, entered into force on 29 November 1999, OAU Doc. CAB/LEG/24.9/49 [hereinafter 'African Children's Rights Charter']; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Ouagadougou, Burkina Faso, on 9 June 1998, OAU/LEG/AFCHPR/PROT (III), reprinted in 6 *International Human Rights Reports* 891 [hereinafter 'African Human Rights Court Protocol'], included as Annex 3 to this volume; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union, Maputo, Mozambique, July 2003 Assembly/AU/Dec. 14(II), July 2003 [hereinafter 'African Women's Rights Protocol'].

23. Eritrea deposited its instrument of ratification on 15 March 1999. Thirteenth Activity Report AHG/222 (XXXVI) Annexes 1-V & Addendum (July 2000). Morocco is the only African State that is not currently party to the African Charter. Having pulled out of the OAU in 1984, Morocco remains outside the framework of regional treaty monitoring mechanisms negotiated under the auspices of the OAU.

24. Its membership includes the Sahrawi Arab Democratic Republic ('Western Sahara'), and excludes Morocco, which withdrew when the OAU recognised the Arab Democratic Republic.

25. O. Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems', (1984) 6 *Human Rights Quarterly* 141, 158.

26. Communication 155/96, *Social and Economic Rights Action Centre and Another v. Nigeria*, Fifteenth Activity Report; (2001) AHRLR 60 (ACHPR 2001), para. 68 [hereinafter '*SERAC*'].

The civil and political rights guarantees in the Charter are mostly hedged in with claw-back clauses, which appear to subject their enjoyment to domestic laws. For example, freedom of association is granted if its exercise is allowed for by 'law'. However, the Commission has made clear that the term 'law' is not equivalent to domestic law, finding that any limitation of Charter rights must be compatible with standards of international law.²⁷

The Charter does not contain any provisions on derogation, and the Commission has interpreted this silence to mean that derogation from the Charter is impermissible.²⁸ However, the absence of a provision on derogation is not necessarily a prohibition of derogation. The entitlement of States to derogate from treaties exists in customary international law and it remains arguable whether or not the African Charter can abrogate this entitlement.²⁹

Like the American Declaration on the Rights and Duties of Man, the Charter contains provisions on both rights and duties of the individual.³⁰ Unlike the international covenants, the Charter guarantees a right to property, omits express guarantees of privacy and citizenship or nationality as human rights,³¹ prohibits collective expulsion of foreign nationals and creates an entitlement to asylum.³²

As its title indicates, the African Charter also contains the rights of 'peoples', thus embodying the idea that rights are not only individualistic, but are also

27 Communications 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda and Others v. Nigeria*, Twelfth Activity Report, (2000) AHRLR 200 (ACHPR 1998).

28 Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Ninth Activity Report, (2000) AHRLR 66 (ACHPR 1995) [hereinafter '*Commission Nationale des Droits de l'Homme*']; Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v. Sudan*, Thirteenth Activity Report; (2000) AHRLR 297 (ACHPR 1999) [hereinafter '*Sudan cases*']; Communications 54/91, 61/91, 98/93, 164-169/97, 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop/UIDH/ RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme v. Mauritania*, Thirteenth Activity Report; (2000) AHRLR 149 (ACHPR 2000) [hereinafter '*Mauritania cases*'].

29 See R. Higgins, 'Derogations under Human Rights Treaties', (1976-77) 48 *British Yearbook of International Law*, 281.

30 African Charter, *supra* note 9, arts. 27-29; see also, American Declaration on the Rights and Duties of Man, 1949, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949).

31 The African Commission has, however, read the right to nationality as implicit in the guarantee of legal status in art. 5 of the Charter. See Communication 97/93, *John K. Modise v. Botswana*, Fourteenth Activity Report; (2000) AHRLR 30 (ACHPR 2000) [hereinafter '*Modise*'].

32 African Charter, *supra* note 9, art. 12(3) provides that 'every individual shall have the right, when persecuted, to seek and obtain asylum...'

collective in nature. One such right, the right of ‘peoples’ to self-determination, has been contentious, begging the question as to who qualifies as a ‘people’. As the concept of ‘people’ is not defined in the Charter, it may be interpreted as referring to the inhabitants or nationals of a State, or to smaller units – religious, ethnic or linguistic minorities – within a State. The Commission has refrained from explicitly accepting that this provision entitles minority groups to special status or would legitimate claims to secession.

III. The African Commission on Human and Peoples’ Rights

Until the entry into force of the Protocol establishing the African Court on Human and Peoples’ Rights in January 2004, the African Commission, established under Article 30 of the Charter, was the only mechanism for the implementation of the African Charter.³³

1. Membership and Functioning

Article 30 of the African Charter establishes the African Commission as an independent expert body comprised of eleven ‘persons of the highest reputation’, nationals of States Parties to the Charter ‘known for their high morality, integrity, impartiality and competence in the field of human and peoples’ rights’³⁴ and functioning in their individual capacities, that is, not as representatives of their Governments or countries. The Charter empowers the Commission to ‘promote human and peoples’ rights and ensure their protection in Africa’.³⁵

As the eleven Commissioners serve part-time, the permanent secretariat based in Banjul, The Gambia plays an important role. The Commission secretariat is headed by a Secretary.³⁶

33 See African Charter, *supra* note 9, art. 30; First Activity Report of the African Commission on Human and Peoples’ Rights 1987-88, ACHPR/RPT/1st, para. 4; see also, African Human Rights Court Protocol, *supra* note 22.

34 African Charter, *supra* note 9, art. 31(1).

35 *Ibid.*, art. 30.

36 As of this writing, the Commission is made up of the following people: Salamata Sawadogo (Burkina Faso) as Chairperson; the Vice-Chair is Yassir Sid Ahmed El Hassan (Sudan); the other members are Abdellahi Ould Babana (Mauritania), Kamel Rezag-Bara (Algeria), Musa Ngary Bitaye (The Gambia), Reine Alapini-Gansou (Benin), Mumba Malila (Zambia), Angela Melo (Mozambique), Sanji Mmasenono Monageng (Botswana), Bahame Tom Mukirya Nyanduga (Tanzania) and Faith Pansy Tlakula (South Africa). Their contact details can be found on the Commission’s web site: <www.achpr.org>.

The Commission accomplishes most of its work during two fifteen-day annual sessions in April/May and October/November. Its mandate requires action to be taken during sessions (the ‘inter-session’). Its sessions are divided into a closed portion, during which the Commission’s protective mandate is exercised, and a public portion, in which the Commission’s promotional mandate is fulfilled.

2. Protective Mandate

Aggrieved parties may submit complaints alleging the violation of Charter provisions to the African Commission. Both States³⁷ and non-State entities, including individuals, may initiate cases and communications before the Commission.³⁸ Under the first possibility, one State Party to the African Charter may submit a complaint that another State Party is in violation of the African Charter (‘inter-State communication’). The second possibility entails the submission of a complaint by an individual or NGO (‘individual communication’). The African Charter grants the African Commission the competence to consider both ‘inter-State’ and ‘individual’ communications in respect of all States Parties. There is therefore no additional protocol or declaration required to bring States Parties within the ambit of the Commission’s protective mandate. Article 30 of the Charter creates a compulsory monitoring mechanism in the form of the African Commission. The African Commission system is compulsory because States Parties to the Charter do not have the option of refusing to submit to it. The Commission is empowered under the Charter to supervise and monitor all rights, including economic, social and cultural rights, as well as group rights.

So far, only one inter-State communication has been submitted to the Commission. Given States’ reluctance to interfere in the ‘domestic affairs’ of other States, and the small role human rights plays in foreign policy and international relations, this procedure is not likely to be used frequently – especially not in respect of torture.

The Charter authorises the Commission to consider complaints from individuals whose rights under the Charter have been violated. Unlike the European

37 *Ibid.*, arts. 47-54. Communication 227/98, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, Twentieth Activity Report Annex IV, is the only inter-State communication so far registered by the African Commission.

38 African Charter, *supra* note 9, arts. 55-57.

and Inter-American human rights courts, however, the Commission is a quasi-judicial body. Its decisions do not carry the binding force of decisions from a court of law, 'but have a persuasive authority akin to the opinions of the UN Human Rights Committee'.³⁹ The Commission can make a finding or declaration as to a State's compliance with the Charter and, in the case of a violation, address recommendations to the State Party to rectify those violations. Through the procedure for considering individual complaints, the Commission has developed significant jurisprudence interpreting the provisions of the Charter, including the right to be free from torture and other forms of ill-treatment.

The Commission also has special investigative powers with respect to emergency situations or 'special cases which reveal the existence of a series of serious and massive violations' of Charter provisions.⁴⁰ It is arguable that every situation of torture creates an emergency. However, under the Charter, emergency situations are those that reveal a pattern of serious or massive violations. Such pattern could be shown to exist through evidence of impunity or absence of consequences for acts in violation of Article 5 of the Charter.

The Commission may 'resort to any method of investigation'⁴¹ including a request of information from 'the Secretary General of the Organization of African Unity or any other person capable of enlightening it'.⁴² In relation to the prevention of and protection against torture and other cruel, inhuman and degrading treatment, this could involve the use of experts, interim measures of protection, receiving testimonies from victims, survivors and perpetrators, and mechanisms for the collection of evidence that do not endanger the victims.

39 G. J. Naldi, 'Future Trends in Human Rights in Africa: The Increased Role of the OAU', in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, (2002) 1, 10. The UN Human Rights Committee is responsible for monitoring the compliance of States Parties to the International Covenant on Civil and Political Rights (ICCPR). See ICCPR, 16 Dec. 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), Part IV.

40 African Charter, *supra* note 9, arts. 58 (1)-(3). For an analysis of art. 58 of the African Charter, see C. A. Odinkalu and R. Mdoe, *Article 58 of the African Charter on Human Rights: A Legal Analysis and Proposals for Implementation*, (1996) INTERIGHTS; R. Murray, 'Serious and Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms', (1999) 17 *Netherlands Quarterly of Human Rights* 109.

41 African Charter, *supra* note 9, art. 46. Under the AU Constitutive Act, the Chairperson of the Commission of the African Union replaces the Secretary-General of the OAU as the head of the Secretariat of the AU. AU Constitutive Act, *supra* note 11.

42 African Charter, *supra* note 9, art. 46.

Before the Commission may publish its decisions or annual Activity Report, it must submit them for consideration by the AU Assembly, as stipulated in Article 59 of the Charter. Although the Charter does not necessarily require it to do so, the Assembly usually concludes its consideration by authorizing or withholding authority for publication of the report or decisions. The decisions are thus included in the Commission's Activity Reports to the AU Assembly. Before the AU replaced the OAU, the Assembly did not take much notice of these decisions and approved the Commission's Activity Reports without much debate. Since 2002, many more African Governments have become sensitive to criticism or condemnation by the Commission, leading to more rigorous and politically coloured discussions of the Activity Reports at the Executive Council, to which the Assembly delegated its authority to consider the Commission's annual reports. Unfortunately, the Executive Council at its most recent meeting decided to prevent the publication of a decision against Zimbabwe contained in the Commission's Twentieth Activity Report.⁴³ The Executive Council decision allows the Zimbabwean Government another opportunity to comment on the case, although it has already participated in the hearing of the matter.

3. Promotional Mandate and Special Procedures (Rapporteurs)

Under Article 45 of the Charter, the responsibilities of the African Commission include promotional work through awareness-raising programs such as conferences, seminars and symposia,⁴⁴ standard-setting, including the formulation of 'principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations',⁴⁵ and advisory work, including the interpretation of the Charter 'at the request of a State Party, an institution of the OAU or an African organization recognized by the OAU'.⁴⁶

The Commission also receives and considers periodic reports that States Parties are required to submit under Article 62. The Commission monitors State compliance with Charter provisions by receiving and considering these reports.⁴⁷

43 African Commission, Twentieth Activity Report, EX.CL/Dec.310(IX), adopted in June 2006.

44 African Charter, *supra* note 9, art. 45(1)(a).

45 *Ibid.*, art. 45(1)(b).

46 *Ibid.*, art. 45(3).

47 *Ibid.*, art. 62.

Over time, however, the Commission took the initiative to establish other mechanisms to supplement its initial mandate. One of these mechanisms was the establishment of the position of Special Rapporteur. The Commission established and appointed the following Special Rapporteurs: the Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions in Africa (in 1994), the Special Rapporteur on Prisons and Conditions of Detention in Africa ('SRP', in 1996), the Special Rapporteur on the Rights of Women in Africa (in 1999), the Special Rapporteur on Freedom of Expression in Africa and the Special Rapporteur on Human Rights Defenders in Africa.

The Commission also appoints working groups, consisting of one or more Commissioners as well as members of civil society organisations or other experts. Another distinction between special rapporteurships and working groups is that the latter are usually appointed for a specific *ad hoc* purpose. Examples of Working Groups of the African Commission are those on Indigenous Peoples/Communities in Africa and on the Implementation of the Robben Island Guidelines.⁴⁸

IV. The African Court on Human and Peoples' Rights

On 3 July 2006, the AU Assembly inaugurated the African Court on Human and Peoples' Rights ('African Human Rights Court'). The Protocol to the Charter⁴⁹ establishing an African Human Rights Court entered into force in 2004. A major cause of the delay in setting up the Court is the AU Assembly's decision to 'merge' the African Human Rights Court and the AU Court of Justice.⁵⁰ The merging process is ongoing and will in all likelihood culminate in a single court with a human rights chamber or section. As at 31 July 2006, 23 States have ratified the African Human Rights Court Protocol.⁵¹ In any event, the merger of the two courts would only become possible once the Protocol on the AU Court of Justice has entered into force, something that has not yet happened. Although the African Human Rights Court's seat has been

48 For further discussion of the Robben Island Guidelines, see Part D, Section XIV(1)(b). The Guidelines are included in Annex 4 to this volume.

49 See African Human Rights Court Protocol *supra* note 22.

50 Decision on the Seats of the Organs of the African Union, Assembly/AU/Dec. 45 (III) Rev. 1.

51 They are: Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Niger, Nigeria, Rwanda, South Africa, Senegal, Tanzania, Togo and Uganda.

assigned (it will be located in Tanzania, most likely in Arusha), it is not yet fully operational. It is too early to say how this Court will affect the system of human rights promotion and protection on the African continent, especially in relation to the enforcement of individual claims.⁵²

The African Human Rights Court has been established ‘to complement the protective mandate of the African Commission on Human and Peoples’ Rights’.⁵³ In other words, the Court does not replace the Commission, but supplements its mandate to examine individual and inter-State communications. As far as its promotional role is concerned, the Commission’s mandate remains intact.

The Court consists of eleven judges selected because they are jurists of high moral character with recognized practical, judicial or academic ability in the field of human and peoples’ rights. After their election early in 2006, the eleven judges were sworn in on 3 July 2006.⁵⁴ The judges shall serve a term of six years, which may be renewed once.⁵⁵ The quorum for a sitting of the Court shall be seven.⁵⁶ Unlike the Commission, whose secretariat was initially staffed by the secretariat of the OAU, and later by the Commission of the AU, the Court will have its own registry with dedicated staff.⁵⁷ Its functioning will be governed by the Protocol and by Rules of Procedure to be adopted by the Court itself.

The Protocol empowers the Court to provide legal assistance to litigants before it if ‘the interests of justice so require’.⁵⁸ The Court will sit and conduct its pro-

52 The Commission of the African Union adopted in November 2005 a budget for the operation of the Court in 2006, suggesting that the African Human Rights Court will become operational sometime in 2006.

53 African Human Rights Court Protocol, *supra* note 22, art. 2.

54 The following were elected judges: Mr Fatsah Ouguergouz (Algeria) (4 year term), Mr Jean Emile Somda (Burkina Faso) (2 years), Mr Gerard Niyungeko (Burundi) (6 years), Ms Sophia Akuffo (Ghana) (2 years), Mrs Kelello Justina Masafu-Guni (Lesotho) (4 years), Mr Hamdi Faraj Fanoush (Libya) (4 years), Mr Modibo Tounty Guindo (Mali) (6 years), Mr Jean Mutsinzi (Rwanda) (6 years), Mr El Hadji Guisse (Senegal) (4 years), Mr Bernard Ngoepe (South Africa) (2 years) and Mr George Kanyeihamba (Uganda) (2 years).

55 African Human Rights Court Protocol, *supra* note 22, art. 15: ‘The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.’

56 *Ibid.*, art. 23.

57 *Ibid.*, art. 55.

58 *Ibid.*, art. 10(2).

ceedings in public,⁵⁹ and shall deliver its decisions within ninety days of conclusion of its deliberations.⁶⁰ A judgment of the Court shall be binding on States Parties, who shall therefore be obliged to guarantee its execution.⁶¹

V. Other Human Rights Treaties and Treaty Bodies

Since the adoption of the African Charter, African States under the auspices of the now defunct OAU⁶² and its successor, the AU, have negotiated and agreed upon other human rights treaties, the most notable of which include the African Children's Rights Charter⁶³ and the African Women's Rights Protocol.⁶⁴ The first of these instruments established a separate treaty body, the African Committee of Experts on the Rights and Welfare of the Child ('African Children's Rights Committee').⁶⁵ Its mandate mirrors that of the African Commission, but as yet it has not examined any State reports or considered any communications. As a protocol that adds to the substance of the African Charter, the African Women's Rights Protocol does not create a new monitoring body. The African Commission and the African Human Rights Court are mandated to implement its provisions. So far, the African Commission has not considered any complaints alleging violations of the Protocol.

African States have accepted as binding numerous UN human rights treaties that are relevant to torture, such as the four 1949 Geneva Conventions,⁶⁶ the two 1977 Optional Protocols thereto,⁶⁷ the International Covenant on Civil and

59 *Ibid.*, art. 10(1).

60 *Ibid.*, art. 28.

61 *Ibid.*, art. 30.

62 See Section I above.

63 African Children's Rights Charter, *supra* note 22.

64 African Women's Rights Protocol, *supra* note 22.

65 African Children's Rights Charter, *supra* note 22, art. 32.

66 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, 12 Aug. 1949, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 UNTS 287.

67 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

Political Rights⁶⁸ and the Convention against Torture.⁶⁹ Common Article 3 of the Geneva Conventions prohibits torture and other forms of cruel treatment, and these Conventions have been ratified by all 53 African UN Member States, while 50 and 49 States have ratified or acceded to Additional Protocols I and II to the 1949 Geneva Conventions, respectively.⁷⁰ Fifty African States have ratified the ICCPR, Article 7 of which contains the explicit provision that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.⁷¹ Of these States only 32 have ratified the Optional Protocol to ICCPR⁷² allowing for individual complaints. The Convention against Torture, which sets forth in more precise detail the State obligations that ICCPR Article 7 entails, has been accepted as binding by 41 AU Member States.⁷³ However, many fewer have made a declaration accepting the right of individuals or other States to bring complaints against the State,⁷⁴ and even fewer have ratified the Optional Protocol to the Convention against Torture⁷⁵ allowing for regular visits by independent international and national bodies to places of detention within States Parties.⁷⁶

68 ICCPR, *supra* note 39.

69 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), 1465 UNTS 85 [hereinafter ‘Convention Against Torture’].

70 See <www.icrc.org> (accessed on 31 July 2006).

71 For status of ratification of UN human rights treaties, see <www.ohchr.org> (accessed 31 July 2006).

72 Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966); 999 UNTS 302.

73 The only AU Member States not parties to the Convention against Torture are Angola, the Central African Republic, Comoros, Eritrea, The Gambia, Guinea-Bissau, Rwanda, Sahrawi Arab Democratic Republic, São Tomé e Príncipe, Sudan, Tanzania and Zimbabwe. The Sahrawi Arab Democratic Republic (‘Western Sahara’) is not a UN member, but Morocco, which is a UN member and not an AU member, has also ratified the Convention against Torture.

74 Nine African States accepted the Committee against Torture’s competence under art. 22 to consider individual communications: Algeria, Burundi, Cameroon, Ghana, Senegal, Seychelles, South Africa, Togo and Tunisia. Two of them (Burundi and Seychelles) did not make a similar declaration under art. 21, accepting the inter-State communications procedure. In all, eight African States accepted that procedure: the seven mentioned above as well as Uganda.

75 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 Dec. 2002, GA res. 57/199, UN Doc. A/RES/57/199 (2003), 42 ILM 26 (2003).

76 As of 31 July 2006, three of the 22 States Parties to the Optional Protocol were African: Liberia, Mali and Mauritius.

