

## AFRICAN HUMAN RIGHTS SYSTEM

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### A. THE INSTITUTIONAL FRAMEWORK

AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLE'S RIGHTS (ACHPR)  
The Organisation of African Unity (now African Union) adopted it in 1981 and it entered into force in 1986. It has been ratified by all 53 member states of the AU.

[http://www.achpr.org/english/info/charter\\_en.html](http://www.achpr.org/english/info/charter_en.html)

#### – Relevant Substantive Rights:

##### 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 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 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 laws 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.

#### **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 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 the woman 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.

#### **–General and procedural rights:**

##### **Article 1**

The Member States of the Organization of African Unity parties to the present Charter shall **recognize** the rights, duties and freedoms enshrined in this Chapter 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 recognized and guaranteed in the present Charter **without distinction** of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

##### **Article 3**

1. Every individual shall be **equal** before the law.

2. Every individual shall be entitled to equal protection of the law.

##### **Article 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 26**

States parties to the present Charter shall have the duty to guarantee the **independence of the Courts** and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

## **B. RELEVANT NON-BINDING INSTRUMENTS**

*–Resolution on the adoption of the declaration of principles on freedom of expression in Africa*

(adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session on 23 October 2002 in Banjul, the Gambia).

[http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html)

Extracts:

### **I. The Guarantee of Freedom of Expression**

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

### **II Interference with Freedom of Expression**

1. No one shall be subject to arbitrary interference with his or her freedom of expression.

2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

### **XI Attacks on Media Practitioners**

1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.

2. States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.

3. In times of conflict, States shall respect the status of media practitioners as non-combatants.

*–Resolution on the situation of freedom of expression in Africa*

(adopted on 29 November 2006 by the African Commission on Human Rights and Peoples' Rights meeting at its 40<sup>th</sup> Ordinary Session in Banjul, the Gambia)

[http://www.achpr.org/english/info/free\\_exp\\_res2.html](http://www.achpr.org/english/info/free_exp_res2.html)

*–Resolution on the protection of human rights defenders in Africa*

(adopted on 4 June 2004 by the African Commission on Human and Peoples' Rights meeting at its 35<sup>th</sup> Ordinary Session in Banjul, the Gambia.

[http://www.achpr.org/english/info/hrd\\_res\\_appoin\\_3.html](http://www.achpr.org/english/info/hrd_res_appoin_3.html)

*–Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa*

and

*Guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa (the Robben Island Guidelines)*

(adopted by the African Commission on Human and Peoples' Rights at its 32<sup>nd</sup> Ordinary Session held in Banjul, the Gambia from 17 to 23 October 2002).

[http://www.achpr.org/english/declarations/declaration\\_robbenislands\\_en.html](http://www.achpr.org/english/declarations/declaration_robbenislands_en.html)

Provisions cover *inter alia*:

#### E. Combating Impunity

16. In order to combat impunity States should:

- a) Ensure that those responsible for acts of torture or ill-treatment are subject to legal process.
- b) Ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.
- c) Ensure expeditious consideration of extradition requests to third states, in accordance with international standards.
- d) Ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody.
- e) Ensure that where criminal charges cannot be sustained because of the high standard of proof required, other forms of civil, disciplinary or administrative action are taken if it is appropriate to do so.

#### F. Complaints and Investigation Procedures

17. Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.

18. Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated.

19. Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).

– *Kigali Declaration*

(adopted on 8 May 2003 at the first AU (African Union) ministerial conference on human rights in Africa in Kigali, Rwanda)

It is a general review assessment of the protection of human rights in the continent that contains development plans, covering also issues, such as democracy, governance and civil society, humanitarian obligations, the promotion of a human rights culture and the development of the domestic legal and administrative framework in accordance with the standards of the African Charter.

[http://www.achpr.org/english/declarations/declaration\\_kigali\\_en.html](http://www.achpr.org/english/declarations/declaration_kigali_en.html)

– *Grand Bay (Mauritius) Declaration and Plan of Action*

(adopted on 16 April 1999 at the first OAU (Organisation of African Unity, now African Union) ministerial conference on human rights in Grand Bay, Mauritius)

It is a general declaration about the status of human rights in the African continent that contains a plan of action for the promotion and development of a system of protection of human rights in conformity with the standards of the African Charter and the UN system.

[http://www.achpr.org/english/declarations/declaration\\_grand\\_bay\\_en.html](http://www.achpr.org/english/declarations/declaration_grand_bay_en.html)

## D. CLARIFICATION OF THE SCOPE OF THE CHARTER RIGHTS

### Article 1

#### *Communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe*

Para. 142: That Article charges the States Parties with the fundamental duty to “recognize the rights ...and undertake to adopt legislative or other measures to give effect to them”.

Para. 143. Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose **positive obligations** on States to **prevent** and **sanction** private violations of human rights. Indeed, human rights law imposes **obligations** on States to **protect citizens** or individuals under their jurisdiction **from the harmful acts of others**. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of *due diligence* [footnote 50] to

prevent the violation or for not taking the necessary steps to provide the victims with reparation.

[footnote 50]: In human rights jurisprudence this standard [of due diligence] was first articulated by a regional court, the **Inter-American Court of Human Rights**, in looking at the obligations of the State of Honduras under the American Convention on Human Rights – *Velasquez-Rodriguez*, ser. C., No.4, 9 Hum. Rts. I.J. 212 (1988). The standard of *due diligence* has been explicitly incorporated into United Nations standards, such as the **Declaration on the Elimination of Violence against Women** which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'.

...

Para. 144: ...The opinion of the [Inter-American] Court [in *Velasquez-Rodriguez Case*] could also be applied, **by extension, to Article 1 of the African Charter** of Human and Peoples' Rights, which requires States parties to "recognize the rights, duties and freedoms enshrined in the Charter and ...undertake to adopt legislative and other measures to give effect to them". Thus, what would otherwise be wholly private conduct is transformed into a constructive act of State, "because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]".

Para. 147: The doctrine of *due diligence* is therefore a way to describe the threshold of action and effort which a State must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights. A failure to exercise *due diligence* to **prevent or remedy violation, or failure to apprehend** the individuals committing human rights violations gives rise to State responsibility even if committed by private individuals. This standard developed in regard to the protection of aliens has subsequently been applied in regard to acts against nationals of the State. The doctrine of due diligence requires the State to "organize the governmental apparatus, and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights". [footnote 57]

[footnote 57]: *Velasquez-Rodriguez's case* para. 166.

***Communications 279/03 – Sudan Human Rights Organisation & The Sudan 296/05 – Centre on Housing Rights and Evictions / Sudan***

[http://www.achpr.org/english/Decison\\_Communication/Sudan/Comm.%20279-03.pdf](http://www.achpr.org/english/Decison_Communication/Sudan/Comm.%20279-03.pdf)

Para. 227: The African Commission concludes further that Article 1 of the African Charter imposes a general obligation on all States parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights. As such any finding of violation of those rights constitutes a violation of Article 1.

### **Article 3**

***Communication 284/03 – Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Zimbabwe***

Para. 156. The most fundamental meaning of equality before the law provided for under Article 3(1) of the Charter *is the right by all to have the same procedures and principles applied under the same conditions.*

158. In order for a party to establish a successful claim under Article 3 of the Charter, it should show that, the Respondent State has not given the Complainant the same treatment it accorded to the others in a similar situation. Or that, the Respondent State had accorded favourable treatment to others in the same position as the Complainant.

#### **Article 4**

##### ***Communication 279/03 – Sudan Human Rights Organisation & The Sudan 296/05 – Centre on Housing Rights and Evictions / The Sudan***

Para. 147: It is the duty of the State to protect human life against unwarranted or arbitrary actions by public authorities as well as by private persons. The duty of the State **to protect the right to life** has been interpreted broadly to include prohibition of arbitrary killing by agents of the State and to strictly control and limit the circumstances in which a person may be deprived of life by state authorities. These **include** the necessity **to conduct effective official investigations** when individuals have been killed as a result of the use of force by agents of the State, to secure the right to life by making **effective provisions in criminal law** to deter the commission of offences against the person, to establish **law–enforcement machinery** for the prevention, suppression, investigation and penalisation of breaches of criminal law. In addition to the foregoing, the State is duty bound **to take preventive operational measures** to protect an individual whose life is at risk from the criminal acts of another individual.<sup>136</sup>

[Footnote 136]: See European Court judgments in *McCann v. United Kingdom* (1995) 21 EHRR 97 and *Tanrikulu v. Turkey* (1999) 30 EHRR 950.

#### **Article 5**

##### ***Communication 279/03 – Sudan Human Rights Organisation & The Sudan 296/05 – Centre on Housing Rights and Evictions / The Sudan***

Para. 155: Article 5 of the African Charter is aimed at the protection of both the dignity of the human person, and the physical and mental integrity of the individual. The African Charter does not define the meaning of the words, or the phrase “torture or degrading treatment or punishment.”

Para. 156: Torture thus constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information. It is a tool for discriminatory treatment of persons or groups of person who are subjected to the **torture by the State or non–state actors** at the time of exercising control over such person or persons.

#### **Article 9**

##### ***Communication 228/99 – The Law Offices of Ghazi Suleiman / Sudan***

Para 46: In adopting the Resolution on the Right to Freedom of Association, the African Commission noted that governments should be careful that “in regulating the use of this right, that the competent authorities should not enact provisions which would limit the exercise of this freedom...[and that]...the regulation of the exercise of the right to freedom of association should be consistent with State’s obligations under the African Charter on Human and Peoples’ Rights.”

*Communication 275/03 – Article 19 / Eritrea*

Para. 105: By applying norms of international human rights law, the Commission has previously found, and finds in this case, that the imprisonment of journalists “deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information. This action is a breach of the provisions of Article 9 of the Charter.” 41

[footnote 41]: Communications 147/95 and 149/96 – Sir Dawda Jawara v. the Gambia.

Para. 106: Moreover, banning the entire private press on the grounds that it constitutes a threat to the incumbent government is a violation of the right to freedom of expression, and is the type of action that Article 9 is intended to proscribe. A free press is one of the tenets of a democratic society, and a valuable check on potential excesses by government.

*Communications 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda / Nigeria*

Para. 36: Freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of public affairs in his country. Under the African Charter, this right comprises the right to receive information and express opinion.

**Article 14**

*Communications 279/03 – Sudan Human Rights Organisation & The Sudan 296/05 – Centre on Housing Rights and Evictions / Sudan*

Para 192: ...The role of the State is to respect and **protect this right [to property] against any form of encroachment**, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.

**Derogations:**

*Communications 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda / Nigeria*

Para. 38: Decrees like these pose a serious threat to the public of the right to receive information not in accordance with what the government would like the public to know. The right to receive information is important: **Article 9 does not seem to permit derogation, no matter what** the subject of the information or opinions and no

matter the political situation of a country. Therefore, the Commission finds that the proscription of the newspapers is a violation of Article 9 (1).

Para. 41: In contrast to other international human rights instruments, **the African Charter does not contain a derogation clause**. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for **limitations** of the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest".

***Communication 279/03 – Sudan Human Rights Organisation & The Sudan 296/05 – Centre on Housing Rights and Evictions / The Sudan***

Para. 165: The African Commission wishes to remind States Parties to the African Charter to respect human and peoples' rights at all times including in times of armed conflict. This was emphasised in **Constitutional Rights Project, et al/Nigeria** in which this Commission stated that:

"[I]n contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitation on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitation of the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest." (emphasis is in the original text)

***Communication 275/03 – Article 19 / Eritrea***

Para. 87: However, unlike other human rights instruments,[footnote 25] and as emphasised in Communication 74/92,[footnote 26] the African Charter does not allow States Parties to derogate from it in times of war or other emergency. The existence of war, international or civil, or other emergency situation within the territory of a state party cannot therefore be used to justify violation of any of the rights set out in the Charter, and Eritrea's actions must be judged according to the Charter norms, regardless of any turmoil within the State at the time.

[footnote 25]: For example, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

[footnote 26]: Commission Nationale des Droits de l'Homme et des Libertés v. Chad, paragraph 21: "The African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter."

**Problems with the so-called 'Claw-back clauses'**

Cees Flinterman and Cathernine Henderson, The African Charter on Human Rights and Peoples' Rights, in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook*, (Abo Akademi University, 1999), p. 390: 'Another aspect of Charter which may substantially limit individual rights is the group of 'claback' clauses inserted in provision throughout the section on individual human rights. These clauses detract from the effectiveness of the

Charter's protection by apparently granting States unqualified power to infringe upon certain rights.

E.g.: 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**.

Thus, 'the Charter contains no general derogation clause for suspension of rights during national emergencies, but such a clause might well be redundant, given the limitations that are otherwise permissible.' (Cees Flinterman and Cathernine Henderson, p. 391)

Recent clarifications:

***Communication 275/03 – Article 19 / Eritrea***

Para. 91: Such provisions of the Charter are sometimes referred to as "claw-back clauses," because if "law" is interpreted to mean any domestic law regardless of its effect, States Parties to the Charter would be able to negate the rights conferred upon individuals by the Charter.

Para. 92: However, the Commission's jurisprudence has interpreted the so-called claw-back clauses as constituting a reference to international law, meaning that only restrictions on rights which are consistent with the Charter and with States Parties' international obligations should be enacted by the relevant national authorities.[footnote 27] The lawfulness of Eritrea's actions must therefore be considered against the Charter and other norms of international law, rather than by reference to its own domestic laws alone.[footnote 28]

[footnote 27]: See for example Communication 101/93 – Civil Liberties Organisation in respect of the Nigerian Bar v. Nigeria, paragraph 16, and Communication 212/98 – Amnesty International v. Zambia, paragraph 50.

[footnote 28]: See Communications 147/95 and 149/96 – Sir Dawda K Jawara v. The Gambia, paragraphs 57–59.

**D. RELEVANT CASE-LAW (African Commission's Communications)**

***Communication 284/03 – Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Zimbabwe***

[http://www.achpr.org/english/Decison\\_Communication/Zimbabwe/Comm.284-03.pdf](http://www.achpr.org/english/Decison_Communication/Zimbabwe/Comm.284-03.pdf)

The applicants claimed that following the decision of an administrative court allowing Associated Newspapers of Zimbabwe (ANZ) to register, and the subsequent publication of their newspaper, police intervened, stopped their work and prevented all further publication. Since then, their offices have not been allowed to re-open and their equipment remain in the hands of the police. In addition, some of the employees of ANZ have been arrested and charged with criminal offences.

Holds: violation of Articles: 1, 9(2), 14, 15 (Adopted at the 6th Extra Ordinary Session of the African Commission on Human and Peoples' Rights, 30th March – 3rd April, 2009, Banjul, The Gambia)

***Communication 275/03 – Article 19 / Eritrea***

(included in the 22<sup>nd</sup> Activity Report of the African Commission in 2007)

[http://www.achpr.org/english/Decison\\_Communication/Eritrea/Comm.%20275-03.pdf](http://www.achpr.org/english/Decison_Communication/Eritrea/Comm.%20275-03.pdf)

The case concerns incidents that took place in September 2001 in which former Eritrean governmental officials including the former Vice president and Foreign Minister were arrested and the entire private press companies were banned. The applicant complained about the continued detention incommunicado without trial of at least 18 journalists who were arrested following these the events.

Holds: a violation of Articles 1, 5, 6, 7(1), 9 and 18 by the State of Eritrea;

Urges the government of Eritrea to release or to bring to a speedy and fair trial the 18 journalists detained since September 2001, and to lift the ban on the press;

Recommends that the detainees be granted immediate access to their families and legal representatives; and

Recommends that the government of Eritrea takes appropriate measures to ensure payment of compensation to the detainees.

***Communication 256/02 – Samuel Kofi Woods, II and Kabineh M. Ja'neh / Liberia***

(adopted at the 34<sup>th</sup> Ordinary Session held in Banjul, the Gambia, from 6 to 20 November 2003)

[http://www.achpr.org/english/Decison\\_Communication/Liberia/Comm.256-02.pdf](http://www.achpr.org/english/Decison_Communication/Liberia/Comm.256-02.pdf)

The case concerned the arrest and detention without charges of the applicant journalists who continue to languish in detention. Their complaint was also directed against governmental intention to arrange a trial by a military tribunal.

Holding: Declares this communication inadmissible due to non-exhaustion of local remedies

***Communication 206/97 – Centre for Free Speech / Nigeria***

(Done in Kigali, Rwanda on 15 November 1999)

[http://www.achpr.org/english/Decison\\_Communication/Nigeria/Comm.206-97.pdf](http://www.achpr.org/english/Decison_Communication/Nigeria/Comm.206-97.pdf)

The case concerns the unlawful arrest, detention, trial and conviction of four Nigerian journalists, by a military tribunal for reporting on issues relating to an alleged attempted coup in that country. The journalists were tried in secret without access to a counsel of their choice or a right to appeal.

Holding: the Commission concludes that the violations of Articles 6 and 7 (1)(a) and (c) and 26 occurred in this case.

It urges the government of Nigeria to order for the release of the four Journalists.

***Communication 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda / Nigeria***

(Done in Kigali, Rwanda on 15 November 1999)

[http://www.achpr.org/english/Decison\\_Communication/Nigeria/140-94.pdf](http://www.achpr.org/english/Decison_Communication/Nigeria/140-94.pdf)

The case concerned a joint examination of various complaints that involved the arrest and detention of pro-democracy activists as well the closing down and seizures of media offices by state officials in defiance of court orders that resulted also in physical attacks of the personnel.

Holding: the Commission finds that there have been violations of Articles 5, 6, 7(1)(a), 9(1) and (2), and 14 of the African Charter.

Invites the government to take all necessary steps to comply with its obligations under the Charter.

***Communication 102/93 – Constitutional Rights Project / Nigeria***

(Done in Banjul, 31 October 1998)

[http://www.achpr.org/english/Decison\\_Communication/Nigeria/Comm.102-93.pdf](http://www.achpr.org/english/Decison_Communication/Nigeria/Comm.102-93.pdf)

The case concerns the arrest and detention of activists and journalists who protested the annulment of the presidential elections. Thousand copies of the publication were seized by the state authorities.

Holds: violations of Articles 1,6, 9 and 13 of the African Charter;

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.

***Communication 294/04: Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) / Zimbabwe***

(Adopted during the 6th Extra – Ordinary Session of the ACHPR, Banjul, The Gambia. April, 2009)

[http://www.achpr.org/english/Decison\\_Communication/Zimbabwe/Comm.294-04.pdf](http://www.achpr.org/english/Decison_Communication/Zimbabwe/Comm.294-04.pdf)

The case concerns a foreign journalist who was deported from the state despite having a permanent residence permit and various court orders against his deportation. The journalist had published an article for which he was charged with ‘publishing falsehood’ but acquitted by court’s decision. Immediately after his acquittal, a deportation order was issued with a deportation order which was finally enforced despite various court decisions ordering the release of the journalist.

Holds: the Respondent State, the Republic of Zimbabwe, has violated Articles 1, 2, 3, 7(1) (a) and (b), 9, 12(4) and 26 of the African Charter.

The African Commission recommends that the Respondent State should:

- a. Take urgent steps to ensure court decisions are respected and implemented;
- b. Rescind the deportation orders against Mr Andrew Meldrum, so that he can return to Zimbabwe, if he so wishes, being a person who had permanent residence status prior to his deportation. The status quo ante to be restored;
- c. Ensure that the Supreme Court finalizes the determination of the application by Mr Meldrum, on the denial of accreditation;
- d. In the alternative, taking into account that the AIPPA has undergone considerable amendments, grant accreditation to Mr Andrew Meldrum, so that he can resume his right to practice journalism; and

e. Report to the African Commission within six months on the implementation of these recommendations.

***Communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe***

(Adopted at its 39th Ordinary Session held from 11 – 15 May 2006 in Banjul, The Gambia)

[http://www.achpr.org/english/activity\\_reports/21%20Activity%20Report.pdf](http://www.achpr.org/english/activity_reports/21%20Activity%20Report.pdf)

The case concerns serious incidents of violence of mass scale that took place before and after the presidential elections of 2002 in which it was alleged that many people lost their lives or were tortured and kidnapped. In addition, numerous activists, the president of the opposition party, a journalist and a human rights activist received death threats.

Holds that the Republic of Zimbabwe is in violation of Articles 1 and 7 (1) of the African Charter;

Calls on the Republic of Zimbabwe to establish a Commission of Inquiry to investigate the causes of the violence which took place from February – June 2000 and bring those responsible for the violence to justice, and identify victims of the violence in order to provide them with just and adequate compensation.

Request the Republic of Zimbabwe to report to the African Commission on the implementation of this recommendation during the presentation of its next periodic report.

***Communication 228/99: The Law Offices of Ghazi Suleiman / Sudan***

(Done at 33th Ordinary session in Niamey, Niger, 2003)

[http://www.achpr.org/english/Decison\\_Communication/Sudan/Comm.228-99.pdf](http://www.achpr.org/english/Decison_Communication/Sudan/Comm.228-99.pdf)

The case concerns the arrest threats that a lawyer was receiving from security officials if he gave a public lecture for which he was invited by a group of human rights defenders. He further alleged various instances in which he was arrested including an incident of attack in his office.

Holds: the Republic of Sudan in violation of Articles 6, 9, 10, 11 and 12 of the African Charter;

Requests the government of Sudan to amend its existing laws to provide for de jure protection of the human rights to freedom of expression, assembly, association and movement.

***Communication 290/04: Open Society Justice Initiative (on behalf of Pius Njawè Noumeni) / Cameroon***

(Done at the 39<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 11<sup>th</sup> to 25<sup>th</sup> May 2006)

[http://www.achpr.org/english/Decison\\_Communication/Cameroon/Comm.%20290-04.pdf](http://www.achpr.org/english/Decison_Communication/Cameroon/Comm.%20290-04.pdf)

The case concerns the complaint of a radio broadcasting company and its director about the closing down of the premises of the radio station by state officials on the grounds that it operated without licence. The applicants alleged that they had applied for license but only an informal and temporary authorisation to operate on some frequencies was offered. No reasons were given why a formal license was not granted.

Friendly settlement.

## **E. MONITORING SYSTEM**

### **1. AFRICAN COMMISSION ON HUMAN RIGHTS AND PEOPLES' RIGHTS**

It was established in 1987, one year following the entry into force of the African Charter.

[http://www.achpr.org/english/info/news\\_en.html](http://www.achpr.org/english/info/news_en.html)

It promotes the protection of human rights through studies and research, cooperation with other human rights bodies, dissemination of information.

It interprets the Charter's provisions, considers complaints for violation of the Charter's provisions and drafts state's reports on the implementation of the Charter's provisions. It adopts resolutions and guiding principles that are subsequently used in the interpretation of the Charter and the reasoning of its decisions.

Complaints can be submitted by the victims of a human right violation as well as a third party (e.g. NGO).

When a violation of a human right is found, the Commission's communication may contain recommendations to the respondent state including an award of compensation (although it does not specify the amount). Under its own rules and provisions, the Commission is empowered to issue provisional measures.

The African Commission has been and still remains the main human rights body of the African Continent.

However, the individual complaint procedure is not used as frequently as one would expect, something that surely does not explain the delay in reaching a decision upon a given complain. Also, there is no follow up mechanism for its recommendations.

The Commission's work is assisted by Special Rapporteurs, such as the Special Rapporteur on the Freedom of Expression and Access to Information, and the Special Rapporteur on Human Rights Defenders.

The Special Rapporteurs publish press releases, send letters to the governments, receive information about violations of the Charter's provisions, engage with NGOs, undertake on-site visits and produce their own reports that include recommendations.

### **2. THE AFRICAN COURT OF HUMAN RIGHTS**

The Protocol on the African Court on Human Rights and People's Rights, adopted in 1998, entered into force in 2004. Less than half the member states of the AU have ratified the Protocol.

<http://www.african-court.org/fileadmin/documents/Court/Court%20Establishment/africancourt-humanrights.pdf>

The African Court of Human Rights will be replaced by the African Court of Justice when the Protocol on the Statute of the African Court of Justice (adopted in 2008) enters into force.

Under Article 5 of Protocol, the African Commission is entitled to submit cases to the Court. Only one case has been examined by Court that was found inadmissible due to lack of jurisdiction.

Under the provisions of the Protocol, the Court can:  
make an appropriate order to remedy the human rights violation (including payment),<sup>1</sup>  
deliver advisory opinions,<sup>2</sup>  
adopt provisional measures in circumstances of ‘extreme gravity and urgency’ when ‘irreparable harm to persons’ would otherwise ensue.<sup>3</sup>

The Council of Ministers (now the Executive Council of the African Union) shall monitor the execution of the Court’s judgments.<sup>4</sup>

### 3. SPECIAL RAPPORTEUR ON THE FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

[http://www.achpr.org/english/info/index\\_free\\_exp\\_en.html](http://www.achpr.org/english/info/index_free_exp_en.html)

*Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa.*

[http://www.achpr.org/english/resolutions/resolution122\\_en.htm](http://www.achpr.org/english/resolutions/resolution122_en.htm)

The Special Rapporteur reports incidents of attacks against journalists and in Part V of the report contains ‘Conclusions and Recommendations’

See e.g.: *Activity Report Presented to the 46th Ordinary Session of the African Commission on Human and Peoples’ Rights, 11 – 25 November 2009, Banjul, the Gambia*

[http://www.achpr.org/english/Commissioner%27s%20Activity/46th%20OS/Special%20Mechanisms/freedom\\_expression.pdf](http://www.achpr.org/english/Commissioner%27s%20Activity/46th%20OS/Special%20Mechanisms/freedom_expression.pdf)

Para. 77. Journalists in the continent have constantly been victims of attacks in various ways. There have also been censorship designed to prevent or punish publication of materials critical to the government. All of these amount to abuse of the press and violation of the right to freedom of expression and access to information.

Para. 91. The Special Rapporteur therefore calls on these States Parties to ensure that journalists and media practitioners are allowed to freely disseminate information on the elections without any form of harassment or intimidation.

See also *Activity report Presented to the 44th Ordinary Session of the African Commission on Human and Peoples’ Rights, 10–24 November 2008, Abuja, Federal Republic of Nigeria*

<http://www.achpr.org/english/Commissioner%27s%20Activity/44th%20OS/Special%20Rappoteurs/Freedom%20of%20expression.pdf>

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<sup>1</sup> Art 27(1)

<sup>2</sup> Article 4(1)

<sup>3</sup> Article 27(2)

<sup>4</sup> Article 29(2)

and

*Activity report Presented to the 48th Ordinary Session of the African Commission on Human and Peoples' Rights Banjul, the Gambia, 10–24 November 2010*

<http://www.achpr.org/english/Commissioner%27s%20Activity/48th%20OS/Special%20Mechanism/FOE%20&%20ATI.pdf>

Para. 60. **Although Africa** has generally **made significant progress** in the realization of freedom of expression and access to information, there is still room for improvement. States parties are under an obligation to take practical steps, including through legislation to give effect to the right to freedom of information.

Para. 63. The **Safety** of journalists in some parts of the continent remains a **source of concern** for the Special Rapporteur. In this regard, the Special Rapporteur welcomes the holding of the Regional Workshop on Safety and Protection of African Journalists that was organised by the Federation of African Journalists in partnership with the African Union Commission in Addis Ababa on 2 to 3 September 2010.

#### **4. SPECIAL RAPPORTEUR ON HUMAN RIGHTS DEFENDERS**

[http://www.achpr.org/english/\\_info/index\\_hrd\\_en.html](http://www.achpr.org/english/_info/index_hrd_en.html)

*Resolution on the appointment of a special rapporteur on human rights defenders in Africa* (adopted on 5 December 2005 by the African Commission on Human Rights and Peoples' Rights at its 38<sup>th</sup> Ordinary session in Banjul, the Gambia)

[http://www.achpr.org/english/\\_info/hrd\\_res\\_appoin\\_2.html](http://www.achpr.org/english/_info/hrd_res_appoin_2.html)

Press release: 'Assassination of the journalist and human rights defender Serge Maheshe', 22 June 2007, Banjul

[http://www.achpr.org/english/Press%20Release/press%20release\\_DRC\\_Serge\\_en.htm](http://www.achpr.org/english/Press%20Release/press%20release_DRC_Serge_en.htm)

#### **OTHER MONITORING BODIES**

##### **(1) Pan–African Parliament**

Protocol to the treaty establishing the African economic community relating to the pan–African parliament (adopted on 2 March 2001, entered into force on 14 December 2003).

Article 3 – Objectives

... '2. promote the principles of human rights and democracy in Africa'

[http://www.africa–union.org/rule\\_prot/protocol–panafrican–parliament.pdf](http://www.africa–union.org/rule_prot/protocol–panafrican–parliament.pdf)

It has exercised a consultative and advisory role in limited areas: election observation, fact–finding missions

<http://www.pan–africanparliament.org/>

## **(2) Peace and Security Council**

The African Union established the Peace and Security Council with the Protocol on the Peace and Security Council which was adopted in 2002 and entered into force in 2003.

One of the PSC's objectives is to 'promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts'.<sup>5</sup>

## **(3) The African Peer Review Mechanism (APRM)**

It is part of the New Partnership for Africa's Development (NEPAD) adopted in 2001 as the development framework for the AU.

It publishes reports that address also human rights issues. It involves a political Forum that consists of the heads of participating states that aim to exercise political pressure in a conciliatory way that is typical of modern African politics. This explains also the fact that the APRM has not been in much cooperation with the African Commission on Human Rights and Peoples' Rights.<sup>6</sup>

It adopted a Declaration on Democracy, Political, Economic and Corporate Governance in 2002 within the framework of NEPAD.

[http://aprm.krazyboyz.co.za/index.php?option=com\\_aprm\\_documents&Itemid=32&page=documents-category&cid=25&nid=24&id=24](http://aprm.krazyboyz.co.za/index.php?option=com_aprm_documents&Itemid=32&page=documents-category&cid=25&nid=24&id=24)

### **–Sub-regional Systems:**

There are also sub-regional organisations with some monitoring mechanism (within the framework of preparing the ground for an African Economic Community).

#### **(a) The Economic Community of West African States (ECOWAS)**

<http://www.ecowas.int/>

<http://www.uemoa.int/index.htm>

The ECOWAS Community Court may deal also with human rights complains.

#### **(b) The Court of Justice of the Common Market for Eastern and Southern Africa**

<http://www.comesa.int/>

<http://about.comesa.int/lang-en/institutions/court-of-justice>

#### **(c) The Tribunal of the Southern African Development Community**

<http://www.sadc.int/index/browse/page/52>

<http://www.sadc-tribunal.org/>

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<sup>5</sup> [http://www.africa-union.org/root/au/organs/psc/Protocol\\_peace%20and%20security.pdf](http://www.africa-union.org/root/au/organs/psc/Protocol_peace%20and%20security.pdf)

<sup>6</sup> Christof Heyns and Magnus Killander, 'Africa', in, D. Moeckli, S. Shah, S. Sivakumaran (eds), *International Human Rights law*, (Oxford: OUP, 2010), p. 496.

## F. CONCLUSION

The African Human Rights system has been much improved in the last ten years as far as the institutional and legal framework is concerned. The quality of legal reasoning of the African Commission's decisions is comparable to that of the other international human rights systems. This is because the Commission draws frequently on the legal principles that have been established in other systems so as to develop by analogy the legal principles and standards of human rights protection for its own control mechanism. The improvement of the quality of judicial reasoning of the Commission's communications and the setting out of specific legal obligations (i.e. the positive obligation to protect individual from violent acts of other private parties; to conduct an effective investigation, etc.) can clearly be seen by comparing old and new cases. The Commission has also started to ask for follow-up reports from those states found in violation of the Charter's provisions.

Resolutions, recommendations and declarations usually proclaiming a future plan of action and commitment are also used for the interpretation of the Charter's provisions and the expansion of its scope.

In the late 1990s, commentators were of the opinion that '[t]he African Charter falls short of truly effective human rights protection on several counts. The clawback clauses severely limit supposedly protected rights by granting governments the power to infringe them.'<sup>7</sup> However, the situation has changed (see above extracts from the recent Commission's communications on claw-back clauses). Commentators are now able to state that '[b]y and large, the standards have been set and the foundations for the enforcement mechanism have been laid'.<sup>8</sup> A number of sub-regional systems have also been developed and can engage more actively in the protection of human rights in the future.

The level of implementation and enforcement is improving but the continent has surely a long way to go given the high rate of poverty and the frequent episodes of armed conflicts. For this reason, the UN system also plays an important role and human rights violations of massive scale have been addressed through the institutions of International Criminal Court and the International Criminal Tribunal for Rwanda.

Overall, the African system has improved significantly, but it has not been used as much as one would expect in a region with an appalling record of human rights violations.

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<sup>7</sup> Cees Flinterman and Cathernine Henderson, The African Charter on Human Rights and Peoples' Rights, in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook*, (Abo Akademi University, 1999), p. 395.

<sup>8</sup> Christof Heyns and Magnus Killander, 'Africa', in , D. Moeckli, S. Shah, S. Sivakumaran (eds), *International Human Rights law*, (Oxford: OUP, 2010), p. 496.