

## Chapter 13

### The African Regional Perspectives on the Justiciability and Enforcement of the Right to Development

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#### Learning Objectives:

- To revisit the evolution of the African human rights system as a means of deepening the learner’s understanding of the rationale behind its emphasis on the right to development and other collective rights.
- To review the mandate and the enforceability of the decisions of the African Commission on Human and Peoples’ Rights, which remains Africa’s principal mechanism for protection and promotion of human rights, with emphasis on its work on the RtD.
- To examine the jurisprudence of the African Court on Human and Peoples’ Rights and the Court of Justice of the Economic Community for West African States in relation to the RtD.

#### *A task upon us*

*When interrogating the recent history of most advanced countries, I realised that one of the tenets of [political] stability, peace and development, is the attention paid to free, informed and inclusive participation in economic, social and cultural life. I also noted that everywhere, societies seek development; but their efforts are measured against their ability to recognise and to give equal opportunities to youth and women as well as to those living with disabilities or albinism and other vulnerable groups which must all be able to participate in and benefit from development. I finally learned that having in place reliable institutions and mechanisms for justice; both civic and economic; was an assurance of stability and a means for addressing conflicts; both in the preventive and curative sense.*

*As a young human rights defender from the Global South, my dream was to be part of a paradigm shift in the part of the globe that I was born so that all can enjoy the same benefits of the pledges of the Universal Declaration of Human Rights. Bringing economic, social and cultural rights to the same level as civil and political rights is the means toward achieving this goal. This is because for us, it is not a matter of choosing between rights. We need them all and as a collective. This is what the UN achieved through the Declaration on the Right to Development in 1986. The 2030 Agenda for a sustainable development and its 17 goals offer a unique opportunity for making the right to development real.*

*Human rights reforms and practices emanate from the field and are shaped in nice words internationally; and they are driven by social movements; and a few activists within the decision-making circles. The challenge however is that while the normative work on the right to development continues at the international level, on the ground, very little happens. The human rights community continues to allow preference to civil and political rights. It is upon us – through a community of practice - to mutually build our capacities and capabilities for advancing the right to development.*

## 1.1 Introduction

The African system for the promotion and protection of human rights includes several instruments which reflect specific African values such as the concept of *ubuntu*; lays emphasis on socio-economic and cultural rights; individual duties alongside rights; as well as group rights.

The African concept of *ubuntu* conveys the notion that individual rights can and should be realised within the communal cohesion and not at the expense of the group. *Ubuntu* is an African humanist concept that is shortened from the isiZulu proverb *Umuntu ngumuntu ngabantu* which literally means that ‘a person is a person because of other people’ or simply put ‘a person is through other people’. *Ubuntu* translates the notion that the African is a person that belongs to his/her community and is not defined outside of this reality. *Ubuntu* also implies that the life, welfare, and integrity of the group are conditioned by ‘active participation’, which is the respect and promotion of the rights of the individuals constituting it.<sup>1</sup>

The African Charter on Human and Peoples’ Rights (African Charter)<sup>2</sup> also known as the Banjul Charter, is the primary instrument around which the African regional system has evolved over the years. The African Charter is also the first regional and legally binding instrument to recognise the RtD. At the time of writing, the African Charter has been supplemented by a variety of legal instruments, amongst others the African Charter on the Rights and Welfare of the Child;<sup>3</sup> the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights;<sup>4</sup> and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.<sup>5</sup> The African Charter is unique in the international law context in that it affirms

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<sup>1</sup> See <http://www.saflii.org/za/cases/ZACC/1995/3.html> (15 January 2014).

<sup>2</sup> The African Charter on Human and Peoples’ Rights was adopted on 1 June 1981 and entered into force on 21 October 1986.

<sup>3</sup> The African Charter on the Rights and Welfare of the Child was adopted on 1 July 1990 and entered into force on 29 November 1999. See <http://au.int/en/content/african-charter-rights-and-welfare-child> (accessed 27 September 2013).

<sup>4</sup> The Protocol on the Establishment of an African Court on Human and Peoples’ Rights was adopted on 10 June 1998 and entered into force on 25 January 2004. See <http://au.int/en/content/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and-people> (accessed 27 September 2013).

<sup>5</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa was adopted on 11 July 2003 and came into force on 25 November 2005. See <http://au.int/en/content/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 27 September 2013).

the indivisibility of rights;<sup>6</sup> and renders economic, social and cultural rights justiciable (articles 15 to 24). The African Charter allows no derogation, although it does contain a number of ‘claw-back’ clauses which permit states to suspend several fundamental rights in their municipal law. It needs to be noted that a claw-back clause is not identical to a limitation clause. The claw-back clause relates to an internal limitation within a right while a limitation clause sets the external boundaries of the right. As commented by Rautenbach, the claw-back clause ‘neutralises the protection that the constitutional definition of the right is supposed to provide’.<sup>7</sup> Indeed, the enjoyment of certain civil and political rights is limited by terms such as ‘except for reasons and conditions previously laid down by law’,<sup>8</sup> ‘subject to law and order’,<sup>9</sup> or ‘within the law’<sup>10</sup> which empty these rights of their substance. The African Charter further recognises the RtD (article 22) and imposes duties on individuals (articles 27 to 29).<sup>11</sup>

The chapter begins with a brief historical overview of the African human rights system. The genesis and an examination of the socio-political factors which triggered the establishment of the African human rights system are highlighted to provide a contextual background to its original deficiencies and subsequent evolution. This is followed by a review of the mandate and the enforceability of the decisions of the African Commission on Human and Peoples’ Rights. On reviewing the work of the African Commission, a detailed discussion of the *Endorois* case is presented as the main occasion on which the Commission made far-reaching pronouncements on the RtD. This course also examines the jurisprudence of the African Court on Human and Peoples’ Rights relating to the RtD. Finally, a brief outline of the decisions of the Court of Justice of the Economic Community for West African States is provided as this body affords ideal opportunities to NGOs for human rights litigation.

## **1.2 Historical background to the African human rights system: An overview**

### **1.2.1 The ‘Lagos Law’**

Equipping Africa with mechanisms for the promotion and enforcement of human rights was a project championed by African lawyers and NGOs soon after the wave of independence of most of the African countries from colonial domination in the mid-fifties and mid-seventies.<sup>12</sup> It was a

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<sup>6</sup> From its preamble, the African Charter enunciates the principle of the indivisibility of rights and sets the premises upon which rights are to be understood as follows:

‘... [C]onvinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights ...’.

<sup>7</sup> Rautenbach IM *Introduction to the bill of rights: trade, occupation and profession* (May 2008) 1A70.3. <http://0-beta.mylexisnexis.co.za.oasis.unisa.ac.za/Index.aspx> (accessed through Unisa Library 11 February 2014).

<sup>8</sup> African Charter article 6 (Right to liberty and security).

<sup>9</sup> *Id* article 8 (Freedom of conscience and religion).

<sup>10</sup> *Id* article 9 (Freedom of expression).

<sup>11</sup> See also ‘Celebrating the African Charter at 30: A guide to the African human rights system’ 8-11 available at [http://www.pulp.up.ac.za/pdf/2011\\_13/2011\\_13.pdf](http://www.pulp.up.ac.za/pdf/2011_13/2011_13.pdf) (accessed 27 September 2013).

<sup>12</sup> About 70% to 80% of the African countries, gained independence between 1958 and 1970. The chronology of independence of African countries runs as follows: Liberia (26 July 1874), Libya (24 December 1951), Egypt (independent from the United Kingdom on 28 February 1922, then declared sovereign state on 18 June 1953), Sudan (1 January 1956), Tunisia (20 March 1956), Morocco (7 April 1956), Ghana (6 March 1957), Guinea (2 October 1958), Cameroon (1 January 1960), Senegal (4 April

logical consequence of socio-political events on the continent, that after hard-won political liberation, newly independent countries aspired to build their nations on core values such as respect for human rights and human dignity. For example, the Charter of the Organisation of African Unity states in its preamble that:

We, the Heads of African States and Governments assembled in the City of Addis Ababa, Ethiopia ...

... Conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples ...

... Persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among States, ...<sup>13</sup>

The idea of having an African regional mechanism for the protection of human rights originated from the 1961 African Conference on the Rule of Law which adopted a declaration referred to as the ‘Law of Lagos’. One of the key recommendations in the Law of Lagos was:

In order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.<sup>14</sup>

In essence, the African lawyers and NGOs gathered at the Lagos Conference, called for a court on human rights, accessible to individuals as a guarantee for the effective promotion and protection of human rights as enshrined in the Universal Declaration of Human Rights (UDHR). It should be noted here that the sole reference to the UDHR is justified by the fact that it was, at that time, the only reference available in international human rights law. In 1967, the first conference of Francophone lawyers recalled the Lagos Conference and called for the creation of

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1960), Togo (27 April 1960), Madagascar (26 June 1960), Democratic Republic of Congo (30 June 1960), Somalia (1 July 1960), Benin (1 August 1960), Niger (3 August 1960), Burkina Faso (5 August 1960), Côte d’Ivoire (7 August 1960), Chad (11 August 1960), Central African Republic (13 August 1960), Congo (15 August 1960), Gabon (17 August 1960), Mali (22 September 1960), Nigeria (1 October 1960), Mauritania (28 November 1960), Sierra Leone (27 April 1961), Tanzania (9 December 1961), Rwanda (1 July 1962), Burundi (1 July 1962), Algeria (5 July 1962), Uganda (9 October 1962), Kenya (12 December 1963), Malawi (6 July 1964), Zambia (24 October 1964), The Gambia (18 February 1965), Botswana (30 September 1966), Lesotho (4 October 1966), Mauritius (12 March 1968), Swaziland (6 September 1968), Equatorial Guinea (12 October 1968), Guinea-Bissau (24 September 1973), Mozambique (25 June 1975), Cape Verde (5 July 1975), Comoros (6 July 1975), Sao Tome y Principe (12 July 1975), Angola (11 November 1975), Sahrawi Arab Democratic Republic (27 February 1976), Seychelles (29 June 1976), Djibouti (27 June 1977), Zimbabwe (18 April 1980), Namibia (21 March 1990), Eritrea (24 May 1993), South Africa (31 May 1910 independence from the United Kingdom and 27 April 1994 – end of the apartheid regime), and South Sudan (9 July 2011).

<sup>13</sup> OAU Charter available at [http://au.int/en/sites/default/files/OAU\\_Charter\\_1963.pdf](http://au.int/en/sites/default/files/OAU_Charter_1963.pdf) (accessed 12 October 2013).

<sup>14</sup> The first African conference on the rule of law was convened by the International Commission of Jurists in Lagos, Nigeria from 3-7 January 1961 and adopted a declaration known as ‘The Law of Lagos’. See [http://www.globalwebpost.com/genocide1971/h\\_rights/rol/10\\_guide.htm#lagos](http://www.globalwebpost.com/genocide1971/h_rights/rol/10_guide.htm#lagos) (accessed 8 October 2013).

a regional mechanism for the protection of human rights.<sup>15</sup> Nearly a decade after the ‘independence euphoria’, a period of deception set in in parts of the continent with the consolidation of one-party systems,<sup>16</sup> the rise of *coups d’état*, and military dictatorships.<sup>17</sup> In southern Africa the struggle for political liberation was on-going in countries such as the then Southern Rhodesia (now Zimbabwe) and South Africa where apartheid was still the guiding policy.<sup>18</sup> In this political climate, it was inconceivable that African states would agree on a legally binding human rights treaty, especially on a court which could deliver decisions by which they would be legally bound.

## 1.2.2 Impact of the ‘cold war’ on human rights in Africa<sup>19</sup>

The proliferation of one-party systems and military dictatorships in Africa was also facilitated by the ‘cold war’ during which the Russian Communist party leadership in the then Soviet Union, served as a model for the African one-party system.<sup>20</sup> Naturally, the changing global political

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<sup>15</sup> The first Congress of French-speaking African Jurists was jointly organised in Dakar, Senegal from 5-9 January 1967 by *Association Sénégalaise d’études et de recherche juridiques* (‘The Senegalese Association for Legal Studies and Research’) and the International Commission of Jurists’. See MacDermot Niall *Mémoire sur les conclusions des conférences de la commission internationale de juristes à Lagos (1961), Dakar (1967) et autres régions présenté à la conférence des juristes africain sur le thème ‘African Legal Process and the individual’*, Addis-Ababa (Ethiopia) 18 to 23 April 1971, Document CIJ S-2895 (b) 1.

<sup>16</sup> Almost every newly independent African state experienced a one-party-system during this period.

<sup>17</sup> *Coups d’état* occurred in the following countries: Algeria (1972, 1965 and 1992); Benin (1963,1965,1967 and 1972); Burkina Faso (1966, 1980, 1982, 1983 and 1987); Burundi (1966 (twice), 1976, 1987 and 1996); Central African Republic (1966, 1979, 1981, 2003 and 2013); Chad (1975, 1982 and 1990); Côte d’Ivoire (1999); Comoros (1975, 1978, 1989, 1995 and 1999); Republic of Congo (1963, 1968, 1979 and 1997); Democratic Republic of Congo (1960, 1965 and 1997); Egypt (1952 and 2013); Equatorial Guinea (1979); Ethiopia (1910, 1916, 1974 (twice), 1977 and 1991); The Gambia (1994); Ghana (1966, 1972, 1978, 1979 and 1981); Guinea (1984 and 2008); Guinea-Bissau (1980, 1999, 2003, 2012); Lesotho (1986, 1990 and 1991); Liberia (1980 and 1990); Libya (1969); Madagascar (1972, 1975 and 2009); Mali (1968, 1991 and 2012); Mauritania (1978, 1979, 1980, 1984, 2005 and 2008); Niger (1974, 1996, 1999 and 2010); Nigeria (1966 (twice), 1975, 1983, 1985 and 1993); Rwanda (1973 and 1994); São Tomé and Príncipe (1995 and 2003); Seychelles (1977); Sierra Leone (1967, 1968, 1992, 1996, 1997 and 1998); Somalia ( 1969 and 1991); Sudan (1958, 1969, 1985 and 1989); Togo (1963 and 1967); Tunisia (1957, 1987 and 2011); and Uganda (1966, 1971, 1979, 1980, 1985 and 1986). See *coup d’états in Africa 1946-2004* <http://www.systemicpeace.org/africa/ACPP Annex2b.pdf> (accessed 18 November 2013).

<sup>18</sup> Zimbabwe became independent from Great Britain in April 1980. In South Africa, the apartheid regime was enforced by the National Party (ruling party) from 1948 to 1994. The apartheid regime ended in 1994 with the introduction of the new democratic order.

<sup>19</sup> The term ‘cold war’ is generally used in reference to the tense relationship between the United States of America and the Soviet Union which set in soon after they won World War II as allies. The cold war lasted from 1945 to 1980. As such there was never open confrontation between the two super-powers. Instead, they battled it out (based on their respective ideologies/belief systems) using ‘satellite states’ who sometimes went into open confrontation for their respective beliefs on their behalf. Such was the case between South Korea (an anti-communist country supported by the USA) and North Korea (a pro-Communist country supported by Russia). This confrontation culminated in the Korean War waged in the early 1950s. In Afghanistan, the Americans supplied the rebel Afghans with weapons after the Soviet Union invaded the country in 1979, while they never physically involved themselves in the confrontation thus avoiding a direct clash with the Soviet Union. See ‘The Cold War’ available at <http://www.history.com/topics/cold-war> (accessed 14 October 2013).

<sup>20</sup> Mbaye Kéba *Les droits de l’Homme en Afrique* (1992) 8.

context inaugurated by the ‘reconstruction/restructuring’ program known as the *Perestroika*, and the period of transparency referred to as *Glasnost*, undertaken between 1981 and 1991 by the Russian Communist party under the leadership of Mikhail Gorbachev,<sup>21</sup> largely contributed to the change in attitude amongst African leaders with regard to democracy and human rights. *Perestroika* and *Glasnost* were necessitated internally in the Soviet Union, as over-centralisation of the Russian economy had become an impediment to the development of the private sector, to entrepreneurship, and to economic growth. In addition, the Russian Federation had to face economic competition not only from the United States of America; but also from Japan, the then West Germany, and China. The reforms began with the revision of the Russian Constitution in 1977, in particular through the creation of the position of President and the institution of multi-party elections. Four years later, Mikhail Gorbachev’s ten-year reform programme was articulated around the following issues: land redistribution to farmers through fifty-year leases; granting of permission for individuals to set up their own businesses; liberalisation of state companies; the reduction of the dominant position occupied by the Communist party by allowing the formation and functioning of other political parties; and the adoption of a new press law in a bid to promote transparency (*Glasnost*).<sup>22</sup> Whether these reforms had the expected impact in Russia is beyond the scope of this study. Suffice to observe that these reforms contributed to the creation of an enabling environment for the democratisation process and enhancement of human rights protection on the African continent. It became particularly difficult for African leaders to continue leaning on the Russian one-party-system to reject multiparty democracy. Internally, the combined effects of severe economic recession, drought and unequal trade opened the way for social uprisings and calls from NGOs for democracy and human rights reform in many parts of Africa.

### **1.2.3 The post-cold war era and the adoption of the African Charter on Human and Peoples’ Rights**

Discussions on the adoption of an African mechanism for the promotion and protection of human rights which had been dragging since the early sixties, accelerated with the support of the United Nations. The African Charter on Human and Peoples’ Rights saw the light of day against this background in 1981. Two of its distinctive (some will say, ‘unique’) features are that the Charter expresses the African concept of human rights by placing individual rights in the context of group rights (articles 18 to 24); and articulates the quest for social cohesion and harmony between the individual and the group by introducing the notion of duties of the individual *vis-à-vis* other individuals, the family, and the group at large (articles 27 to 29). The African concept of human rights is better expressed by the concept of *ubuntu* discussed above. The African Charter is also distinctive in that it brings together in a single legally binding document, the recognition of the traditional civil, and political rights as well as cultural, economic, and social rights, in addition to environmental and developmental rights, thus setting an example of the complementarity and mutual reinforcement of rights – a notion that only gained global recognition years later in the 1993 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights held in Vienna, Austria, from 14-15 June 1993.<sup>23</sup>

The African Charter creates a single enforcement mechanism, the African Commission on Human and Peoples’ Rights. To the disappointment of the promoters of the Lagos Law, the African

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<sup>21</sup> Gorbachev Mikhail *Perestroika: New thinking for our country and the world* (1987). See <http://college.cengage.com/history/west/resources/students/primary/perestroika.htm> (accessed 14 October 2013).

<sup>22</sup> *Ibid.*

<sup>23</sup> Adopted on 23 June 1993 UN Document A/Conf 157/23 (1993).

Charter failed to establish a court. Kéba Mbaye, one of the drafters of the first proposal of the Charter, explained that the absence of a court in the final draft was based on two considerations: First, that the experts commissioned to draft the African Charter were instructed, especially by African leaders such as Leopold Sedar Senghor, then President of Senegal,<sup>24</sup> to reflect the conciliatory nature of the African conflict resolution system in terms of which referral to a court is the exception rather than the rule. Secondly, Mbaye argued that the idea of a court was promoted against the background of the struggle against the apartheid regime in South Africa. Its proponents wanted to use the court to forestall or punish the human rights violations occurring under the apartheid regime as an additional tool in their struggle to dismantle racial discrimination. But the idea of the court did not win universal support among African leaders at that time because some of them were in favour of dialogue (and cooperation) with the South African apartheid regime, while others were strongly opposed to such dialogue.<sup>25</sup> I fully agree with the African scholar Makau wa’Mutua, who maintained that having an enforcement mechanism with very limited powers and non-binding decisions was a ‘comfortable’ option for dictators – either civilian operating under a one-party regime, or military.

It was not until after the fall of the apartheid regime and the advent of the African Union that the notion of an African court on human rights gained meaningful support among African states. In the mid-to-late nineties, events on the continent, especially the genocide in Rwanda (1994), and the civil wars in Sierra Leone (1991) and Liberia (1997), prompted NGOs and other actors to push for the creation of a court in the hope that it would strengthen human rights protection in Africa. As Mutua reports, there were two polar views on the creation of the court.<sup>26</sup> One view (to which Mutua subscribes) held that a human rights court should be established as soon as possible to salvage the entire system.<sup>27</sup> The other saw the work of the African human rights system as

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<sup>24</sup> Mbaye Kéba *Les droits de l’Homme en Afrique* (1992) 149.

<sup>25</sup> It is generally argued that President Felix Houphouët-Houphouët Boigny of Côte d’Ivoire was among the strongest proponents of the ‘dialogue’ with the apartheid regime of South Africa in the mid-seventies. He was reportedly supported by Francophone African leaders such as Jean-Bedel Bokassa of the Central African Republic, Omar Bongo of Gabon, and Philibert Tsiranana of Madagascar. Critics link this to the fact that France was a strong supporter of the apartheid regime and a key economic partner (while the United Nations imposed sanctions against this regime). See, for example, *‘la France était le meilleure alie de l’Afrique du Sud’* available at <http://lesactualitesdudroit.20minutes-blogs.fr/archive/2013/06/29/la-france-etait-le-meilleur-soutien-de-l-apartheid-en-afriqu.html> (accessed 18 November 2013). It then followed that France’s key allies on the African continent, especially among its former colonies, followed its position at the level of the Organisation of African Unity. An investigation into this issue is beyond the scope of this work. For a more detailed discussion on this issue see, for example, Comte G *Le Président Houphouët-Boigny aura du mal a raliar les Etats francophones a sa thèse* in *Le Monde Diplomatique* (juin 1971) 147.

<sup>26</sup> Makau wa’Mutua *The African human rights system: a critical evaluation* (2000) 24-25. See <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 13 October 2013). wa’Mutua Makau is an American of Kenyan origin. He is professor of law and the Dean of the University at Buffalo Law School, where he is also a SUNY Distinguished Professor and the Floyd H and Hilda L Hurst Faculty Scholar. This article was written as reference material to the 2000 Human Development Report published by UNDP on the theme: ‘Human rights and development’. wa’Mutua was chair of the Kenyan Human Rights Commission (NGO) at the time of his writing.

<sup>27</sup> Komeja M ‘The African system of human and peoples’ rights: An annotated bibliography’, (1996) 3 *East Afr J of Peace and HR* 271 284-85.

evolving gradually and primarily for promotional rather than adjudicative purposes. In terms of this view, the African regional system should focus on human rights promotional activities.<sup>28</sup>

### **1.3 The African Commission on Human and Peoples’ Rights**

#### **1.3.1 Mandate and the enforceability of its decisions**

As briefly indicated above, the African Commission on Human and Peoples’ Rights (African Commission) was until recently, the only African regional mechanism for the promotion and protection of human rights. This is reinforced by Part II (articles 30 to 63) of the African Charter relating to the ‘measures of safeguard’ (of the rights enshrined therein), and the establishment and functioning of the African Commission headquartered in Banjul, the Gambia. The African Commission comprises eleven members expected to be:

African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples’ rights; particular consideration being given to persons having legal experience.<sup>29</sup>

The African Commission is supported by a secretariat. It holds bi-annual ordinary sessions and an unlimited number of extraordinary sessions as the need arises.

The African Commission is established by article 30 of the African Charter which reads as follows:

An African Commission on Human and Peoples’ Rights, hereinafter called ‘the Commission’, shall be established within the Organization of African Unity to promote human and peoples’ rights and ensure their protection in Africa.

Article 45 specifies the mandate of the African Commission as:

- 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, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights, and should the case arise, give its views or make recommendations to Governments.
  - (b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislations.
  - (c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.
- 2 Ensure the protection of human and peoples’ rights under 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 Organization recognized by the OAU.

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<sup>28</sup> Ankumah Evelyn A *The African Commission on Human and Peoples’ Rights: Practice and procedures* (1996) 195.

<sup>29</sup> African Charter article 31.



- 4 Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

It is also worth noting that at the time of its creation, the African Commission differed from similar institutions such as the Inter-American Commission on Human Rights<sup>30</sup> and the European Commission on Human Rights,<sup>31</sup> in at least two respects. First, the African Commission was not supplemented by a court and therefore performed quasi-judicial functions<sup>32</sup> to the extent that it exercised functions similar to those of a court. Generally, a quasi-judicial body is understood as having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations, and to make decisions in the general manner of courts.<sup>33</sup> In implementing its protection mandate provided for by article 45(2), the African Commission receives communications from states and others, carries out investigations into human rights claims, and pronounces on these issues itself. It differs from a court, however, in that its decisions are not orders, but recommendations. Secondly, it performs quasi-legislative functions such as formulating principles and rules (article 45(1b)),<sup>34</sup> and interprets provisions of the African Charter pursuant to article 45(3).<sup>35</sup> In 2011, the Commission, for example, developed ‘[D]raft Guiding Principles on Economic, Social and Cultural Rights in the African Commission on Human and Peoples’ Rights’,<sup>36</sup> as well as a ‘Model Law for African States on Access to Information’.<sup>37</sup> Again, guiding principles and model laws, and interpretations offered by the African Commission, are purely advisory and do not carry the weight of laws enacted by a legislature/parliament. It is, however, striking to observe that while the African Charter is very specific on the promotional functions of the Commission, it remains somewhat vague when it comes to protection. Mutua explains this imbalance by referring to the general political environment prevailing in Africa at the time of the drafting of the Charter. For him:

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<sup>30</sup> American Convention on Human Rights (also known as the Pact of San José, Costa Rica) which was adopted on 22 November 1969 and came into force on 18 July 1978 available at [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm) (accessed 3 October 2013).

<sup>31</sup> The [European] Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in Rome on 4 November 1950 and entered into force on 3 September 1953 available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (accessed 5 October 2013).

<sup>32</sup> For example, in the presentation of its mandate, the African Court on Human and Peoples’ Rights explains that it was established to complement and reinforce the function of the African Commission, which is a quasi-judicial body charged with monitoring the implementation of the African Charter. See <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-2/basic-facts#sthash.srCKeV7N.dpuf> (accessed 10 October 2013).

<sup>33</sup> Quasi-judicial <http://www.merriam-webster.com/dictionary/quasi-judicial> (accessed 10 October 2013).

<sup>34</sup> Article 45(1) reads: ‘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 legislations’.

<sup>35</sup> 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.

<sup>36</sup> ‘Draft guiding principles on Economic, Social and Cultural Rights in the African Commission on Human and Peoples’ Rights’ available at <http://www.achpr.org/instruments/economic-social-cultural/> (accessed 21 November 2013).

<sup>37</sup> ‘Draft model law for African Union member states on access to information’ available at [http://www.achpr.org/files/instruments/access-information/achpr\\_instr\\_draft\\_model\\_law\\_access\\_to\\_information\\_2011\\_eng.pdf](http://www.achpr.org/files/instruments/access-information/achpr_instr_draft_model_law_access_to_information_2011_eng.pdf) (accessed 21 November 2013).

[T]his [the absence of an explicit protection function] is hardly surprising because virtually no African state, with the exceptions of the Gambia, Senegal and Botswana could boast of a nominal democracy in 1981, the year that the Organisation of African Unity adopted the African Charter.<sup>38</sup>

I share this view, especially against the background of the widespread dictatorship and violations of human rights observed on the continent from the early seventies to the late nineties.<sup>39</sup>

In carrying out its mandate, the Commission has also established a number of ‘subsidiary mechanisms’ including special rapporteurs, committees, and working groups (Chapter V ‘subsidiary mechanisms’ – rules 23 and 24 of the Rules of Procedure of the African Commission).<sup>40</sup> Generally, a working group monitors a specific human rights issue, while the special rapporteur handles specific allegations of human rights violations.

The following table reflects the number and activities of the subsidiary mechanisms established to date by the Commission.

Special Mechanism	Establishment	Missions	Resolutions
Special Rapporteur on Prisons and Conditions of Detention	1996	16	10
Special Rapporteur on the Rights of Women	1999	6	13
Working Group on Indigenous Populations/Communities in Africa	2000	14	16
Special Rapporteur on Human Rights Defenders	2004	1	18
Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons	2004	0	15
Special Rapporteur on Freedom of Expression and Access to Information	2004	2	23
Committee for the Prevention of Torture in Africa	2004	2	8
Working Group on Economic, Social and Cultural Rights	2004	1	9
Working Group on the Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa	2005	0	15

<sup>38</sup> wa’Mutua Makau *The African human rights system: A critical evaluation* (2000) 12. See <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 13 October 2013).

<sup>39</sup> See background above.

<sup>40</sup> Rule 23 ‘Special Rapporteurs, Committees and Working Groups’

- (1) The Commission may create subsidiary mechanisms such as special rapporteurs, committees, and working groups.
- (2) The creation and membership of such subsidiary mechanisms may be determined by consensus, failing which, the decision shall be taken by voting.
- (3) The Commission shall determine the mandate and the terms of reference of each subsidiary mechanism. Each subsidiary mechanism shall present a report on its work to the Commission at each ordinary session of the Commission.

Rule 24 ‘Applicable rules for Subsidiary Mechanisms’ The Rules of Procedure of the Commission shall apply *mutatis mutandis* to the proceedings of its subsidiary mechanisms. See [http://www.achpr.org/files/instruments/rules-of-procedure-010/rules\\_of\\_procedure\\_2010\\_en.pdf](http://www.achpr.org/files/instruments/rules-of-procedure-010/rules_of_procedure_2010_en.pdf).

Working Group on Rights of Older Persons and People with Disabilities	2007	0	11
Working Group on Extractive Industries, Environment and Human Rights Violations	2009		5
Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV	2010		4
Internal Mechanisms			
Working Group on Specific Issues Related to the work of the African Commission	2004		9
Advisory Committee on Budgetary and Staff Matters	2009		6
Working Group on Communications	2011		5
Committee on Resolution	2016	0	0

Source: African Commission on Human and Peoples’ Rights: <http://www.achpr.org/specialmechanisms/> (accessed 5 October 2019).

### 1.3.1.1 *The protection mandate and competence of the Commission*

The Commission protects human and peoples’ rights in three ways: (1) it considers communications on alleged violations of human rights (as enshrined in the African Charter and other international human rights instruments);<sup>41</sup> (2) it examines state reports on the implementation of the African Charter; and (3) it interprets the African Charter.<sup>42</sup>

*Ratione materiae*, and in terms of article 47, the African Commission is competent to hear claims of violations of the provisions of the African Charter.<sup>43</sup> The Commission can be approached on the basis of violations of the provisions relating to human and peoples’ rights. It is also competent

<sup>41</sup> Regarding the principles applicable to the work of the African Commission, article 60 allows ‘draw[ing] 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 Specialized Agencies of the United Nations of which the parties to the present Charter are members’. Article 61 adds that 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 recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people’s rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine”.

<sup>42</sup> Article 45(3) of the African Charter.

<sup>43</sup> Article 47 reads as follows: ‘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 ...’

to entertain claims of the breach of international human rights instruments to which member states are party under the principles laid down in articles 60 and 61.<sup>44</sup>

*Ratione loci*, the African Charter imposes no limitation on a state party’s obligation to protect its citizens, whether the alleged violation took place within or outside of its territory.<sup>45</sup> In contrast, the European Convention on Human Rights provides in article 1:

The High Contracting Parties shall secure to everyone *within their jurisdiction* [my emphasis] the rights and freedoms defined in Section 1 of this Convention.<sup>46</sup>

*Ratione personae*, the Commission only entertains claims against a state party to the African Charter. All African states currently meet this requirement.<sup>47</sup>

*Ratione temporis*, both the Charter and the rules of procedure of the African Commission are silent as to whether the Commission is competent to examine communications on allegations of human rights violation that may have occurred before the Commission was established. On this, Mbaye argues that retroactivity should only apply in cases of gross human rights violations amounting to crimes against humanity.<sup>48</sup> While I may agree with this view, I also opine that it may not apply in situations of the ‘continuity of violation’ like the one faced by the Endorois community. In my view, insofar as the violation continues, whether or not the violation began before or after the Charter came into force, the Charter will apply.

### 1.3.1.2 Access to the Commission

Access to the Commission is afforded to the states, individuals, and NGOs with observer status and they are entitled to submit communications. Observer status at the African Commission is granted to NGOs meeting the following requirements:

[When they] have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter and in the African Charter on Human and Peoples’ Rights; (b) [are] organisations working in the field of human rights; and (c) [if they] declare their financial resources.<sup>49</sup>

The issue of *locus standi*<sup>50</sup> is not contentious under the African Charter. There is no requirement of being a direct victim of the violation complained of. Any individual, group, or NGO may file

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<sup>44</sup> See Vazak *Dimension internationale des droits de l’homme* (1978) 544 para 1221 available at <http://unesdoc.unesco.org/images/0013/001342/134209fo.pdf> (accessed 3 October 2013). See also Mbaye Kéba *Les droits de l’Homme en Afrique* (1992) 233.

<sup>45</sup> *Ibid.*

<sup>46</sup> See [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (accessed 3 October 2013).

<sup>47</sup> South Sudan, which seceded from the Republic of Sudan in 2011 and became the 54<sup>th</sup> member of the African Union, ratified the African Charter on 23 October 2013.

<sup>48</sup> *Id* 234 n 181.

<sup>49</sup> Resolution 33 on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples’ Rights adopted at the 25<sup>th</sup> ordinary session of the African Commission held in Bujumbura, Burundi, from 26 April - 5 May 1999 available at <http://www.achpr.org/sessions/25th/resolutions/33/> (accessed 3 October 2013).

<sup>50</sup> *Locus standi* is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged, to support that party’s participation in the case.

a communication<sup>51</sup> before the Commission alleging violation of any of the provisions of the Charter by a state party.

### 1.3.1.3 Admissibility

With regard to admissibility, the Charter distinguishes between ‘communications from a state’ (articles 47-54) who must be a party to the African Charter, and ‘other communications’ (articles 55-56). Admissibility of ‘other communications’ is subject to a number of rules including: indication of the identity of the author; not being couched in insulting or disparaging language; and not being incompatible with both the OAU Charter (now the Constitutive Act of the African Union) and the African Charter. Communications from NGOs and individuals must also comply with the requirement of the exhaustion of local remedies. Article 56(5) requires that local remedies, if any, be exhausted, unless there is an undue delay. On several occasions, the African Commission has expounded on this requirement when examining the admissibility of communications submitted by NGOs and individuals. Suffice it to mention that in the opinion of the Commission:

[O]ne purpose of the exhaustion of the local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels.<sup>52</sup>

Still on the interpretation of the provisions of article 56(5), in the case *Purohit and Moore v The Gambia* (Communication No 241/2001), the Commission declared the communication submitted by mental health advocates admissible as the remedies provided by The Gambia (general provisions in law) were ‘not realistic for this category of people (the mental health patient) and therefore not effective’.<sup>53</sup> In this case, the complainants alleged that the provisions of the Lunatic Detention Act of The Gambia, and the way in which mental patients were being treated, amounted to a violation of specific provisions of the African Charter – including the right to health (article 16). The applicants submitted that the Act failed to provide safeguards for patients who were suspected of being insane during their diagnosis, certification, and detention. According to them, the Act failed, inter alia, to allow for the review of, or appeal against, orders of detention, or to provide any remedy for incorrect detentions. It was also argued that no provision existed for the independent examination, management, and living conditions within the unit itself.

The Commission ruled that The Gambia had violated several provisions of the African Charter, and held that the Lunatic Detention Act was discriminatory because the categories of people who would be detained under it were likely to be people picked up from the streets and people from poor backgrounds; in other words, people with no means of challenging erroneous detention or wrong treatment done to them. In the opinion of the Commission, the remedies put in place by the respondent state were not accessible to this category of people. The Commission therefore reminded the respondent state that under article 16 of the Charter on the right to health, it is obliged to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination. The requirement of ‘realistic’ remedies used by the Commission to establish admissibility of

<sup>51</sup> wa’Mutua Makau n 177 above 17.

<sup>52</sup> *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples’ Rights Communication 155/96 (2001) para 37. See <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html> (accessed 15 October 2013).

<sup>53</sup> *Purohit and Moore v The Gambia*: Communication 241/2001, 16<sup>th</sup> Activity Report 2002-2003, Annex VII paras 36, 37 and 38. See [http://www.law.syr.edu/media/documents/2009/9/Purohit\\_and\\_Moore\\_v\\_Gambia.pdf](http://www.law.syr.edu/media/documents/2009/9/Purohit_and_Moore_v_Gambia.pdf) (accessed 15 October 2013).

communication is an important one. It is grounded in the general situation of poverty prevailing in Africa where social protection of the poor requires concrete steps on the part of the state as principal duty-bearer. The position taken by the Commission on the obligation imposed on states to put in place non-discriminatory policies and measures is consistent with the stance taken by the UN Committee on Economic, Social and Cultural Rights in its interpretation of article 12 of the CESCR.<sup>54</sup>

### **1.3.2 Overview of decisions of the African Commission on Human and Peoples’ Rights on the right to development**

Over the past few years, the African Commission has entertained a number of cases based on the alleged violation of article 22 of the African Charter which enshrines the RtD. In the selected cases which follow, I review these decisions with a view to finding entry points for recourse to the RtD. This review serves two purposes: Considering these cases chronologically enables the establishment of a trend and an appreciation of the gradual progress towards the full and express recognition of the RtD which finally emerged in the *Endorois* case when the Commission pronounced itself on the nature and scope of this right. Secondly, the denial of the RtD is a root cause of several crises, worldwide, and notably in the African continent. Yet, right-holders and civil society organizations rarely have any experience in working on the RtD, let alone submitting a communication to the Commission based on this right. The purpose of this review is, therefore, to support the principal argument of this chapter – that the RtD is yet another right that right-holders must use, including reliance in pleadings.

#### **1.3.2.1 William A Courson v Zimbabwe: Communication 136/94<sup>55</sup>**

In 1995, the African Commission admitted a communication by William A Courson regarding the legal status of homosexuals in Zimbabwe in which the complainant claimed, *inter alia*, that the criminalisation of homosexuality by Zimbabwean laws was in breach of articles 1 (general obligation of the state to guarantee all rights enshrined in the African Charter); 2 (freedom from discrimination);<sup>56</sup> 3 (right to equality before the law); 4 (right to life and personal dignity); 5 (right to dignity); 6 (right to due process concerning arrest and detention); 8 (freedom of religion); 9

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<sup>54</sup> The steps required of the state are set out in paras 30 to 37; and include general obligations such as the guarantee that the right will be exercised without discrimination of any kind (article 2.2) and the obligation to take steps (article 2.1) towards the full realisation of article 12. Such steps must be deliberate, concrete, and targeted towards the full realisation of the right to health. It also includes specific legal obligations and international obligations. See UN Committee on Economic, Social and Cultural Rights. The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights): General Comment 14 9-11. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement> (accessed 20 November 2013).

<sup>55</sup> *William A Courson v Zimbabwe* Communication 136/94 available at <http://caselaw.ihra.org/doc/136.94/view/> (accessed 2 October 2013).

<sup>56</sup> Freedom from discrimination is also provided by article 18(3) especially in the context of the ‘family’ regarded in the Charter as custodian of moral and traditional values recognised by the community to the extent that ‘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. And the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs’.

(freedom of information and expression); 10 (freedom of association); 11 (freedom to assembly); 16 (right to health); 20 (right to self-determination); 22 (right to development);<sup>57</sup> and 24 (right to a generally satisfactory environment). The complainant withdrew the communication and so the Commission did not decide on the merits.

### **1.3.2.2 Bakweri Land Claims Committee v Cameroon: *Communication 260/02***<sup>58</sup>

The Bakweri Land Claims Committee (the Bakweri) filed a communication with the African Commission following Presidential Decree No 94/125 of 14 July 1994 by the government of Cameroon, ceding a large parcel of land to the Cameroon Development Corporation (CDC). The complainants alleged that this would result in the alienation (to private purchasers) of approximately 400 square miles (104 000 hectares) of land in the Fako division traditionally owned, occupied, used, and/or generally in effective possession of the Bakweri. The complainant alleged that the transfer would extinguish the Bakweri title rights and interests in two-thirds of the minority group’s total land area, and considered this to represent a violation of several provisions of the African Charter, namely articles 7(1)(a), 14, 21, and 22. The African Commission declined admissibility on the basis of the non-exhaustion of local (internal) remedies as required under article 56(5) of the African Charter. Once again, an opportunity for a quasi-judicial pronouncement on the meaning and application/applicability of article 22 of the African Charter was missed.

### **1.3.2.3 Democratic Republic of Congo v Burundi, Rwanda and Uganda: *Communication 227/99***<sup>59</sup>

On 8 March 1999, during the armed conflict which threatened the Democratic Republic of the Congo (DRC), the complainant (DRC) filed a complaint against its neighbours, Burundi, Rwanda and Uganda alleging, amongst others, that it was the victim of armed aggression perpetrated by those countries. The DRC further alleged that this aggression amounted to a violation of the fundamental principles that govern friendly relations between states, as stipulated in the Charters of the United Nations (UN) and the Organisation of African Unity (OAU). In particular, the principles of non-recourse to force in international relations; the peaceful settlement of disputes; respect for the sovereignty and territorial integrity of states; and non-interference in the internal affairs of states were alleged to have been violated. The DRC also alleged that it was a victim of violation of articles 2 (freedom from discrimination); 4 (right to life and personal dignity); 6 (right to due process concerning arrest and detention); 12 (freedom of movement and residence); 16 (right to health); 17 (right to education); 19 (right to equality); 20 (right to self-determination); 21 (right to freely dispose of wealth and natural resources); 22 (right to development); and 23 (right to peace and security) of the African Charter.

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<sup>57</sup> Article 22 reads:

- 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.

<sup>58</sup> *Communication 260/02 Bakweri Land Claims Committee v Cameroon* available at [http://www.achpr.org/files/sessions/36th/comunications/260.02/achpr36\\_260\\_02\\_fra.pdf](http://www.achpr.org/files/sessions/36th/comunications/260.02/achpr36_260_02_fra.pdf) (accessed 5 October 2013).

<sup>59</sup> *Communication 227/99 Democratic Republic of Congo v Burundi, Rwanda and Uganda* available at <http://caselaw.ihra.org/doc/227.99/view/> (accessed 5 October 2013).

The complainant requested the African Commission to:

... deploy an investigation mission with a view to observing *in loco* the accusations made against Burundi, Rwanda and Uganda.<sup>60</sup>

As part of the process of determining the allegations against the respondents, the Commission carried out an analysis of the acknowledgement made by the respondent states of their presence in the area,<sup>61</sup> and on the findings of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Wealth in the DRC.<sup>62</sup> In response to this analysis, the Commission ruled that the occupation of the complainant’s territory by armed forces from the respondents amounted to a violation of article 23 relating to peoples’ right to peace and security.<sup>63</sup> The Commission found that the alleged occupation of parts of the provinces of the complainant states by the respondents, to be a violation of the Charter to which it could not turn a blind eye.<sup>64</sup> Consequently, it ruled that the respondent states were in breach of several provisions of the African Charter, including article 22 on the RtD; recommended a withdrawal of their troops from occupied provinces and payment of compensation to the complainant state on behalf of the populations’ victims of human rights violations.<sup>65</sup> In this case, it is striking to note that the Commission made no reference to its own findings. Coming to such a strong conclusion without the Commission’s own investigations, is questionable. The African Charter provides in article 46 as follows:

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<sup>60</sup> See para 11(c).

<sup>61</sup> In para 72 of the case report, the African Commission states that ‘The Complainant States allege the occupation of the eastern provinces of the country by the respondent States and armed forces. It alleges also that most parts of the affected provinces have been under control of the rebels since 2<sup>nd</sup> August 1998, with the assistance and support of the respondent States. In support of its claims, it states that the Ugandan and Rwandan government have acknowledged [the] presence of their respective armed forces in the eastern provinces of the country under what it calls the “fallacious pretext” of “safeguarding their interests”. The [African] Commission takes note that this claim is collaborated by the statements of representatives of the Respondent States during the 27<sup>th</sup> Ordinary Session [of the African Commission] held in Algeria’.

<sup>62</sup> On 2 June 2000, the President of the Security Council issued a statement (S/PRST/2000/20) requesting the Secretary-General to establish a panel of experts on the illegal exploitation of natural resources and wealth in the Democratic Republic of the Congo for a six month period. The Secretary-General submitted the panel’s report on 12 April 2001. See <http://www.un.org/News/dh/latest/drcongo.htm> (accessed 5 October 2013).

<sup>63</sup> Paragraphs 76 and 77.

<sup>64</sup> Paragraph 69.

<sup>65</sup> In its ruling, the African Commission, ‘finds the respondent states in violation of articles 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22 and 23 of the African Charter; Urges the Respondent States to abide by their obligations under the Charters of the UN, the OAU, the African Charter, the *UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States* and other applicable international principles of law and to withdraw its troops immediately from the Complainant’s territory; Takes note with satisfaction, of the positive developments that occurred in this matter, namely the withdrawal of the Respondent States armed forces from the territory of the Complainant State; Recommends that adequate reparations be paid, according to the appropriate ways to the Complainant State for and on behalf of the victims of the human rights by the armed forces of the Respondent States while the armed forces of the Respondent States were in effective control of the provinces of the Complainant State, which suffered these violations’.



The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.<sup>66</sup>

Such ‘enlightenment’ can amount to hearsay and may be an insufficient basis for the Commission to make its ruling. For this reason, the Commission has established a number of subsidiary mechanisms (special rapporteurs, committees, and working groups) which it could have used in this case as ‘methods of investigation’. Nothing in the case report shows that the Commission made use of these methods in establishing the facts.

The African Charter also recognises under article 60 that the Commission shall draw inspiration from a variety of sources, including ‘other instruments adopted by the United Nations’,<sup>67</sup> which in my opinion may include reports and resolutions of organs such as the Security Council. It is in this context that the Commission relied on the findings by the UN Panel of Experts cited above. The report in question only covers the alleged violation of article 21 (right to freely dispose of wealth and natural resources), but is silent on the other human rights claims raised by the complainant state. As such, it is of limited relevance to an analysis of the alleged violation of article 22 of the African Charter (right to development). It follows that in my opinion reference to this UN report is insufficient as a method of investigation required of the Commission in discharging its duties under article 46. This is exacerbated in the case of an inter-state Communication like the one under discussion, where the Commission had both the time and the opportunity to verify the allegations of the complainant state through field visits and use of special rapporteurs and working groups.

Referring to the RtD, the Commission described the occupation of the eastern provinces of the complainant by the respondents’ armed forces as:

barbaric and in reckless violation of the Congolese peoples’ rights to cultural development guaranteed by article 22 of the African Charter, and an affront to the noble virtues of the African historical tradition and values enunciated in the preamble to the African Charter.<sup>68</sup>

The Commission failed to provide any explanation of how the occupation violated the right to cultural development. However, it did identify the notion of ‘cultural development’ as an element of the RtD. It was only later, in the *Endorois* case, that it provided details on its interpretation of the concept of ‘cultural development’ and of the RtD *per se*.

In its considered communication on this matter, the Commission also found the illegal exploitation/looting of the natural resources of the complainant state to be in contravention of article 21 of the African Charter.<sup>69</sup> In this way, the African Commission introduced another facet

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<sup>66</sup> See <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> (accessed 7 October 2013).

<sup>67</sup> Article 60 provides: ‘The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members’.

<sup>68</sup> Paragraph 87.

<sup>69</sup> Article 21 stipulates that:

of the RtD as defined in the UN Declaration on the Right to Development when it concluded that the deprivation of the right of the people of the Democratic Republic of Congo freely to dispose of their wealth and natural resources, constituted a further violation –a violation of their right to economic, social and cultural development and of the general duty of states to ensure the exercise of the right to development as guaranteed under article 22 of the African Charter. To a certain extent, I will argue that articles 21 and 22 should be read together, and that both relate in some way to the RtD as defined by the UN Declaration. Article 21 relates to physical possessions, while article 22 ‘operates’ on a more ‘psychological’ plane with its reference to ‘cultural development’. It is the combination of these two articles that brings the definition offered by these two instruments closer. Distinguishing between them, leaves room for misinterpretation of the substantive content of the RtD and a possible limitation of ‘cultural’ development. Such was, for example, the inter-pretation used by Côte d’Ivoire in its initial and combined report to the African Commission in October 2012.<sup>70</sup> In accounting for measures taken to fulfil its obligations under the RtD,<sup>71</sup> Côte d’Ivoire reported on efforts made in promoting economic development (such as those relating to the achievement of the millennium development goals)<sup>72</sup> on the one hand, and on the other, activities relating to culture, such as the establishment of a ministry of culture, and the protection of property rights and sites considered as world cultural heritage. This account of the implementation of the RtD undermines the nature of this right as composite and participatory.

In this communication, I submit, the Congolese NGOs, acting on behalf of victims of the occupation by the respondent states’ armed forces, could have networked both internally and with international human rights groups to demand payment of reparation for the violation of the RtD, among other rights. In my opinion, this opportunity is still open and should be explored, including by approaching the African Court on Human and Peoples’ Rights.

#### **1.3.2.4 Socio Economic Rights and Accountability Project v Nigeria: *Communication 300/05*<sup>73</sup>**

In this communication the Nigerian NGO, Socio Economic Rights and Accountability Project (SERAP), claimed that Nigeria had violated article 17 (the right to education); article 21 (the right of the people not to be dispossessed of their wealth and natural resources); and article 22 (the right of the people to economic, social and cultural development) following a controversial television announcement by former President Olusegun Obasanjo, alluding to the fact that some

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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 States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.

<sup>70</sup> The Republic of Côte d’Ivoire’s initial and combined report submitted the African Commission on Human and Peoples’ Rights on 4 July 2012 and examined at the 52<sup>nd</sup> ordinary session held in Yamoussoukro (Côte d’Ivoire) in October 2012 available at [http://www.achpr.org/files/sessions/52nd/state-reports/1-1994-2012/initial\\_combined\\_periodic\\_report\\_194\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/state-reports/1-1994-2012/initial_combined_periodic_report_194_2012_eng.pdf) (accessed 23 November 2013).

<sup>71</sup> *Id* 41-42.

<sup>72</sup> In 2000, the UNGA adopted a declaration known as the ‘Millennium Declaration’ which contains eight development goals ranging from halving extreme poverty and providing universal primary education, to stopping the spread of HIV and AIDS by 2015. For more on the MDGs, see <http://www.un.org/millenniumgoals/> (accessed 23 November 2013).

<sup>73</sup> *Communication 300/05 Socio Economic Rights and Accountability Project v Nigeria* available at <http://caselaw.ihrrda.org/doc/300.05/view/> (accessed 3 October 2013).

senior officials in government had taken bribes. SERAP claimed that the diversion of the sum of 3,5 billion naira from the National University Commission by certain public officers in ten states of the Federation of Nigeria, was illegal and unconstitutional as it violated articles 21 and 22 of the ACHPR. However, the case was declared inadmissible by the African Commission, again on the basis of non-exhaustion of available domestic remedies (article 56(5)).<sup>74</sup> Not satisfied with this conclusion, SERAP then submitted the same Communication to the Court of Justice of the Economic Community of West African State (ECOWAS Court) on the same facts.<sup>75</sup>

Although this case is not examined in detail here, it is noteworthy – and indeed innovative – that contrary to the general principle of international law (and municipal/national law), the exhaustion of domestic remedies is not a requirement for admissibility of communications before the ECOWAS Court of Justice, hence the admission of the case by the court which had earlier been declared inadmissible by the African Commission. (A more extensive discussion of the ECOWAS Court of Justice is undertaken below.)

### **1.3.2.5 *Sudan Human Rights Organisation (SHRO) & Centre on Housing Rights and Evictions (COHRE) v Sudan: Communication 279/03-296/05***<sup>76</sup>

These two communications were filed against Sudan on behalf of the Darfuree people by a group of both international and national NGOs. The first communication was submitted by the Sudan Human Rights Organisation (London); the Sudan Human Rights Organisation (Canada); the Darfur Diaspora Association; the Sudanese Women’s Union in Canada; and the Massaleit Diaspora Association (the complainants). The second communication, *Centre for Housing Rights and Evictions v Sudan* (the COHRE case), was submitted by an NGO based in Washington, DC (the complainant) against the same respondent state, the Sudan. Since the last-mentioned communication was based on allegations virtually identical to those raised in the SHRO case, the African Commission consolidated the complaints.<sup>77</sup> It is worth noting in passing that the Commission made use of rule 96 (joinder and disjoinder of Communications) of its Rules of Procedure.<sup>78</sup>

In substance, the complainants alleged gross, massive, and systematic violations of human rights by the Republic of Sudan (the respondent state) against the indigenous black African tribes in the

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<sup>74</sup> Article 56(5) provides that communications relating to human and peoples’ rights referred to in article 55 received by the Commission, shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

<sup>75</sup> Communication 338/07 *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* available at <http://caselaw.ihrra.org/doc/338.07/view/> (accessed 5 October 2013).

<sup>76</sup> *Sudan Human Rights Organisation (SHRO) and Centre on Housing Rights and Evictions (COHRE) v Sudan* Communication 279/03-296/ available at [http://www.achpr.org/files/sessions/45th/communications/279.03-296.05/achpr45\\_279.03\\_296.05\\_eng.pdf](http://www.achpr.org/files/sessions/45th/communications/279.03-296.05/achpr45_279.03_296.05_eng.pdf) (accessed 5 October 2013).

<sup>77</sup> See paras 33 and 50 of Communication 279/03-296/05.

<sup>78</sup> Rule 96 provides:

- 1 If two or more Communications against the same State Party address similar facts, or reveal the same pattern of violation of rights, the Commission may join them and consider them together as a single Communication.
- 2 Notwithstanding paragraph 1 of the present Rule, the Commission may decide not to join the Communications if it is of the opinion that the joinder will not serve the interest of justice.
- 3 Where in accordance with paragraph 1 of the present Rule, the Commission decides to join two or more Communications, it may subsequently, where it deems appropriate, decide to disjoin the Communications.

Darfur region (Western Sudan); in particular, members of the Fur, Marsalit, and Zaghawa tribes. They claimed that the violations committed in the Darfur region included large-scale killings; forced displacement of populations; destruction of public facilities and properties; and disruption of life through the bombing of densely populated areas by military fighter jets.

In this case, the African Commission found the Darfuree people to be victims of violations of several articles of the African Charter, including article 22 (the RtD). The African Commission restated Sudan’s obligation under the African Charter to protect the rights of every individual and peoples of every race, ethnicity, religion, and other social origin.<sup>79</sup> In addressing the violations committed against the people of Darfur, the Commission found that the people of Darfur in their collective are ‘a people’, who should not be dominated by a people of another race in the same state. The Commission understood that their claim for equal treatment arose from their alleged underdevelopment and marginalisation. On this ground, the Commission concluded that the response by Sudan which, in the course of fighting the armed conflict, targeted the civilian population instead of the combatants, constituted a form of collective punishment which is prohibited under international law. It is in that respect that the Commission found Sudan in violation of article 22 of the African Charter. In this instance the African Commission introduced the notion of respect for human rights in general and the RtD in particular, during an armed conflict by stressing the line between non-combatant civilian populations entitled to the respect and protection of their rights, and combatants. The Commission motivated the breach of the RtD as resulting from the fact that the attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social, and cultural activities.<sup>80</sup> The Commission did not elaborate on this point in the case under review.

The African Commission finally afforded the RtD full attention through providing a detailed and elaborate analysis of the definition and application of the African Charter to the RtD in the *Endorois* case discussed next.

#### **1.3.2.6 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya: Communication 276/03<sup>81</sup>**

The communication was filed by the Centre for Minority Rights Development (CEMIRIDE) who acted on behalf of the Endorois community. CEMIRIDE received assistance from two international organisations, Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE – which submitted an *amicus curiae* brief). CEMIRIDE alleged human rights violations arising from the displacement of the Endorois community, an indigenous people, from their ancestral lands; failure to compensate them adequately for the loss of their property; the disruption of the community’s pastoral enterprise; and violations of the right to practice their religion and culture; as well as the overall process of development of the people. The complainant claimed these constituted violations of articles 8 (freedom of religion); 14 (right

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<sup>79</sup> See articles 2 and 19 of the African Charter on Human and Peoples’ Rights (ACHPR).

<sup>80</sup> Paragraph 224: ‘The attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and pursuit of other activities. Instead of deploying its resources to address the marginalisation in the Darfur, which was the main cause of the conflict, the Respondent State instead unleashed a punitive military campaign which constituted a massive violation of not only the economic social and cultural rights, but other individual rights of the Darfurian people.’

<sup>81</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* Communication 276/03 available at <http://caselaw.ihrrda.org/doc/276.03/view/> (accessed 5 October 2013).

to property); 17 (right to education); 21 (right to freely dispose of wealth and natural resources); and 22 (right to development) of the African Charter.

They requested that these violations be remedied by the restitution of their land with legal title and clear demarcation of their boundaries, and compensation of the community for all the losses suffered. They also requested respect for and protection of their freedom to practice their religion and culture.

In considering the case based on the failure of the respondent state (Kenya) to submit arguments on the admissibility of the communication despite numerous reminders, the African Commission decided that the complaint complied with article 56 of the African Charter and accepted jurisdiction.<sup>82</sup>

In considering the case on its merits, the Commission examined each of the claims founded on specific provisions of the African Charter and pronounced on each. For the purpose of this thesis, reference is only made to the decision of the Commission on the dispute relating to the alleged violation of the provisions of article 22 (the RtD).

The respondent state argued that the Endorois did not qualify as ‘peoples’ in the terms of the definition in the African Charter. On this, the African Commission stated:

The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of ‘peoples’. . . . It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three ‘generations’ of rights: civil and political rights; economic, social, and cultural rights; and group and peoples’ rights. In that regard, the African Commission notes its own observation that the term ‘indigenous’ is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission.<sup>83</sup>

The Commission therefore considered that the Endorois could not be denied a right to legal personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community. The African Commission agreed that the Endorois consider themselves a distinct people, sharing a common history, culture, and religion. It was satisfied that the Endorois are ‘a people’, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The Commission was further of the view that the alleged violations of the African Charter, involved those rights that go to the heart of indigenous rights – the right to preserve one’s identity through identification with

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<sup>82</sup> Paragraph 60: ‘The African Commission notes that there was a lack of cooperation from the respondent State to submit arguments on admissibility of the communication despite numerous reminders. In the absence of such a submission, given the face value of the complainants’ submissions, the African Commission holds that the complaint complies with article 56 of the African Charter and hence declares the communication admissible.’

<sup>83</sup> Paragraph 149.

ancestral lands.<sup>84</sup> In relation to the particular components of the RtD, the African Commission offered a detailed account of its understanding of the RtD as including the people’s participation and consultation in decision-making; benefit sharing; and ultimately, the creation of favourable conditions for development. These components of the RtD are listed here as they go a long way in furthering an understanding of the definition of the RtD in Africa.

First, the African Commission used its mandate to interpret the provisions of the African Charter under article 45(3)<sup>85</sup> to elaborate on the dual nature of this right. It found that the right to development required a two-pronged approach as the right is both ‘constitutive’ and ‘instrumental’, or useful as both a means and an end. A violation of either the procedural or substantive element will constitute a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.<sup>86</sup> This interpretation of the RtD is consistent with the definition of the UN Declaration on the RtD<sup>87</sup> and my understanding of this right as a composite and participatory right.

The African Commission identified five main criteria and listed them as the requirements for the enforcement of the RtD. It (development) must be equitable;<sup>88</sup> non-discriminatory (on any ground

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<sup>84</sup> In para 157, the Commission expounds on this point thus: ‘[I]n addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples. The UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supports self-identification as a key criterion for determining who is indeed indigenous. The African Commission is aware that today many indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as “peoples” is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems. The African Commission further notes that the Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (WGIP) emphasises that peoples’ self-identification is an important ingredient to the concept of peoples’ rights as laid out in the Charter. It agrees that the alleged violations of the African Charter by the Respondent State are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.’

<sup>85</sup> Article 45(3) provides that the functions of the African Commission shall be 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 Organization recognized by the OAU’ (now the African Union).

<sup>86</sup> Paragraph 277.

<sup>87</sup> Article 1 of the UN Declaration on the RtD provides:

- 1 The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.
- 2 The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

<sup>88</sup> According to the fourth report submitted by Arjun Sengupta, then UN Independent Expert on the Right to Development, ‘equity’ in the field of development, implies a change in the structure of production and distribution in the economy to ensure growth and equity. It would also imply providing for equality of opportunity or capabilities, which could translate into equitable distribution of income or amount of benefits accruing from the exercise of the rights. See <http://daccess-dds->

such as sex, opinion, origin, belief, social status); participatory (involving the beneficiaries); accountable (this would imply specifying obligations for different duty-holders who are responsible for carrying out the programme); and involves establishing appropriate adjudicating and monitoring mechanisms through a formal, legal process.<sup>89</sup>

Second, on the concept of participation, the African Commission relied on article 2(3) of the UN Declaration on the Right to Development which states that the RtD includes ‘active, free and meaningful participation in development’. On this basis, the African Commission recommended that the result of development should be empowerment of the Endorois community. It was therefore insufficient for the Kenyan authorities merely to give food aid to the Endorois.<sup>90</sup> It further held that even though the respondent state claimed that it had consulted with the Endorois community, the African Commission was of the view that this consultation had been inadequate. The Commission found that in fact, the respondent state had not obtained the prior, informed consent of all the Endorois before designating their land as a game reserve and embarking upon their eviction.<sup>91</sup> Next, the African Commission introduced an interesting perspective on the African indigenous knowledge system as part of its definition of participation in decision-making, when it espoused the view that before any development or investment projects that would have a major impact within the Endorois territory could be embarked upon, the state had a duty to consult with the community and obtain their free, prior, and informed consent, in accordance with their customs and traditions.<sup>92</sup>

Regarding benefit sharing as a constitutive part of the RtD, the African Commission observed that in accordance with the 1990 ‘African Charter for Popular Participation in Development and Transformation’,<sup>93</sup> benefit sharing is key to the development process. It therefore ruled that in the present case of the Endorois, the right to obtain ‘just compensation’ in the spirit of the African Charter translates into a right of the members of the Endorois community reasonably to share in the benefits accrued to the state as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands, and of those natural resources necessary for their survival.<sup>94</sup>

Finally, and in accordance with article 22 of the African Charter, the African Commission ruled that Kenya was a duty-bearer whose obligations included creating conditions favourable to a people’s development, and on this ground to ensure that the Endorois were not excluded from the development process or benefits. The Commission agreed with the complainant that the failure to provide adequate compensation and benefits or to provide alternative suitable land for grazing was an indication that the respondent state had not adequately provided for the Endorois in the development process.<sup>95</sup> On the basis of the above, the African Commission ruled that Kenya had violated article 22 of the African Charter and recommended reparation in favour of the Endorois

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ny.un.org/doc/UNDOC/GEN/G01/164/02/PDF/G0116402.pdf?OpenElement (accessed 5 October 2013).

<sup>89</sup> Sengupta Arjun ‘Development cooperation and the right to development’ available at [http://www.tanzaniagateway.org/docs/Development\\_cooperation\\_and\\_the\\_Right\\_to\\_Development.pdf](http://www.tanzaniagateway.org/docs/Development_cooperation_and_the_Right_to_Development.pdf) especially at 7 (accessed 5 October 2013).

<sup>90</sup> Paragraph 283.

<sup>91</sup> Paragraph 290.

<sup>92</sup> Paragraph 291.

<sup>93</sup> African Charter for Popular Participation in Development and Transformation available at <http://www.afrimap.org/english/images/treaty/file4239ac8e921ed.pdf> (accessed 10 October 2013).

<sup>94</sup> *Endorois* case para 295.

<sup>95</sup> *Id* para 298.

community. From information accessible to us as of June 2020, Kenya had not complied with the decisions of the Commission on this matter.

The *Endorois* case briefly summarised here represents the first definitive explanation and expansion on the definition and enforcement of the RtD by the African Commission. From this perspective, this case is not only useful but also crucial as an aid to litigation by human rights NGOs on the subject of the RtD.<sup>96</sup> The main points to substantiate this particular assertion are highlighted in what follows.

## **1.4 Significance of the *Endorois* case for human rights non-governmental organisations and the realisation of the right to development**

### **1.4.1 Impact of development on people against the background of the *Endorois* case**

As with the *Bakweri* case above, the *Endorois* case typifies development-oriented displacement on which the African Commission has been required to make specific legal pronouncements. Given the magnitude of forced displacement in Africa, the African Commission established a subsidiary mechanism to address this issue through the position of a special rapporteur on refugees, asylum seekers, migrants and internally displaced persons (IDPs).<sup>97</sup> Commissioner Nyanduga, the first incumbent, explains that:

In response to the prevalence of displacement, and the gross violations of the human rights of IDPs in Africa, the African Commission on Human and Peoples’ Rights, the organ charged by the African Union to promote and protect human rights, established a special mechanism to monitor and report to the Commission on a regular basis, the displacement situation on continent, and violations of the rights of IDPs.<sup>98</sup>

It is common for local communities in Africa to experience displacement by the state (or with its support) as part of the construction of infrastructure for development, such as the building of dams, highways, game parks, or even housing estates.<sup>99</sup> Central to development-oriented displacement is the fact that the affected populations are perceived as a necessary sacrifice in the development process. Within this paradigm, the positive gains of development projects, encapsulated in the notion of the public interest (or the public good), are seen to outweigh the negative consequences – the displacement of a few, being one of them. Robinson from the

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<sup>97</sup> African Commission on Human and Peoples’ Rights: Special Rapporteur of Refugees, Assylum Seekers, Migrants and Internally Displaced Persons available at <http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/> (accessed 23 November 2013).

<sup>98</sup> Statement by Bahame Tom Nyanduga on the occasion of the 10<sup>th</sup> anniversary of the ‘Guiding principles on internal displacement: An African perspective’ 3 available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/6AB5850D2E1F89ABC12574E20048ED25/\\$file/Statement%20by%20Bahame%20Tom%20Nyanduga,%20Commissioner,%20African%20Commission%20on%20Human%20and%20Peoples'%20Rights.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/6AB5850D2E1F89ABC12574E20048ED25/$file/Statement%20by%20Bahame%20Tom%20Nyanduga,%20Commissioner,%20African%20Commission%20on%20Human%20and%20Peoples'%20Rights.pdf) (accessed 23 November 2013).

<sup>99</sup> See Terminski Bogumil *Development-induced displacement and resettlement: Theoretical frameworks and current challenges* (2013) 47-68 available at <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8833/Bogumil%20Terminski,%20developmentinduced%20Displacement%20and%20Resettlement.%20Theoretical%20frameworks%20and%20current%20challenges.pdf?sequence=1> (accessed 23 November 2013).



Migration Policy Institute, an international NGO with an established record in displacement issues, has observed that:

People who are forced to flee from a disaster or conflict usually receive sympathetic attention and international aid. The same cannot be said for the millions of people worldwide who have been displaced by development, even though the consequences they face may be comparably dire. In decades past, the dominant view of those involved in the ‘development’ of traditional, simple, Third World societies was that they should be transformed into modern, complex, Westernized countries. Seen in this light, large-scale, capital-intensive development projects accelerated the pace toward a brighter and better future. If people were uprooted along the way that was deemed a necessary evil or even an actual good, since it made them more susceptible to change.<sup>100</sup>

The challenges posed by development-oriented displacement are highlighted by Sing’Oei, one of the lawyers involved in the *Endorois* case and a founding trustee of the Centre for Minority Rights Development in Kenya. He argues that the marginal position occupied by pastoralism in the economic matrix of the Kenyan state, has led to the de-emphasis of pastoralism in favour of economic activities that respond to market demands, in this case tourism, mining, and energy extraction.<sup>101</sup> Cernea’s work on the sociological impact of the economics of resettlement for purposes of development, indicates the high risk for the displaced population including impoverishment as a result of landlessness, loss of jobs and houses, food insecurity, marginalisation, and social disintegration.<sup>102</sup>

In my opinion, the major challenge lies in striking a balance between the right of the affected communities and the imperatives of development embedded in the RtD. If a given group/people has to be sacrificed in the name of development, then justice and fairness have to be considered taking into account the way in which the displacement occurs, the process involved, and the compensatory measures taken to accommodate the losses experienced by the affected group/people. The *Endorois* case illustrates the negation by the government of Kenya of its domestic and international human rights obligations to protect the rights of the affected group/people (a minority group). From this perspective, the decision of the African Commission is significant, not only for the *Endorois* community, but beyond it for thousands of other communities facing similar situations in Africa and beyond.

A scenario similar to that witnessed in Kenya, played out earlier in Côte d’Ivoire. However, there was a major difference between the situation in Kenya and Côte d’Ivoire. Similar to the *Endorois* community, the Baoulé people were displaced from Kossou in 1969 (at virtually the same time as the *Endorois* were forcefully evicted) for the construction of the Kossou Dam, Côte d’Ivoire’s second largest dam. Kossou is located in the central region of the country, and the Baoulé people rely on farming for their livelihood and trade. The Baoulé are African traditional religion believers. The building of a dam on the Ivorian river Bandaman for hydro-electricity, led to the creation of an artificial lake forcing some 75 000 locals from their ancestral lands and depriving them of their means of livelihood. The Ivorian government established the *Autorité pour l’Aménagement de la vallée du Bandaman*, a public agency to resettle the affected populations on

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<sup>100</sup> Robinson C ‘Minimizing development-induced displacement’ available at <http://www.migrationinformation.org/feature/display.cfm?ID=194> (accessed 23 November 2013).

<sup>101</sup> Sing’Oei ‘The *Endorois*’ legal case and its impact on state and corporate conduct in Africa’ (2010) *Buffalo Human Rights Law Review* 57.

<sup>102</sup> Cernea M ‘For a new economics of resettlement: A sociological critique of the compensation principle’ (2003) 175 *International Social Science Journal* 16-17.

the banks of the new lake. Means of livelihood were to be restored through an ambitious land clearing scheme by which annual rainwater-fed crops were to be cultivated. The farming was highly mechanised with crop rotation and associated cattle breeding. This scheme was largely supported by international financing organisations, including the Food and Agriculture Organisation and the European Development Fund. The locals could not cope with the new farming system which they found constraining and unprofitable. They thus returned to the traditional cultivation of their crops. The new scheme was abandoned by the disillusioned locals and eventually collapsed and was terminated in 1981.<sup>103</sup>

The two main consequences of the construction of the dam were the displacement of some 75 000 people from their ancestral land and the re-orientation of the habits and lifestyles of some 3 000 people who opted to stay behind. However, in contrast to the *Endorois* case, the state undertook to compensate the displaced population and to sponsor skills-development for those who stayed on their ancestral land. The then President appointed a local from the Kossou region as director of the resettlement agency in an attempt to diffuse any likely tension that could arise in the course of the resettlement process. Although these two development-induced displacements occurred at almost the same time, the Kossou population did not organise themselves into a pressure group and did not have to resort to court-based remedies, as did the *Endorois*. The reason for this difference in reaction could most certainly be found in the way in which development-induced eviction took place in these two instances.

The first difference relates to the recognition of the relevant group as a ‘people’. In Côte d’Ivoire the state did not deny the existence of the Baoulé as indigenous inhabitants of the Kossou land and so the issue of land ownership did not arise. In fact, whereas the Ivorian law states that the land is a national heritage which every individual and legally constituted body can access, ownership is limited under specific conditions, to the state, local communities, and Ivorian nationals.<sup>104</sup> Customary law still prevails making indigenous people owners of their ancestral land.<sup>105</sup> In the *Kossou* case, the state avoided dispossessing local communities of their land without compensation. In contrast, in Kenya the *Endorois* were denied *locus standi* before municipal courts on the alleged ground of the non-existence of the group as a legal entity with an adjudicative right. Such a stance, if taken in Côte d’Ivoire and perhaps in other African countries as well, would have generated a reaction similar to, if not more violent than, that opted for by the *Endorois*. Some African countries house scores of ethnic groups with much diversity, different lifestyles, cultural practices and belief systems which they claim as their (cultural) heritage.

In terms of participation in decision-making, the *Endorois* also complained of the Kenyan government’s failure to involve them in decisions affecting them. In contrast, the Ivorian government ensured the presence of the affected people on the board of the *Autorité pour l’aménagement du vallée du Bandama*. The authorities also recognised and relied on the ‘Kossou Native Association’, a development group comprising the elite, students, and other middle-class

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<sup>103</sup> Lassailly-Jacob ‘*Colonisation planifiée des rives du Lac de Kossou en Côte-d’Ivoire Centrale: la genèse d’un échec*’ (1982) 147-148 *Économie rurale*. 45-50.

<sup>104</sup> See article 1 of the *Loi n°98-750 du 23 décembre 1998 modifiée par la loi du 28 juillet 2004* available at [http://www.droit-afrique.com/images/textes/Cote\\_Ivoire/RCI%20-%20Domaine%20foncier%20rural.pdf](http://www.droit-afrique.com/images/textes/Cote_Ivoire/RCI%20-%20Domaine%20foncier%20rural.pdf) (accessed 10 October 2013).

<sup>105</sup> *Id* article 3.

people from the affected area. According to Chauveau, this association played a prominent ‘brokering’ role between rural populations and the wider social and political environment.<sup>106</sup>

With regard to the sharing of benefits, the Ivorian government built modern houses, schools, and healthcare facilities as part of the compensatory measures. This did not happen for the Endorois in Kenya. Although the Endorois are mainly pastoralists while the Baoulé are agriculturalists, there are similarities in religious and cultural practices between the two groups. Both groups perform religious and cultural rites on their ancestral lands, on the banks of their rivers, and in their valleys. They also have a deep attachment to their ancestors and perform certain rites at intervals at the graves of their ancestors seeking protection against wars and calamities and the favour of their gods in carrying out their pastoralist or agricultural activities. The displacement of both groups affected these practices profoundly.

#### **1.4.2 Enforcement of decisions of the African Commission**

As part of its protective mandate (discussed above), and in accordance with provision of articles 45(2)<sup>107</sup> and 46<sup>108</sup> of the African Charter, the Commission entertains communications from states (articles 47-54 of the Charter) and other communications (individuals and groups), in accordance with articles 55 and 56. In discharging its protective mandate, the Commission carries out investigations, confronts the positions of the parties, interprets the law, and makes rulings – including ordering provisional measures.<sup>109</sup> However, it can only make recommendations, and by definition these do not carry the same legal weight as court rulings. This limitation on the protection mandate of the Commission has prompted the establishment of the African Court on Human and Peoples’ Rights which will be discussed in brief below.

What steps can the Endorois take to ensure compliance with the Commission’s ruling? Since the Endorois group was represented by NGOs, the question is in fact what can an NGO do should a state fail to implement a decision by a human rights body – in the present case the African Commission? Generally international law provides for several mechanisms to ensure state compliance. The three major mechanisms are ‘coercion’ as a mechanism by which states and institutions influence the behaviour of other states by escalating the benefits of compliance, or

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<sup>106</sup> Jean-Pierre Chauveau ‘The land tenure question in Côte d’Ivoire: A lesson in history’ (2000) 78 *Politique Africaine* 12 under the general title ‘Question foncière et construction nationale en Côte d’Ivoire. Les enjeux silencieux d’un coup d’Etat’ available at [http://www.hubrural.org/IMG/pdf/iied\\_dry\\_ip95english.pdf](http://www.hubrural.org/IMG/pdf/iied_dry_ip95english.pdf) (accessed 10 October 2013).

<sup>107</sup> ‘[To] ensure the protection of human and peoples’ rights under conditions laid down by the present Charter’.

<sup>108</sup> 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.

<sup>109</sup> For example, in the Communications 137/94, 139/94, 154/96 and 161/97 (1998). *International Pen and Others v Nigeria*, the African Commission ordered the respondent states to suspend the execution of the death sentence imposed on Ken Saro-Wiwa and eight of the co-defendants (Saturday Dobe, Felix Nuate, Nordu Eawo, Paul Levura, Daniel Gbokoo, Barinem Kiobel, John Kpunien and Baribor Bera). The respondent state ignored the order and executed them. The African Commission ruled that the respondent state had violated article 1 of the African Charter. See [http://www1.umn.edu/humanrts/africa/comcases/137-94\\_139-94\\_154-96\\_161-97.html](http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html) (accessed 13 October 2013). On provisional measures, see Yuma Dan ‘Provisional measures under the African human rights system: The African court’s order against Libya’ 359. Available at <http://hosted.law.wisc.edu/wordpress/wilj/files/2013/01/Juma.pdf> at 359 (accessed 13 October 2013).

escalating the costs of non-compliance through material rewards and punishments.<sup>110</sup> ‘Persuasion’, which is achieved through dialogue, negotiation, and diplomatic means and involves the active and often strategic, inculcation of norms;<sup>111</sup> and ‘acculturation’ – the general process by which a state adopts the beliefs and behavioural patterns of the surrounding culture.<sup>112</sup> This translates in notions such as the promotion of the culture of democracy, and implies on the part of the state at fault, that action is taken because other states in close vicinity do the same.

In the context of the *Endorois* case, enforcement of the RtD requires what is termed here either ‘restorative’ or ‘remedial measures’. ‘Restorative measures’ entail restitution of property taken from the people, return to the *status quo ante*, and protection against further disturbance in the enjoyment of their rights to the restored land. As such, ‘restorative measures’ derive their legal authority from the human rights obligations to respect and to protect.<sup>113</sup> They add nothing in terms of any benefit to the affected people, but they do bring an end to the damage. In the case of the Endorois, these were the measures recommended by the African Commission. ‘Remedial measures’ on the other hand, are premised on the obligation to implement steps such as ensuring inclusion of the affected population and their participation in decision-making before displacement and compensation in the form of material arrangements as elaborated above and the sharing of the benefits from the exploitation of the development project. The African Commission recommended that the benefits of the exploitation of the Rift Valley be shared with the Endorois. However, available information shows that to date neither restorative nor remedial measures have been taken by Kenya as regards the Endorois people. Viljoen discusses the enforcement issues and highlights three major steps to ensure compliance with African Commission recommendations: political will on the part of the state; the recognition of the nature of the decisions of the African Commission as legally binding; and advocacy beyond court-based remedies.<sup>114</sup> These three steps will now be examined in greater detail.

First, ‘political will’ on the part of the state is a prime element in triggering compliance. However, this trigger also exposes the limitation of the African protection system based largely on the political goodwill of the state. In the African context, I concur with Viljoen’s observation that this goodwill needs to be supplemented by consideration of the fact that the political will of the regional and sub-regional institutions also plays an important, if not key, role.<sup>115</sup>

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<sup>110</sup> Goodman, Ryan and Jinks ‘How to influence states: Socialization and international human rights law’ (2004) 54 *Duke LJ* 9 available at SSRN: <http://ssrn.com/abstract=519565> (accessed 30 September 2013).

<sup>111</sup> *Id* 10.

<sup>112</sup> *Id* 5.

<sup>113</sup> Generally, under international human rights law, there are three obligations: to respect, protect, and fulfil. The duty-bearer, and in the present context the state, assumes obligations and duties under international law to respect, to protect, and to fulfil human rights. The obligation to respect means that state must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires the state to protect individuals and groups against human rights abuses. The obligation to fulfil means that state must take positive action to facilitate the enjoyment of basic human rights. See <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (accessed 10 October 2013).

<sup>114</sup> Viljoen F ‘State compliance under the African Charter on Human and Peoples’ Rights’ (2010) 16/2 *Interrights Bulletin* 62.

<sup>115</sup> *Ibid*.

The African Commission is of the view that its recommendations are legally binding on the state, and therefore carry an obligation to comply.<sup>116</sup> Although this is the ideal, in my opinion recommendations of the African Commission are and will remain non-binding<sup>117</sup> until the African Charter states differently, or the defendant state acts in a different way. The African Charter makes no provision for this as is the case with the decisions and recommendations formulated by bodies established under UN human rights treaties. Compliance with treaty body decisions is therefore subject to the goodwill of the state.<sup>118</sup> With respect to implementation of the decisions of the African Commission, I again agree with Viljoen’s view referred to above, that in combining pressure from NGOs, members of parliament, national human rights commissions, and the judiciary, an unstoppable momentum towards compliance can be created.<sup>119</sup>

I turn now to a brief discussion of the African Court on Human and Peoples’ Rights.

## **1.5 The African Court on Human and Peoples’ Rights**

### **1.5.1 Genesis, mandate and the enforceability of its decisions**

The African Court on Human and Peoples’ Rights was established by the African Union through the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (‘the Protocol’) in 2006 in Arusha, Tanzania to complement and reinforce the protection functions of the African Commission.<sup>120</sup>

The African Court comprises eleven judges, nationals of member states of the African Union with a track record in human rights (article 11).<sup>121</sup> The judges of the court elect a President and Vice-President from among themselves who serve a two-year term, renewable once. Ten judges work on part-time basis, while the President works full time at the seat of the court in Arusha, Tanzania (article 21(2)). S/he is assisted by a registrar who also performs managerial and administrative oversight of the court.<sup>122</sup>

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<sup>116</sup> In the case *Kenneth Good v Botswana*, the African Commission rejected Botswana’s argument that the African Charter does not impose legally binding obligations because, among other reasons, the drafters decided to adopt a treaty rather than a declaration (which is not legally binding). See Communication 313/05 *Kenneth Good v Botswana* 28th Activity Report of the African Commission on Human and Peoples’ Rights AU Doc EX.CL/600 (XVII) Annex IV.

<sup>117</sup> See wa’Mutua Makau *The African human rights system: A critical evaluation* (2000) 19. See <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 13 October 2013).

<sup>118</sup> See, for example, Van Alebeek Rosanne and Nollkaemper André ‘The legal status of decisions by Human Rights Treaty Bodies in National Law’ ACIL research paper 2011-02, finalised 11 April 2011 23-25 available at SSRN <http://dare.uva.nl/document/450293> (accessed 2 October 2013).

<sup>119</sup> Viljoen ‘State compliance under the African Charter on Human and Peoples’ Rights’ (2011) 16/2 *Interrights Bulletin* 62.

<sup>120</sup> Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights available at <http://african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf> (accessed 13 October 2013).

<sup>121</sup> The first judges of the court were elected in January 2006, in Khartoum, Sudan. They were sworn in before the Assembly of Heads of State and Government of the African Union on 2 July 2006 in Banjul, the Gambia.

<sup>122</sup> Article 24 provides that:

1 The Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the OAU according to the Rules of Procedure.

### 1.5.1.1 Access to the Court

Access to the court depends on the nature of the applicant/defendant. In terms of article 5 of the Protocol, access is unconditional or an ‘entitlement’ to the following:

- a The Commission;
- b The State Party which has lodged a complaint to the Commission;
- c The State Party against which the complaint has been lodged at the Commission
- d The State Party whose citizen is a victim of human rights violation
- e African Intergovernmental Organisations.

In contrast, access for individuals and NGOs (with them having observer status only at the African Commission) is left to the discretion of the court which ‘may entitle’ them.<sup>123</sup>

The first weakness of the African Court relates to the restricted access for the principal holders of the rights enshrined in the African Charter: individuals and peoples (very often represented by NGOs).<sup>124</sup> Access to the court by individuals and NGOs is subject to the requirement that a state party (to the Protocol) accepts the jurisdiction of the court by making the appropriate declaration under article 34(6) of the Protocol establishing the court which reads:

At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.

In addition, and in accordance with provisions of the Vienna Convention on the Law of Treaties,<sup>125</sup> a state party to the Protocol to the African Charter on Human and Peoples Rights on

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2 The office and residence of the Registrar shall be at the place where the Court has its seat. Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights available at <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf> (accessed 24 November 2013).

Rule 25(1) of the court further stipulates that ‘[T]he Registrar shall assist the Court in the exercise of its judicial function and shall be in charge of the general administration of the Court’s Registry. He or she shall be responsible for the supervision and coordination of all the operations and activities of the Registry. Rules of the Court’ See [http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_\\_English\\_7\\_sept\\_1\\_.pdf](http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf) (accessed 24 November 2013).

<sup>123</sup> Article 5(3) provides: ‘The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it’.

<sup>124</sup> The African Charter provides for the rights of individuals (articles 1-17) and groups of individuals (family or people) (articles 18-26). See [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) (accessed 1 October 2013).

<sup>125</sup> The Vienna Convention applies to treaties between states. It was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties. The Conference was convened pursuant to GA resolution 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967. The Conference held two sessions, both at the Neue Hofburg in Vienna. The first session from 26 March to 24 May 1968, and the second session from 9 April to 22 May 1969. In addition to the Convention, the Conference adopted the Final Act and certain declarations and resolutions, which are annexed to that Act. It entered into force on 27 January 1980, in accordance with article 84(1). The Vienna

the Establishment of an African Court on Human and Peoples’ Rights (‘the Protocol’) may of withdraw its declaration (made under article 34(6)) at any time, or simply withdraw from the Protocol.<sup>126</sup> Hansungule argues that the primary function of a human rights court is to protect citizens against the state. For him, therefore, the limitation on access to the court by individuals and NGOs renders it ‘virtually meaningless unless it is interpreted broadly and liberally’.<sup>127</sup> I concur in this view for two reasons. First, the court has been established to supplement the Commission. The complementarity between the Commission and the Court will be effective if the same requirements for access apply. Secondly, the court was established to strengthen the African human rights protection system. Strengthening of human rights protection goes hand-in-hand with easy access to the ‘protector’, and not the contrary. Article 34(6), therefore, defeats the dual purpose of complementarity and enhancing human rights protection.

The validity of this requirement for access to the court set by article 34(6) of the Protocol, has recently been challenged in at least two instances before the African Court: Femi Falana and Atabong Denis Atemnkeng against the African Union, respectively. In the first case, Femi Falana, the applicant (a national of Nigeria) pleaded that the provisions of article 34(6) be repealed and sued the African Union as a corporate community on behalf of its member states. Given that Nigeria – which ratified the Protocol in 2004<sup>128</sup> – had not made the declaration required by article 34(6), the intention was to ensure direct access to the court without this requirement. The court rejected this argument and ruled that the African Union has a legal personality separate from its member states.<sup>129</sup> In the second case<sup>130</sup> a similar line of defence was raised in relation to Cameroon which signed the Protocol in 2006.<sup>131</sup> The court did not depart from its earlier position and again rejected the application. On both occasions, the court dismissed the applications because, in its opinion, the African Union under the auspices of which the Protocol was adopted cannot be sued on behalf of its member states; and because it is not a party to the Protocol.

### 1.5.1.2 Admissibility

In deciding on the admissibility of applications submitted by individuals and NGOs, the court is guided by the provisions of article 56 of the African Charter.<sup>132</sup> This includes the prior exhaustion

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Convention on the Law of Treaties is available at 1155 UNTS 155 .331 <http://www.worldtradelaw.net/misc/viennaconvention.pdf> (accessed 1 October 2013).

<sup>126</sup> The Vienna Convention on the Law of Treaties states in article 62(3) that: ‘If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty’.

<sup>127</sup> Hansungule M ‘Towards a more effective African system of human rights: “Entebbe Proposals”’ available at [http://www.biicl.org/files/2309\\_hansungule\\_towards\\_more\\_effective.pdf](http://www.biicl.org/files/2309_hansungule_towards_more_effective.pdf) (accessed 10 October 2013).

<sup>128</sup> Status of ratification of the Protocol on the establishment of an African Court on Human and Peoples’ Rights available at <http://au.int/en/sites/default/files/achpr.pdf> (accessed 28 November 2013).

<sup>129</sup> *Femi Falana v The African Union* Application 1/2011 available at <http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Judgment%20Application%200001-2011-%20Femi%20Falana%20v.%20The%20AU.%20Application%20no.%200001.2011.EN.pdf> (accessed 1 October 2013)

<sup>130</sup> *Atabong Denis Atemnkeng v The African Union*: application 14/2011 available at [http://www.african-court.org/en/images/documents/orders/JUDGMENT-\\_Atemnkeng\\_v\\_African\\_Union\\_ENGLISH.pdf](http://www.african-court.org/en/images/documents/orders/JUDGMENT-_Atemnkeng_v_African_Union_ENGLISH.pdf) (accessed 10 October 2013).

<sup>131</sup> *Id* n 268.

<sup>132</sup> Article 56 provides:

of local remedies (article 56(5)). The Protocol is silent on applications submitted by the Commission, a state party, and African inter-governmental organisations. It can be assumed that admissibility of their applications is not to be questioned.

### **1.5.1.3 Jurisdiction of the court**

The court has jurisdiction over disputes arising in Africa under the Protocol and ‘any other relevant human rights instruments ratified by the states concerned’.<sup>133</sup> In taking decisions, the court may draw inspiration from a multitude of sources of law, including the African Charter and any other human rights instrument ratified by the state.<sup>134</sup> This provision offers enormous possibilities for the court to draw inspiration from a variety of sources of law given that, generally, in Africa most states are party to the core international and African human rights instruments.<sup>135</sup> In accordance with the provisions of article 9 of the Protocol, the role played by the court in its proceedings can be conciliatory (amicably settling disputes),<sup>136</sup> or adversarial. Finally, the court also has advisory jurisdiction.<sup>137</sup> It can provide an ‘advisory opinion’ on any legal matter that has not been brought to the attention of the African Commission.

### **1.5.1.4 Enforcement of decisions of the Court**

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Communications relating to human and peoples’ rights referred to in 55 received by the Commission, shall be considered if they:

- 1 Indicate their authors even if the latter request anonymity,
- 2 Are compatible with the Charter of the Organization of African Unity or with the present Charter,
- 3 Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
- 4 Are not based exclusively on news discriminated 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 of the matter, and
- 7 Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

<sup>133</sup> Article 3(1) provides: ‘The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned’.

<sup>134</sup> Article 7.

<sup>135</sup> The Office of the United Nations High Commissioner for Human Rights keeps an update on state ratification and reporting on human rights obligations. See [www.ohchr.org](http://www.ohchr.org) for the updates. The African Union makes public a status of ratification of all instruments, including those which are human rights related. See [www.au.int](http://www.au.int) (accessed 10 October 2013).

<sup>136</sup> Article 9: ‘The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter’.

<sup>137</sup> Article 4(1) states: ‘At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission’.



As opposed to decisions of the African Commission, decisions of the African Court on Human and Peoples’ Rights are legally binding;<sup>138</sup> hence the court complements and reinforces the human rights protection mandate of the Commission. However, in the absence of genuine enforcement or a compliance mechanism and political will on the part of a state, the advent of the African Human Rights Court can only bring favourable conditions for state compliance without necessarily being a real guarantee for effective protection of fundamental rights. The measures provided by the Protocol to ensure compliance function on two levels. First, article 30 gives the task of monitoring compliance with decisions of the court to the Executive Council of Ministers of the African Union, an organ comprising Ministers of Foreign Affairs of the African Union member states. The Protocol does not specify how this monitoring can be done. The second measure is the listing, in other words ‘naming and shaming’ in its annual report to the Assembly of Heads of State and Government of the African Union of countries which have not complied with its decisions (article 31).<sup>139</sup> Several scholars have expressed scepticism over the ability of the African Court to achieve its desired purpose of supplementing the African Commission in strengthening the protection of the rights enshrined in the African Charter.<sup>140</sup> For example, for Mutua the measures in place to guarantee compliance are inadequate, and amount to replicating the weaknesses of the African Commission which therefore renders the court irrelevant and an unnecessary bureaucratic complication. He does not see how a weak and financially constrained institution like the African Union will be able to coerce a state to comply with decisions of its court. This raises the issue of the financial autonomy of the African Union; an issue which is beyond the scope this study. The African Union, it is argued, largely depends on assessed contributions from its member states and from voluntary contributions from donor countries and institutions. Simon’s analysis of the African Union’s 2011 budget illustrates the dependence of the AU on external donors or a handful of its member states:

A close reading of the 2011 budget of the African Union tells a few interesting stories. There’s the astonishing fact that more than half of the \$257 million total is not African money, coming from a collection of ambiguously titled ‘International Partners’ – other, richer organisations like the European Union, or donations from NGOs. The European Union, incidentally, has a 2011 budget of \$141.9 billion. This might explain the vast gulf between the respective influence and international standing of the two organisations, but, given the EU’s budget is 1,000 times bigger than the AU’s, the AU is punching above its weight.

The money that’s not from ‘International Partners’ is contributed by African countries and amounts to \$123 million. However, the load is not divided equally. Five countries put in more than their fair share. The Big Five – Algeria, Egypt, Libya, Nigeria and South Africa – each contribute 15% of the African portion of the budget, effectively subsidising everyone else. This means the other 49 countries in Africa only need to find around \$30 million between them.<sup>141</sup>

The situation is almost similar in 2020. However, Mutua’s scepticism should be more nuanced. In my opinion, the measures provided could serve as ‘foundation blocks’ upon which ensuring

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<sup>138</sup> Article 30 provides, in part, that states ‘undertake to comply with the judgment in any case in which they are parties within the time stipulated by the Court and to guarantee its execution’.

<sup>139</sup> Article 31 provides: ‘The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court’s judgment.’

<sup>140</sup> See wa’Mutua Makau ‘The African human rights system: A critical evaluation’ 2-34 available at <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 1 October 20113).

<sup>141</sup> Allison Simon ‘After Gaddafi who will fund the AU?’ <http://www.dailymaverick.co.za/article/2011-09-29-after-gaddafi-who-will-fund-the-au#.UvrMSWyPPIU> (accessed 26 November 2013).

effective compliance and enforcement of court decisions could be achieved gradually. I propose that the Permanent Representatives Committee ((PRC) – ambassadors of AU member states,<sup>142</sup> which prepares meetings of the Executive Council, establishes, in accordance with article 21(2) *in line* with the Constitutive Act of the African Union, a sub-committee on ‘compliance’. It is usual practice for the PRC to organise its works around sub-committees, for example, for administrative and budgetary matters or programmes and conferences.<sup>143</sup>

Through the proposed sub-committee, the PRC would work closely with the Court on issues relating to the implementation of the court’s decisions and submit draft reports on compliance for the consideration by the Executive Council. Obviously, it is difficult to establish how a sub-committee of state representatives would ensure compliance. This proposed collaboration will by no means prevent the court from complying with its obligation to list states that have not implemented its decisions in its annual report to the AU Assembly. On the contrary, such is the natural flow between articles 30 (execution of judgments) and 31 (report) of the Protocol on the court.

### 1.5.2 Ordering of provisional measures by the court

As indicated above, the African Commission can submit the case to the court on the basis of non-compliance with its own ruling pursuant to article 5(1)(a) of the Protocol.<sup>144</sup> Under rule 118 of the Rules of Procedures of the African Commission on Human and Peoples’ Rights, at least three situations requiring referral to the court are envisaged: non-compliance with its recommendations; non-compliance with provisional measures; and serious or massive violations.<sup>145</sup>

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<sup>142</sup> Article 21 provides:

- 1 There shall be established a Permanent Representatives Committee. It shall be composed of Permanent Representatives to the Union and other Plenipotentiaries of Member States.
- 2 The Permanent Representatives Committee shall be charged with the responsibility of preparing the work of the Executive Council and acting on the Executive Council’s instructions. It may set up such sub-committees or working groups as it may deem necessary.

available at [http://au.int/en/sites/default/files/ConstitutiveAct\\_EN.pdf](http://au.int/en/sites/default/files/ConstitutiveAct_EN.pdf) (accessed 26 November 2013).

<sup>143</sup> See, for example, Report of the joint meeting of the advisory sub-committee on administrative and budgetary matters and sub-committee on programmes and conferences to the twenty-first ordinary session of the Executive Council held in Addis Ababa, Ethiopia from 9 to 13 July 2012 available at [http://webmail.africa-union.org/Lilongwe\\_July\\_2012/EX%20CL%20720%20\(XXI\)%20i%20E.pdf](http://webmail.africa-union.org/Lilongwe_July_2012/EX%20CL%20720%20(XXI)%20i%20E.pdf) (accessed 17 April 2013).

<sup>144</sup> Article 5(a) on ‘access to the Court’ provides: ‘1 The following are entitled to submit cases to the Court: (a) The Commission ...’ See [http://www.achpr.org/files/instruments/court-establishment/achpr\\_instr\\_proto\\_court\\_eng.pdf](http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf) (accessed 17 April 2013).

<sup>145</sup> Rule 118 (‘Seizure of the Court’) reads as follows:

- 1 If the Commission has taken a decision with respect to a communication submitted under Articles 48, 49 or 55 of the Charter and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 112(2), it may submit the communication to the Court pursuant to Article 5(1)(a) of the Protocol and inform the parties accordingly.
- 2 If the Commission has made a request for Provisional Measures against a state party in accordance with Rule 98, and considers that the State has not complied with the Provisional Measures requested, the Commission may pursuant to Article 5(1)(a) of the Protocol, refer the communication to the Court and inform the Complainant and the State concerned.

The Commission has referred a number of cases to the court on the basis of non-compliance with provisional measures. Provisional measures are ordered by the African Commission in order ‘to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands’.<sup>146</sup> Such was, for example, the case in *African Commission (Ogiek) v Kenya*.<sup>147</sup> In a case similar to that of the Endorois, and once again involving eviction by Kenya, the African Commission referred the case to the African Court on Human and Peoples’ Rights. In this case, the African Commission raised concerns over the implementation of the eviction notices of the government of Kenya which had far-reaching implications and constituted, amongst others, a violation of the right to development (RtD) of the Ogiek community. The African Commission was concerned that the lifting by Kenya of the restriction on land transactions in the Mau Forest complex, would lead to the Ogiek people being dispossessed of their ancestral lands.

The African Commission pleaded for a halt to the eviction of the Ogiek from the East Mau Forest and for Kenya to refrain from harassing, intimidating, or interfering with the community’s traditional livelihood; revise domestic laws to accommodate communal ownership of property; and pay compensation to the Ogiek Community for all the losses suffered. The court heard the case which it considered to be one of extreme urgency, and ordered provisional measures to be taken by Kenya. The African Court took provisional measures and ordered Kenya immediately to rescind the restrictions it had imposed on the land transaction in the Mau Forest and refrain from any act or thing that could prejudice the principal application pending before the court.<sup>148</sup> But as discussed, no steps to comply have as yet been taken by Kenya.

In the *Endorois* case, too, Kenya failed to comply with the recommendations of the African Commission. However, the Commission has not yet referred the matter to the African Court.

Beyond the court-based remedies, the Endorois Development Counsel availed itself of opportunities for engaging the Kenyan authorities on policy issues. They also engaged the Kenyan parliament and NGOs both in Kenya and internationally to raise public awareness of their plight and to win more support. In this, it is worth noting the positive steps that have been taken by Kenya to address some of the claims of the Endorois. For example, the 2010 Constitution of Kenya acknowledges the rights of indigenous communities recognised as ‘marginalised

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3 The Commission may, pursuant to Rule 84(2) submit a communication before the Court against a state party if a situation that, in its view, constitutes one of serious or massive violations of human rights as provided for under Article 58 of the African Charter, has come to its attention

4 The Commission may seize the Court at any stage of the examination of a communication if it deems [it] necessary.

See [http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules\\_of\\_procedure\\_2010\\_en .pdf](http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf) (accessed 17 April 2013).

<sup>146</sup> Rule 98(1) stipulates: ‘At any time after the receipt of a Communication and before a determination on the merits, the Commission may, on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands’.

<sup>147</sup> See Application 006/2012 [http://www.african-court.org/en/images/documents/Orders-Files/ORDER\\_of\\_Provisional\\_Measures\\_African\\_Union\\_v\\_Kenya.pdf](http://www.african-court.org/en/images/documents/Orders-Files/ORDER_of_Provisional_Measures_African_Union_v_Kenya.pdf) (accessed 1 July 2013)

<sup>148</sup> See Application 006/2012 *African Commission v The Republic of Kenya* available at [http://www.african-court.org/en/images/documents/Orders-Files/ORDER\\_of\\_Provisional\\_Measures\\_African\\_Union\\_v\\_Kenya.pdf](http://www.african-court.org/en/images/documents/Orders-Files/ORDER_of_Provisional_Measures_African_Union_v_Kenya.pdf) (accessed 17 April 2013).

groups’.<sup>149</sup> I suggest that NGOs should also broaden the scope of their work along similar lines when pursuing the RtD).

## **1.6 Human rights litigation before the Court of Justice of the Economic Community of West African States, the East African Court of Justice and the Southern African Development Community Tribunal**

There are also a number of African ‘sub-regional’ courts with either express or implied human rights jurisdiction. Apart from the African Court on Human and Peoples’ Rights with its headquarters in Arusha, Tanzania, at the continental level, at the sub-regional level, there are the Economic Community of West African States Court of Justice (Community Court of Justice), the East African Court of Justice (EAC Court) and the Southern African Development Community Tribunal (SADC Tribunal).

Only the ECOWAS Court has express human rights jurisdiction by virtue of its 2005 Supplementary Protocol which amended the initial protocol establishing the Community Court of Justice.<sup>150</sup> The other regional courts deal with human rights as an implied jurisdiction in their

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<sup>149</sup> Article 10 provides:

10(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

(2) The national values and principles of governance include –

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.

Article 260 further defines the concepts of ‘indigenous community’ and ‘marginalised group’: ‘marginalised community’ means –

- (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are –
  - (i) nomadic; or
  - (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

‘Marginalised group’ means: ‘a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)’. ‘group’ in legislation’ means ‘an Act of Parliament, or a law made under authority conferred by an Act of Parliament’. See the Constitution of Kenya, Revised edition 2010 available at <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> (accessed 10 October 2013).

<sup>150</sup> In essence, the Supplementary Protocol A/SP.1/01/05 materialises the inclusion of human rights in the jurisdiction of the Community Court by amending the preamble to include reference ‘obstacles to economic integration (which include human rights violations, and articles 1 (definitions), 2 (establishment of the Court), 9 (competence of the Court) and 30 (expenses of the Court) of the Protocol A/P.1/7/91 which relate to the Community Court of Justice, and article 4 paragraph 1 of the English

mandate. Two examples suffice to illustrate the ‘implied’ jurisdiction over human rights issues. First, in the case of *Hon Sitenda Sebalu v the Secretary General of the East African Community and others*, the East African Court of Justice (EAC Court) ruled that:

... this Court wishes to draw attention to Article 6(d) of the East African Community Treaty which urges the Partner States, *inter alia*, to recognize, promote and protect human and people’s rights in accordance with the provisions of the African Charter on Human and People’s Rights. National courts have the primary obligation to promote and protect human rights. But supposing human rights abuses are perpetrated on citizens and the State in question shows reluctance, unwillingness or inability to redress the abuse, wouldn’t regional integration be threatened? We think it would. Wouldn’t the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the Community Partner State concerned to access their own regional court, to wit, the EACJ, for redress? We think they would.<sup>151</sup>

In this case, although the EAC Court has no such power; it has dealt with human rights claims using its competence to interpret and apply community law, namely the East African Community Treaty’s commitment to pursue development by respecting certain principles, including human rights, democracy, and the rule of law.

Secondly, the SADC Tribunal also has no human rights mandate but the Charter of Fundamental Social Rights in SADC includes specific rights.<sup>152</sup> One of these rights relates to non-discrimination on the basis of race, which was applied by the SADC Tribunal in the case of *Campbell v Zimbabwe*.<sup>153</sup>

The ECOWAS Court of Justice is therefore briefly touched upon through the lens of its explicit mandate on human rights. This court is the judicial organ of the Economic Community of West

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version of the Protocol. The initial protocol can be found at [http://www.courtecowas.org/site2012/pdf\\_files/protocol.pdf](http://www.courtecowas.org/site2012/pdf_files/protocol.pdf) (accessed 12 February 2014). With regards the Supplementary Protocol A/SP.1/01/05, see in particular, article 6 (jurisdiction of the Court) and article 10 (access to the court) available at [http://www.courtecowas.org/site2012/pdf\\_files/supplementary\\_protocol.pdf](http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf) (accessed 10 October 2013).

<sup>151</sup> *Hon Sitenda Sebalu v the Secretary-General of the East African Community and others* Reference 001 of 2010 available at [http://www1.chr.up.ac.za/images/files/documents/african\\_cases/institution/eacoj/eacoj\\_judgment\\_ref1\\_2010\\_sebalu.pdf](http://www1.chr.up.ac.za/images/files/documents/african_cases/institution/eacoj/eacoj_judgment_ref1_2010_sebalu.pdf) (accessed 10 October 2013).

<sup>152</sup> Charter of Fundamental Social Rights in SADC available at <http://www.sadc.int/documents-publications/show/837> (accessed 1 July 2013). See also <http://www.sadc-tribunal.org/?instruments=charter-of-fundamental-social-rights-in-sadc>.

<sup>153</sup> *Mike Campbell (Pvt) Limited and Others v Zimbabwe* (2008) AHRLR 199 (SADC 2008). On 11 October 2007, Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Southern African Development Community Tribunal (the Tribunal) challenging the acquisition by the respondent of agricultural land known as Mount Carmel in the District of Chegutu in the Republic of Zimbabwe. Simultaneously, they filed an application in terms of article 28 of the Protocol on the Tribunal (the Protocol), as read with rule 61(2)-(5) of the Rules of Procedure of the SADC Tribunal (the Rules), for an interim measure restraining the respondent from removing or allowing the removal of the applicants from their land, pending the determination of the matter. For more details see <http://www.sadc-tribunal.org/?cases=mike-campbell-pvt-ltd-and-others-v-the-republic-of-zimbabwe> (accessed 28 November 2013). See also <http://www1.chr.up.ac.za/index.php/human-rights-news/509-zimbabwe-mike-campbell-pvt-limited-and-others-v-zimbabwe-2008-ahrlr-sadc-2008.html> (accessed 28 November 2013). See also a chronology of the *Campbell* case [http://www.pbs.org/pov/mugabe/campbell\\_zimbabwe\\_case\\_documents.php](http://www.pbs.org/pov/mugabe/campbell_zimbabwe_case_documents.php) (accessed 28 November 2013).

African States (ECOWAS), and is competent to resolve disputes relating to the Community’s treaty, protocols, and conventions.

### **1.6.1 The establishment of the Economic Community of West African States Court of Justice**

The Community Court of Justice was created under article 15 of the ECOWAS (revised) Treaty in furtherance of the objectives of the Community.<sup>154</sup> The ECOWAS Treaty was revised in July 1993 to replace the tribunal originally envisioned with a Community Court of Justice. While the revised treaty entered into force in 1995, the judges of the Community Court of Justice were not appointed until 30 January 2001. It was not until 2005 that a new protocol was adopted (in Accra, Ghana on 19 January 2005) giving an explicit human rights mandate to the Community Court.<sup>155</sup> In December 2001, ECOWAS adopted Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (the Protocol on Democracy and Good Governance), in which its members affirmed, *inter alia*, their adherence to the principles of recognition, promotion, and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples Rights;<sup>156</sup> and the promotion of a peaceful environment as a prerequisite for economic development.<sup>157</sup> Article 1(h) provides:

The rights set out in the African Charter on Human and People’s Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights.

Article 15(4) of the ECOWAS [revised] Treaty states that:

Judgements of the, Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.<sup>158</sup>

In other words, they are final and not subject to appeal.

Article 39 of the Protocol on Democracy and Good Governance states further:

Protocol A/P 1/7/91 adopted in Abuja on 6 July 1991 relating to the community court of justice, shall be reviewed so as to give the court the power to hear, *inter-alia*, cases relating to violation of human rights, after all attempts to resolve the matter at national level have failed.

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<sup>154</sup> Treaty of ECOWAS available at <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en> (accessed 28 November 2013).

<sup>155</sup> Supplementary Protocol A/SP.1/01/05 amending the preamble and articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of the Justice, and article 4 paragraph 1 of the English version of the Protocol available at [http://caselaw.ihrda.org/doc/2005\\_prot\\_eco/view/](http://caselaw.ihrda.org/doc/2005_prot_eco/view/) (accessed 26 November 2013).

<sup>156</sup> Article 4(g) of ECOWAS Treaty (revised) available at [http://www.comm.ecowas.int/sec/fr/docs/traite\\_revise.pdf](http://www.comm.ecowas.int/sec/fr/docs/traite_revise.pdf) (accessed 3 October 2013).

<sup>157</sup> Article 4(1) of ECOWAS Treaty (revised).

<sup>158</sup> *Id* n 298.

### 1.6.2 Expansion of the mandate to include human rights

The initial treaty establishing the court had certain shortcomings. First, the adjudicative jurisdiction of the ECOWAS Court was limited specifically to matters of interpretation and the application of the ECOWAS Treaty, Protocols, and Conventions.<sup>159</sup>

With the adoption in January 2005 of a supplementary protocol, prior exhaustion of local remedies is no longer required of individuals and NGOs before gaining access to the court. Article 10 of the Supplementary Protocol of 2005 specifies the new mandate of the court and the conditions access to the jurisdiction of the court by individuals and or group as follows:

Access to the Court is open to the following:

- a) Member States, and unless otherwise provided in a Protocol, the Executive Secretary, where action is brought for failure by a Member State to fulfil an obligation;
- b) Member States, the Council of Ministers and the Executive Secretary in proceeding for the determination of the legality of an action in relation to any Community text;
- c) Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;
- d) Individuals on application for relief for violation of their human rights; the submission of application for which shall:
  - i) not be anonymous; nor
  - ii) be made whilst the same matter has been instituted before another International Court for adjudication;
- e) Staff of any Community institution, after the Staff Member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations;
- f) Where in any action before a court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations, the national court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.

### 1.6.3 Opportunities and limitations for human rights litigation

As from June 2013, the ECOWAS Court has adjudicated a number of human rights cases since the expansion of its jurisdiction to include human rights. These cases are not reviewed here. Apart from the *SERAP* case<sup>160</sup> (in which the Community Court ruled that the RtD was a justiciable right in accordance with article 22 of the African Charter), the other cases so far decided by the court do not relate to the central inquiry of this chapter.

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<sup>159</sup> Article 9 of that Protocol states that:

- (1) The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty.
- (2) The Court shall also be competent to deal with disputes referred to it, in accordance with the provisions of Article 56 of the Treaty, by Member States or the Authority, when such disputes arise between the Member States or between one or more Member States and the Institutions of the Community on the interpretation or application of the provisions of the Treaty.

<sup>160</sup> ECW/CCJ/JUD/07/10 *The Registered Trustees of the Socio-economic and Accountability Project (SERAP) v Nigeria and UBEC*. See <http://caselaw.ihrda.org/doc/ecw.cj.jud.07.10/view/> (accessed 10 October 2013).

In the *SERAP* case, the Nigerian NGO, Socio Economic Rights and Accountability Project (SERAP) claimed that Nigeria had violated article 17 (the right to education); article 21 (the right of the people not to be dispossessed of their wealth and natural resources); and article 22 (the right of the people to economic and social development) of the African Charter following a controversial television announcement by former President Olusegun Obasanjo alleging that certain senior officials in government had taken bribes. The ECOWAS Court rendered the case admissible since no exhaustion of local remedies was required, but dismissed the case for lack of evidence.

Other cases relating to claims of violations of human rights also illustrate the jurisdiction of this court to hear human rights cases. Niger, for example, has paid compensation to Hadijatou Mani Koraou in execution of the court’s decision in a slavery case in which the defendant state was found in breach of human rights law.<sup>161</sup>

From the perspective of civil society organizations, *de jure* access to the ECOWAS Court is easier than to the African Commission or the African Court on Human and Peoples’ Rights. The former does not require exhaustion of local remedies as in the case of the African Commission,<sup>162</sup> or a solemn declaration by the state at the time of ratification accepting the competence of the court to receive cases filed by NGOs and individuals.<sup>163</sup> *De facto*, this direct access to the ECOWAS Court by NGOs and individuals is nonetheless rendered difficult by the court’s location in Abuja, the political capital of Nigeria, which is too far and expensive to travel to, or to live in – even for a short period – for both a local NGO with limited funding, and an ordinary ECOWAS citizen. This geographic location argument, however, needs to be more nuanced when comparing the ECOWAS Court, with for instance, the African Court on Human and Peoples’ Rights, located in Arusha, Tanzania, or even the African Commission on Human and Peoples’ Rights based in Banjul, both of which are even less accessible in many respects, including in terms of cost, than the Abuja-based court. Other challenges faced by those wishing to use the court include lack of translation facilities in the three languages of the court (English, French and Portuguese), absence of witness protection mechanisms, assistance, or legal aid, and limited awareness of the existence and functioning of the court.<sup>164</sup>

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<sup>161</sup> ECW/CCJ/JUD/06/08: *Hadijatou Mani Koraou v Niger* available at <http://caselaw.ihrda.org/doc/ecw.ccj.jud.06.08/view/> (accessed 10 October 2013).

<sup>162</sup> Article 56.5 of the African Charter on Human and Peoples’ Rights requires that communications must be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

<sup>163</sup> Article 5.3 of the Protocol to the African Charter on Human and Peoples’ Rights relating to the African Court on Human and Peoples’ Rights reads: ‘The Court may entitle relevant Non-Governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol’. Article 34.6 requires that ‘at the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.’

<sup>164</sup> Challenges relating to access and functioning of the ECOWAS Court are highlighted in a study commissioned by the United Nations in preparation for the regional conference on ‘Impunity, justice and human rights’. See Azimazi S ‘Evaluation of the implementation of the ECOWAS Protocol on Democracy and Good Governance’ a paper commissioned by UNOWA and OHCHR October 2011, unpublished (on file with the author).



In sum, this overview of the avenues available to pursue the RtD clearly establishes that right-holders and civil society organizations in [West] Africa in general, not only have a legal framework to operate within – both at home and regionally – they can also contribute to the development of the jurisprudence of domestic, sub-regional and continental courts tasked with the mandate of enforcing human rights.