

The protection of asylum seekers and refugees within the African regional human rights system

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Summary

The first treaty with a human rights focus adopted under the auspices of the Organisation of African Unity (now the African Union) was the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in 1969. Seventeen years later, the African Charter on Human and Peoples' Rights, which elaborated on the rights of asylum seekers and refugees in Africa, came into force. The next two decades would see two further instruments adopted under the auspices of the OAU/AU in which the rights of asylum-seeking women and children would be spelt out further. This article considers not only the legal framework providing for the promotion and protection of the rights of asylum seekers and refugees within the African regional human rights system, but also the manner in which the institutions charged with supervising the implementation of these treaties have interpreted the rights afforded to asylum seekers and refugees within the African regional human rights system.

1 Introduction

1.1 Historical background to the creation of an African human rights system

The Organisation of African Unity (OAU), created in 1963, had as its primary goal the protection of sovereignty and non-interference in domestic affairs for those states that had already gained indepen-

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dence and the liberation of those yet to gain independence.¹ Given this preoccupation with sovereignty, it is unsurprising that the language of human rights and the potential scrutiny which rights protection entailed were almost entirely absent from the organisation's diction,² the only exception in this regard being the use of the language of human rights in the battle against the elimination of racial discrimination and oppression and the fight for self-determination from colonial rule. Equally unsurprising, given the organisation's primary goals, was the blind eye turned to abuses committed by newly-independent African states against their own citizenry, particularly in the period between the 1960s and 1980s.³

The first proposal for the adoption of an African human rights instrument predated the establishment of the OAU by two years. However, it was to take two more decades, punctuated by sporadic calls made at a number of conferences and seminars organised primarily under the auspices of the United Nations (UN) and the International Commission of Jurists, for the African human rights system to come into being.⁴ These calls for the creation of an African human rights convention and mechanism for the protection of human rights in the main emanated from outside the continent. Nevertheless, by the mid-1960s, African states began to contemplate the creation of a human rights mechanism for Africa as a means of holding minority regimes in Southern Africa accountable for abuses committed there. However, it was only at the 16th ordinary session of the Assembly of Heads of State and Government of the OAU, held in Monrovia, Liberia from 17-20 July 1979, that a decision on human rights and peoples' rights was adopted. In this decision, the Assembly of Heads of State and Government of the OAU called on the Secretary-General to organise a meeting of qualified experts to prepare a preliminary draft of an African Charter, providing *inter alia* for the establishment of bodies to promote and protect human rights.⁵ Two years and several meetings as well as draft instruments later, the Assembly of Heads of State and Government adopted the African Charter on Human and

1 See in general on the OAU, sovereignty and non-interference in domestic affairs, AB Akinyemi 'The OAU and the concept of non-interference in the internal affairs of member states' (1972-1973) 46 *British Yearbook of International Law* 393; O Okongwu 'The OAU Charter and the principles of domestic jurisdiction in intra-African affairs' (1973) 13 *Indian Journal of International Law* 589; and UO Umozurike 'The domestic jurisdiction clause in the OAU Charter' (1979) 78 *African Affairs* 197.

2 This position is also reflected in the OAU's founding document, the OAU Charter, 25 May 1963, 479 UNTS 39.

3 Some of the most notorious examples in this regard can be found in relation to Uganda under Idi Amin, Equatorial Guinea under Macias Nguema and Jean Bédel-Bokassa's Central African Republic.

4 On the background to the adoption of the African Charter, see E Kannyo 'The Banjul Charter on Human and Peoples' Rights: Genesis and background' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 140.

5 Decision 115(XXVI) Rev 1 AHG/115(XVI).

Peoples' Rights (African Charter), thus ushering in the African human rights system.⁶

1.2 Current legal framework for the promotion and protection of human rights in Africa

The African Charter drew inspiration from the Universal Declaration of Human Rights (Universal Declaration), the two international covenants, as well as the European and American Conventions on Human Rights. However, it also contained a number of distinctive features, the most notable of which were the inclusion of peoples' rights and duties placed upon individuals.⁷ In addition, it also catalogued a host of civil and political as well as economic and social rights, all of which, with the exception of political participation and access to the public service detailed in articles 13(1) and (2) of the African Charter, were to apply equally to citizens and to non-nationals.⁸ Finally, it provided for the creation of the African Commission on Human and Peoples' Rights (African Commission) to oversee the implementation of the treaty. This institution, whilst theoretically independent, was in practice to be made subservient to the political machinery of the OAU, with article 59 of the African Charter in this regard providing that all measures taken by the African Commission are to 'remain confidential until the Assembly of Heads of State and Government shall otherwise decide', thus effectively ensuring that no decisions or reports adopted by the Commission are publicised until the Assembly has approved them.⁹

Over the next two decades, primarily as a result of pressure exerted on African states in order to address a number of deficiencies and gaps inherent in the substantive provisions of the African Charter as well as the supervisory mechanism established in terms thereof, three

6 As of July 2013, the African Charter had been ratified by 53 of the 54 member states of the AU. Only South Sudan is yet to ratify this instrument.

7 The African Charter places specific duties on individuals towards family, community, society and the state. (For a list of these duties, see arts 28 and 29 of the African Charter.) Peoples' rights to be equal (art 19); to existence and self-determination (art 20); to freely dispose of their wealth and natural resources (art 21); to economic, social and cultural development (art 22); to peace and security (art 23); and to a satisfactory environment (art 24) are recognised in the African Charter.

8 The African Charter recognises the following civil and political rights: the prohibition of discrimination (art 2); equality (art 3); bodily integrity and the right to life (art 4); dignity and prohibition against all forms of exploitation and degradation, including slavery and torture and inhuman treatment (art 5); liberty and security of the person (art 6); fair trial (art 7); freedom of conscience (art 8); information and freedom of expression (art 9); freedom of association (art 10); assembly (art 11); freedom of movement (art 12); political participation (art 13); property (art 14); and independence of the courts (art 26). In respect of economic and social rights, the African Charter provides for the right to work 'under equitable and satisfactory conditions' and equal pay for equal work (art 15); the right to health (art 16); and the right to education (art 17).

9 Up until 2004, approval by the Assembly was given automatically. However, after objections raised by the Zimbabwean authorities in respect of a report on a

further treaties were adopted, adding to the arsenal of the African human rights system. The first of these instruments was the African Charter on the Rights and Welfare of the Child (African Children's Charter),¹⁰ which was adopted in 1990 in order to supplement the provisions of the African Charter in respect of children and as a complementary mechanism to the UN Committee on the Rights of the Child.¹¹ The African Children's Charter in substance replicated a number of the provisions contained in the UN Convention on the Rights of the Child (CRC). In much the same way as the African Charter, it too provided for the recognition of a number of civil and political as well as economic, social and cultural rights.¹² In keeping

mission to that country undertaken by the Commission in 2002, the Assembly suspended publication of this report until such time as Zimbabwe had been given an opportunity to respond (see Decision on the 17th Annual Activity Report of the African Commission, Assembly/AU/Dec.49(III)). Thereafter the Assembly failed to authorise the publication of resolutions adopted by the Commission on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe (Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec. 101 (VI)). Subsequently, the Executive Council prevented publication of a decision by the Commission on Zimbabwe (Decision on the 20th Activity Report of the African Commission, EX CL/Dec. 310 (IX)). More recently, the Executive Council failed to adopt the African Commission's 29th Activity Report, requesting that the Commission 'engage concerned member states in the verification of the facts' and resubmit its 29th Activity Report (see Decision on the Activity Report of the African Commission, EX CL/Dec.639(XVIII)). For reasons that remain unclear, the Executive Council also failed to adopt the resubmitted 29th Activity Report, along with the Commission's 30th Activity Report (see Decision on the Activity Report of the African Commission, EX.CL/Dec.666(XIX)). These two reports were subsequently adopted by the Executive Council along with the 31st Activity Report and a request made that the Commission 'carry out the necessary consultations with the member states concerned regarding allegations of human rights violations, thus enabling it to present a balanced report to the AU Policy Organs' (see Decision on the 29th, 30th and 31st Activity Reports of the African Commission, EX.CL/Dec.689(XX)). Thereafter, the Executive Council failed to consider the African Commission's 32nd Activity Report, due to the position taken that in future it would consider reports by the African Commission on its activities on an annual rather than bi-annual basis. This position was subsequently reversed in January 2013, with the Executive Council announcing 'that in line with article 54 of the African Charter on Human and Peoples' Rights, the Commission will continue to present its Report at every session of the Executive Council'. The Executive Council once again asserted its authority by emphasising that the Commission ought to 'respect its procedures when considering reports submitted to it, and consult member states concerned, as appropriate prior to the issuance of its resolutions' (see Decision on the 32nd and 33rd Combined Activity Reports of the African Commission, EX.CL/Dec.752(XXII)).

10 African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49, July 1990, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 77.

11 See Draft Resolution on the Signature and Ratification of the African Charter on the Rights and Welfare of the Child, CM/Draft/Res.13 (LXIII) Rev 1.

12 The following civil and political rights are protected: non-discrimination (art 3); the rights to life and survival and development (art 5); the rights to a name and nationality (art 6); freedom of expression (art 7); freedom of association (art 8); freedom of thought, conscience and religion (art 9); the protection of privacy (art 10); the protection against child abuse and torture (art 16); rights relating to the administration of juvenile justice (art 17); and protection of the family (art 18). Economic, social and cultural rights recognised in the African Children's Charter

with the emphasis on individual duties found in the African Charter, this instrument placed responsibilities on both parents and children. In recognition of the fact that CRC did not adequately address issues of particular concern in respect of the rights of the child in Africa, the provisions of article 23 provided for a higher threshold of protection in respect of displaced children than the corresponding provisions relating to refugee children in CRC.¹³ As was the case in respect of the African Charter, the provisions of this instrument applied to citizens as well as non-citizens. Rather than assign responsibility for monitoring the implementation of the treaty to the African Commission, the African Children's Charter created a separate institution, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) to oversee its implementation, arguably duplicating the work of the African Commission in respect of children.

The next major addition to the African human rights system came in June 1998, by way of the adoption of a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol),¹⁴ which created a court in order to 'complement' the protective mandate of the African Commission.¹⁵ In 2003, three years after the transformation of the OAU into the African Union (AU), which brought about greater formal recognition of the importance of human rights, another piece of the puzzle was added to the African human rights system, with the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).¹⁶ This instrument in effect mirrored a number of UN instruments, including the Convention on

include the right to education (art 11); rights to leisure, recreation and cultural activities (art 12); the right to the best attainable state of physical, mental and spiritual health (art 14); and protection from economic exploitation and from performing work hazardous to physical, mental, spiritual, moral or social development (art 15).

13 Note that only Algeria, Morocco, Senegal and Egypt actively participated in the drafting of CRC and, as such, it was felt that the provisions of CRC did not adequately address African concerns. Art 23 provides for special measures of protection for asylum-seeking and refugee children as well as the extension of refugee protection to internally-displaced children. The African Children's Charter also sets out the principle of the best interests of the child (art 4); provides for special measures in respect of handicapped children (art 13); provides for a right to parental care and protection (art 19); protection against harmful practices (art 21); protection of children in armed conflict (art 22); safeguards in respect of adoption (art 24); special measures of protection for children who are separated from their family (art 25); protection against apartheid and discrimination (art 26); protection from sexual exploitation (art 27); protection from drug abuse (art 28); protection from the sale, trafficking and abduction of children (art 29); and special measures in respect of children of imprisoned mothers (art 30). With regard to responsibilities, see arts 20 and 31 respectively.

14 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/MIN/AFCHPR/PROT(I)Rev2.

15 See arts 2 and 8 of the Protocol Establishing the African Court.

16 CAB/LEG/66.6, 11 July 2003, reprinted in Heyns & Killander (n 10 above) 61.

the Elimination of All Forms of Discrimination Against Women (CEDAW) and the General Recommendations emanating from the CEDAW Committee, as well as the UN Declaration on the Elimination of Violence Against Women. It also augmented the provisions of the African Charter in respect of women and, in similar fashion to the African Charter as well as the Children's Protocol which preceded it, it provided for the recognition of a wide range of rights – civil, political as well as economic and social – applicable to both nationals and non-nationals.¹⁷ Further amongst its provisions, the African Women's Protocol provided for special measures of protection for asylum-seeking and refugee women.¹⁸ Unlike the African Children's Charter which created a new institution to supervise the implementation of the treaty, the Women's Protocol assigned supervisory functions to both the African Commission as well as the newly-established African Court on Human and Peoples' Rights (African Court).¹⁹

Before proceeding to consider the rights of asylum seekers and refugees and the work of the supervisory institutions charged with human rights promotion and protection within the African human rights system, it should be noted that there are a number of AU organs and initiatives within the framework of the OAU/AU specifically addressing the issue of displacement in Africa.²⁰ However, this article considers only the practice of the institutions charged with rights promotion and protection, namely, the African Commission, the

17 The following civil and political rights are provided for in the African Women's Protocol: elimination of discrimination (art 2); dignity (art 3); life, integrity and security of the person (art 4); access to justice and equal protection before the law (art 8); the right to participation in the political and decision-making process (art 9); and the right to a remedy (art 25). An extensive list of economic, social and cultural rights is also provided for in this instrument. These are the right to education and training (art 12); economic and social welfare rights (art 13); health and reproductive rights (art 14); food security (art 15); adequate housing (art 16); right to a positive cultural context (art 17); right to a healthy and sustainable environment (art 18); and the right to sustainable development (art 19).

18 See arts 4, 10 & 11. Other noteworthy provisions include articles dealing with the elimination of harmful practices, including the prohibition of all forms of female genital mutilation (art 5); the encouragement of monogamy as the preferred form of marriage (art 6(c)); equal rights in relation to separation, divorce and annulment of marriage (art 7); control over fertility (art 14); the right to inheritance (art 21); and widows' rights (art 20). The right to peace (art 10) and the protection of women in armed conflict (art 11) are also recognised, as are special measures of protection which are to be afforded to elderly women (art 22), women with disabilities (art 23) and women in distress (art 24).

19 The African Commission is to monitor the implementation of the Protocol through an evaluation of periodic state party reports (art 26) and the African Court on Human and Peoples' Rights is to 'be seized with matters of interpretation arising from the application or implementation of this Protocol' (art 27). As a transitional arrangement, the African Commission was mandated to deal with the interpretation of the Protocol, '[p]ending the establishment of the African Court' (art 32).

20 It should be noted that the Council of Ministers of the OAU/Executive Council of the AU and the OAU Heads of State and Government/AU Assembly of Heads of State have adopted a number of decisions as well as resolutions since 1963 on the topic of refugees. Similarly, the AU Peace and Security Council regularly expresses itself on the issue of refugees and has an express mandate in respect of peace

African Children's Committee and the African Court. It also does not consider the Kampala Convention dealing with the rights of internally-displaced persons, rather focusing more narrowly on the rights of asylum seekers and refugees within the framework of the African human rights system.

2 Right to asylum and the protection of asylum seekers and refugees within the African human rights system

Whilst the adoption of the African Charter heralded the birth of the African human rights system, the first OAU treaty with what may be broadly termed a human rights dimension was the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention), adopted in 1969.²¹ This instrument affirmed the provisions of the 1951 UN Refugee Convention, but also went further in expanding the refugee definition to include individuals fleeing their country of origin or nationality due to 'external aggression, occupation, foreign domination or events seriously disturbing public order'.²² Although the OAU Convention failed to make use of the language of rights, and did not take a direct human rights approach in respect of the protection of asylum seekers and refugees, it nevertheless had important rights implications which were elaborated upon in subsequent instruments. In particular, the OAU Refugee Convention called upon states to grant asylum, emphasising that they²³

use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

This provision was ultimately picked up and expanded upon in article 12(3) of the African Charter, which provides that '[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and

building to undertake activities related to the 'resettlement and reintegration of refugees and internally-displaced persons' (see in this regard art 14(3)(d) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union). Other AU organs/departments that have an explicit mandate in respect of refugees include the Division of Humanitarian Affairs, Refugees and Displaced Persons of the Political Affairs Department of the AU and the Permanent Representative Council (PRC) by way of the Sub-Committee on Refugees. In relation to the latter, in spite of its inactivity, the Co-ordinating Committee on Assistance and Protection to Refugees, Returnees and Internally-Displaced Persons as advisory body to the PRC's Sub-Committee on Refugees also needs to be taken note of.

21 10 September 1969, 1001 UNTS 45.

22 Art 1(2) OAU Refugee Convention (n 21 above).

23 Arts 2(1) & (2) OAU Refugee Convention (n 21 above).

international conventions'. This article further and in more general terms stipulates that non-nationals legally admitted to the territory of a state party may only be expelled 'by virtue of a decision taken in accordance with the law', and additionally prohibits the mass expulsion of non-nationals.²⁴ Finally, article 23(2) of the African Charter provides:

For the purpose of strengthening peace, solidarity and friendly relations, state parties to the present Charter shall ensure that:

- (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other state party to the present Charter;
- (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present Charter.

In addition to these general provisions, both the African Children's Charter and the African Women's Protocol, in acknowledgment of the fact that up to 80 per cent of the world's refugee population is comprised of women and children, further set out specific obligations incumbent on state parties with regard to these two groups. Thus, article 23 of the African Children's Charter details that 'all appropriate measures' are to be taken in order to ensure that children seeking refugee status or who have been granted refugee status, regardless of whether they are accompanied or not, receive 'appropriate protection and humanitarian assistance in the enjoyment of the rights set out in ... [the Children's] Charter and other international human rights and humanitarian instruments to which the states are parties'.²⁵ State parties are also to assist unaccompanied children to 'trace the parents or other close relatives ... in order to obtain information necessary for reunification with the family'.²⁶ Where no parents or guardians are to be found, the state is to ensure the same protection to the unaccompanied child as is given in respect of 'any other child permanently or temporarily deprived of his family environment for any reason'.²⁷ In recognition of the fact that asylum-seeking and refugee women have particular needs which may differ from those of men, the African Women's Protocol provides for: equality of access in respect of the refugee status determination process; the provision to refugee women of their own identity as well as other documentation; the inclusion of women in decision-making structures at all levels; and the protection of asylum-seeking, refugee, returnee and displaced women from 'all forms of violence, rape and other forms of sexual exploitation'.²⁸ With regard to the latter, the African Women's

24 Arts 12(4) & (5) African Charter. Mass expulsion is defined as 'that which is aimed at national, racial, ethnic or religious groups' (see art 12(5)).

25 Art 23(1) African Children's Charter.

26 Art 23(2) African Children's Charter.

27 Art 23(3) African Children's Charter.

28 Arts 4(2)(k), 10(2)(c) & (d) and 11(3) African Women's Protocol.

Protocol further requires states to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that perpetrators of these acts are 'brought to justice before a competent criminal jurisdiction'.²⁹

3 Approach of the African Commission on Human and Peoples' Rights in respect of asylum seekers and refugees

The 11-member African Commission, which started operating in 1987, has a broad mandate to both protect and promote human rights in terms of the African Charter.³⁰

3.1 The protection of asylum seekers and refugees

In terms of its protective mandate, the African Commission's primary function relates to the receipt of inter-state as well as individual communications alleging violations of human rights.³¹ In respect of the latter, the Commission has interpreted broadly the notion of standing, allowing for petitions by non-governmental organisations (NGOs) on behalf of someone else as well as complaints from individuals without requiring that they be the victim of the violation or even that the victim consents to them bringing a complaint on their behalf.³² In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, the African Commission further indicated its preparedness to accept communications brought as an *actio popularis*

29 Art 11(3) African Women's Protocol.

30 See arts 45(2) & (1) respectively of the African Charter.

31 See in this regard arts 47-59 of the African Charter as well as rules 87-113 of the African Commission's Rules of Procedure (2010). To date, only one inter-state communication has been brought before the Commission, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

32 Whilst the African Commission's 1988 Rules of Procedure stipulated that communications could only be brought on behalf of victims when they were unable to do so themselves, these provisions were not reiterated in either the Commission's 1995 Rules of Procedure or the most recent Rules adopted in 2010. The Commission in its Guidelines on the Submission of Communications also confirms broad standing, noting that '[a]nybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the Commission denouncing a violation of human rights ... The complainant or author of the communication need not be related to the victim of the abuse in any way, but the victim must be mentioned.' See http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf (accessed 3 July 2013). The practice of the Commission has also been very clear in broadly interpreting standing, allowing for the submission of complaints without requiring a victim linkage. Thus, in *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004) para 46, the Commission also noted that '... the *locus standi* requirement is not restrictive so as to imply that only victims may seize the African Commission ... The existence of direct interest (like being a victim) to bring the matter before the Commission is not a requirement under the African Charter.' Most recently, the African Commission in Communication 361/08 *JE Zitha & PJJ Zitha v Mozambique* 30th Activity Report of the African Commission

– in the public interest.³³ With regard to communications brought by asylum seekers and refugees, complaints have been lodged variously by a refugee association, by individuals in their own name as well as NGOs on behalf of others whose rights are alleged to have been violated.

3.1.1 Admissibility

In order for individual communications to be considered admissible, seven ‘conjunctive’ criteria set out in article 56 of the Charter have to be met.³⁴ These are that the communications indicate their authors even if they request anonymity; are compatible with the OAU/AU as well as African charters; are not written in insulting or disparaging language; are not based solely on information disseminated through the mass media; are sent after the exhaustion of domestic remedies, unless these procedures are unduly prolonged; are submitted within a reasonable time after the exhaustion of such remedies; and have not already been settled in terms of international law. Of these criteria, perhaps unsurprisingly, the issue of the exhaustion of domestic remedies has proven to be the most contentious.³⁵ Within the context of communications brought by asylum seekers and refugees, the question arises as to whether persons who no longer find themselves in the country against which they are alleging violations for fear of persecution, are nonetheless required to exhaust domestic remedies in that country before approaching the African Commission. The Commission’s jurisprudence in this regard is largely inconsistent. A distinction appears to be drawn between cases where an individual filing an application has been granted refugee status and those where the complainant is merely an asylum seeker, seeking redress against the country from which they had fled. In the latter case, the Commission appears to be reluctant to apply the constructive exhaustion of domestic remedies principle.

In *Rights International v Nigeria*,³⁶ the complainant who was living in the United States as a refugee at the time of lodging the communication, alleged that he had been illegally arrested and detained in Nigeria and that, whilst in detention, he had been

on Human and Peoples’ Rights, November 2010-May 2011 para 106 confirmed that its jurisprudence had developed in such a manner ‘that the person submitting the communication (author or complainant) need not be the victim’. On the reasons for broad standing, see *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 78. Also see *Bakweri Land Claims Committee v Cameroon* (n 32 above) para 46.

33 (2001) AHRLR 60 (ACHPR 2001) para 49.

34 See *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) para 44.

35 The African Commission has held that the domestic remedies rule ought to be dispensed with where such remedies are unavailable, ineffective or insufficient. On the exhaustion of domestic remedies in general, see NJ Udombana ‘So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples’ Rights’ (2003) 97 *American Journal of International Law* 1.

36 (2000) AHRLR 254 (ACHPR 1999).

subjected to torture. He additionally attested that after being abducted and threatened by persons whom he believed to be agents of the Nigerian government, he fled the country first to Benin, where he was granted refugee status, and then to the United States. The African Commission in this case, as it had done with regard to contemporaneous Nigerian cases, held the communication to be admissible on grounds that there was a 'lack of available and effective domestic remedies for human rights violations in Nigeria under the military regime'.³⁷ By coming to this conclusion, the Commission effectively sidestepped the issue of whether someone who had fled the country against which they were alleging violations, for fear of persecution, still had to avail themselves of available domestic remedies. The Commission then went on to find violations of the prohibition against torture, cruel, inhuman and degrading treatment, the right to liberty and security of the person, fair trial and freedom of movement and residence as well as the right to leave and return to Nigeria. In *Jawara v The Gambia*,³⁸ decided at the session following the *Rights International* case session, the African Commission directly confronted the issue of the necessity of exhausting domestic remedies, holding it to be 'an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies' given the particular facts of the case, the salient features of which were that the complainant was a former head of state who had been overthrown by the military, who had been tried *in absentia* and whose political contemporaries had been detained.³⁹ Having found the case admissible, the African Commission went on to hold The Gambia in violation of the general obligations provisions of the African Charter, the right to non-discrimination, liberty and security of the person, the right to fair trial, freedom of expression, opinion, assembly and association, the right to participate in government, freedom of movement as well as the right to leave any country and return to his own country, the right to self-determination and the duty to ensure the independence of the judiciary. In *Ouko v Kenya*,⁴⁰ the African Commission, relying on its decision in the *Rights International* case, provided the most explicit link between the granting of refugee status and the constructive exhaustion of domestic remedies principle, holding that⁴¹

the complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo (DRC) for fear of his life, and

37 *Rights International* case (n 36 above) para 23.

38 (2000) AHRLR 107 (ACHPR 2000).

39 *Jawara* (n 38 above) para 36. The Commission had in an earlier decision, *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996), also held, given that Mr Abubakar had escaped to Côte d'Ivoire from a prison hospital, having been held without charge for seven years and possibly facing a penalty as a result of his escape, that '[i]t would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities' (see para 6).

40 (2000) AHRLR 135 (ACHPR 2000).

41 *Ouko v Kenya* (n 40 above) para 19.

his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugees,

and therefore declared the communication admissible. It further held the Kenyan government to be in violation of the prohibition against torture, cruel, inhuman and degrading treatment, the right to liberty and security of the person, the right to freedom of opinion, freedom of association and freedom of movement as well as the right to leave any country and return to his own country. Most recently, the African Commission has held the case of *Shumba v Zimbabwe*⁴² to be admissible, finding a violation of the prohibition against torture and ill-treatment on the merits. The brief facts of the case were that Mr Shumba left Zimbabwe on or about 17 January 2003 after allegedly being tortured and charged with a treasonable offence, returning to the country on 4 February 2003 and making a court appearance the following day, before permanently fleeing the country. Notwithstanding the fact that there was in theory a remedy provided for in domestic law prohibiting torture, the Commission held that this remedy was ineffective and could not be pursued 'without much impediment'.⁴³ Quoting the *Jawara* case, the Commission further held that the principle of constructive exhaustion of local remedies would apply to Mr Shumba by virtue of the fact that he was 'outside the country, due to the fear for his life'.⁴⁴ Addressing the issue of the complainant's return to the country, the Commission noted that this did not negate the constructive exhaustion of remedies rule.⁴⁵

These cases are to be contrasted with two decisions in respect of Zimbabwe decided prior to the *Shumba* case. In *Chinhamo v Zimbabwe*,⁴⁶ the African Commission declared the case, brought by an employee of the Zimbabwean section of Amnesty International, who alleged that agents of the Zimbabwean government had violated his African Charter rights, causing him to seek asylum in South Africa, to be inadmissible due to the non-exhaustion of domestic remedies. Seemingly conflating issues of admissibility and the merits of the case as well as overstepping its mandate, which does not extend to establishing whether or not someone has a well-founded fear of persecution, the Commission indicated that the facts suggested 'inhuman and degrading treatment' and that, in its opinion, the

42 *Gabriel Shumba v Zimbabwe* 288/04 <http://caselaw.ihrrda.org/doc/288.04/> (accessed 3 July 2013).

43 *Shumba* (n 42 above) para 75.

44 *Shumba* (n 42 above) para 74.

45 *Shumba* (n 42 above) para 66.

46 (2007) AHRLR 96 (ACHPR 2007).

complainant had failed to substantiate his allegations with facts.⁴⁷ Thus, the Commission noted that⁴⁸

[e]ven if, for example, the detention of the complainant amounted to psychological torture, it could not have been life-threatening to cause the complainant [to] flee for his life. Apart from the alleged inhumane conditions under which he was held, there is no indication of physical abuse ...

The case of *Majuru v Zimbabwe*,⁴⁹ in which a Zimbabwean judge, living in exile in South Africa, alleged interference in the judicial process, was similarly declared inadmissible for failure to exhaust remedies.⁵⁰ The African Commission once again focused on the establishment of a well-founded fear,⁵¹ a fear which it deemed was absent, noting that⁵²

the complainant has not sufficiently demonstrated that his life or those of his close relatives were threatened by the respondent state, forcing him to flee the country, and as such, [the Commission] cannot hold that the complainant left the country due to threats and intimidation from the state.

The more recent case of *JE Zitha and P/L Zitha v Mozambique*,⁵³ brought by Professor Dr Liesbeth Zegveld on behalf of Mr Jose Eugency Zitha (first victim) and Professor Pacelli LJ Zitha (second victim), also declared inadmissible for failure to exhaust domestic remedies and for failure to comply with the reasonable time requirements found in article 56(6) of the African Charter, is also worthy of discussion. In this case, the African Commission acknowledged the difficulties encountered by Professor PLJ Zitha, who had applied for refugee status in France, in bringing a case in respect of his father (the first victim) who had disappeared from detention in Mozambique some time in 1975. However, it ultimately held that Professor PLJ Zitha could have seized the Commission sooner than the 13 years that it took from 1995, when he obtained permanent employment in The Netherlands and returned to Mozambique for the first time, before either approaching the domestic courts in

47 *Chinhamo* case (n 46 above) paras 73 & 75.

48 *Chinhamo* case (n 46 above) para 75.

49 (2008) AHRLR 146 (ACHPR 2008).

50 In particular, Mr Majuru pointed to threats directed towards him as a result of his involvement as presiding judge in a case against the Associated Newspaper Group of Zimbabwe (ANZ).

51 Distinguishing the case of *Majuru* from other cases in which the exhaustion of domestic remedies was held to be unnecessary, the African Commission noted that the common denominator in all of these cases was 'the clear establishment of the element of fear perpetrated by identified state institutions' (*Majuru* case (n 49 above) para. 90).

52 *Majuru* case (n 49 above) para 95.

53 Communication 361/08, 30th Activity Report of the African Commission on Human and Peoples' Rights, November 2010-May 2011.

Mozambique or seizing the Commission, and that this therefore constituted an 'unreasonable' delay.⁵⁴

In a small number of cases in which violations were alleged against the receiving state, the African Commission has also held communications to be inadmissible for failure to exhaust domestic remedies. Unlike communications brought against the state alleged to have been involved in persecution, no general impediments exist in relation to the exhaustion of available domestic remedies in receiving states, with access to courts theoretically open to all – nationals as well as non-nationals.⁵⁵ In *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo*,⁵⁶ a Burundian national who had been granted refugee status in the DRC and had lived there for just over 20 years, found himself in the position of being dismissed without notice or compensation from his job (along with all other Rwandan, Burundian and Ugandan nationals in the country) following the war between the DRC, Rwanda, Burundi and Uganda. Thereafter, he left for Togo from where he lodged the complaint, claiming that he had been subjected to 'moral and material pressure' which made the exhaustion of domestic remedies impossible.⁵⁷ The African Commission held that, as neither Mr Simbarakiye nor his wife (a DRC national), who had remained behind in the DRC, had attempted to exhaust domestic remedies and further, as he had failed to provide evidence to the effect that moral and material constraints prevented him from exhausting domestic remedies, the communication was inadmissible.⁵⁸ The case of *Mouvement des Réfugiés Mauritiens au Sénégal v Senegal (1)*,⁵⁹ which alleged a series of violations by the Senegalese authorities against Mauritanian refugees, including arrest and humiliating treatment by the security forces as well as threats from the Mauritanian authorities when they attempted to return to their country of origin, was also held inadmissible *inter alia* for a failure to exhaust domestic remedies.⁶⁰ Similarly, in *Mouvement des Réfugiés Mauritiens au Sénégal v Senegal (2)*,⁶¹ in which the complainant alleged violations of the African Charter as a result of the banning of a demonstration by the refugees of Podor in commemoration of International Refugee Day, the African Commission held that the complainant had failed to

54 *Zitha* case (n 53 above) paras 111-114.

55 Note in this regard that the African Charter provides for equal access to justice in arts 2, 3 and 7 of the Charter.

56 (2003) AHRLR 65 (ACHPR 2003).

57 *Simbarakiye* case (n 56 above) para 9.

58 *Simbarakiye* case (n 56 above) paras 31-33.

59 (2000) AHRLR 287 (ACHPR 1997).

60 The other reasons provided for the inadmissibility decision is the failure to identify the relevant African Charter provisions said to have been violated.

61 (2003) AHRLR 131 (ACHPR 2003).

'provide proof of attempting to exhaust the local remedies that were available to him'.⁶²

Where serious and massive violations involving a large number of complainants have been alleged against a receiving state, the African Commission has dispensed with the domestic remedies requirement. Thus, in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,⁶³ the Commission noted that allegations appeared to 'reveal the existence of a series of serious or massive violations of the provisions of the African Charter', and that it was therefore not necessary to exhaust domestic remedies.⁶⁴ Similarly, the Commission held on review in the case of *Doebbler v Sudan*⁶⁵ that 'where the violations involve many victims, it becomes neither practical nor desirable for the complainants or the victims to pursue such internal remedies in every case of violation of human rights'.⁶⁶ Addressing the specific facts of the case in which it was alleged that as a result of a tripartite agreement between the Sudanese and Ethiopian governments and the United Nations High Commissioner for Refugees (UNHCR), approximately 14 000 Ethiopian refugees would lose their refugee status, the African Commission noted that⁶⁷

even if certain domestic remedies were available, it was not reasonable to expect refugees to seize the Sudanese courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation.

Finally, in *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*,⁶⁸ the African Commission noted three reasons why it considered the exhaustion of domestic remedies to be futile where large numbers of refugees had been *refouled*. In the first instance, the Commission held that it would dispense with the exhaustion of domestic remedies requirement where the complainant is in a 'life-threatening situation that makes domestic remedies unavailable'.⁶⁹ It further noted in this regard that the availability of domestic remedies is compromised in circumstances where 'the authorities tasked with providing protection are the same individuals persecuting victims'.⁷⁰ On the impracticability of large numbers of Sierra Leonean refugees in Guinea (put at nearly 300 000 at the time of the alleged violations) approaching the domestic courts as well as the scale of crimes committed against the refugees, the Commission held that 'the domestic courts would be

62 *Mouvement des Réfugiés Mauritanien au Sénégal v Senegal* (n 61 above) para 21.

63 (2000) AHRLR 321 (ACHPR 1996).

64 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (n 63 above) paras 15-18.

65 (2009) AHRLR 208 (ACHPR 2009).

66 *Doebbler* case (n 65 above) para 117.

67 *Doebbler* case (n 65 above) para 116.

68 (2004) AHRLR 57 (ACHPR 2004).

69 *Sierra Leonean Refugees* case (n 68 above) para 33.

70 *As above*.

severely overburdened if even a slight majority of victims chose to pursue legal redress in Guinea'.⁷¹ Finally, the Commission held that it would be both 'impractical' and inadvisable for the refugees to return to Guinea, where they had suffered persecution. Citing the case of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,⁷² the Commission held that 'victims of persecution are not necessarily required to return to the place where they suffered persecution to exhaust local remedies'.⁷³

3.1.2 Rights of asylum seekers and refugees

Whereas the African Commission's stance in respect of the exhaustion of domestic remedies in respect of those seeking asylum, as illustrated by the *Chinhamo* and *Majuru* cases cited above, may be said to be disappointing, its position with regard to the rights of asylum seekers and refugees in respect of the substantive provisions of the African Charter is more encouraging. Though, as will be shown, the African Commission's jurisprudence has done little to flesh out the substantive provisions in the African Charter in respect of asylum seekers and refugees, nor has the Commission expressed itself on the provisions contained in the African Women's Protocol in respect of asylum-seeking and refugee women.⁷⁴

Whilst the African Commission, invoking article 55 of the African Charter, declined to deal with a plea in *Vitine v Cameroon* in one of the first cases to be decided by it, to the effect that the Commission 'save ... [Mr Vitine's] life and prevail on his government to stop the hunt against him' and further 'appeal to the governments of Senegal and Niger to grant him refugee status', the Commission has subsequently engaged with the issue of the rights of asylum seekers and refugees.⁷⁵ In the case of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,⁷⁶ the Commission unequivocally confirmed that article 2 of the African Charter places an obligation on

71 *Sierra Leonean Refugees* case (n 68 above) para 34.

72 n 63 above.

73 n 63 above, para 35.

74 In the absence of cases being brought to the African Commission in respect of arts 4(2)(k), 10(2)(c) and (d) and 11(3) of the African Women's Protocol, a possible solution in this regard may lie in the use of General Comments clarifying the normative content of the rights provided for in human rights treaties, such as the first one adopted by the African Commission during its 52nd ordinary session held from 9 to 22 October 2012 in Yamoussoukro, Côte d'Ivoire, on arts 14(1)(d) and (e) of the African Women's Protocol.

75 (2000) AHRLR 55 (ACHPR 1994). Note that art 55 of the African Charter provides, *inter alia*, that a communication 'shall be considered by the Commission if a simple majority of its members so decide'. The rationale for the African Commission declining to consider this communication is further elaborated upon in *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997) para 11, with the Commission noting that '[t]he information in ... communication [106/93] did not give evidence of *prima facie* violations of the African Charter. For this reason the Commission declared the communication inadmissible.'

76 n 63 above.

state parties to ensure and secure the rights protected in it to everyone within their jurisdiction – nationals as well as non-nationals.⁷⁷ With regard to the provisions providing for a right to asylum, the African Commission noted in *Organisation Mondiale Contre la Torture and Others v Rwanda* that it should be understood as ‘including a general protection of all those who are subject to persecution, that they may seek refuge in another state’.⁷⁸

To date, the African Commission has only been asked to comment on one occasion on the provisions of article 23(2) in the case of *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia*.⁷⁹ However, without examining the substance of the allegation that ‘Tanzania, Zaire and Kenya sheltered and supported terrorist militia’, the Commission found that the respondent states were not guilty of the alleged violations of the African Charter.⁸⁰

Once granted asylum, the greatest threat to refugees in Africa, if the record of cases litigated before the African Commission is anything to go by, appears to be the possibility of expulsion from the receiving state and the violations of rights ensuing from this. In *Organisation Mondiale Contre la Torture and Others v Rwanda*,⁸¹ four Burundian refugees, Bonaventure Mbonuabucya, Baudouin Ntandini, Vincent Sinarairaye and Shadrack Nkuzwenimana, were expelled from Rwanda, ostensibly on security grounds. In this case, the Commission, without elaborating on the substance of the African Charter insofar as it pertains to refugees, found violations of the right to non-discrimination; the rights to liberty and security of the person; the right to have their cause heard, including an appeal to competent authorities and the rights to asylum; expulsion without due process as well as the prohibition against the mass expulsion of non-nationals contained in the African Charter. In *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*,⁸² it was held that a speech by the Guinean President urging the arrest, search and confinement of Sierra Leonean refugees to refugee camps, also on so-called security grounds, clearly violated a number of Charter provisions.⁸³ In particular, it was held that there

77 n 63 above, paras 18 & 21-22.

78 (2000) AHRLR 282 (ACHPR 1996) para 31.

79 (2003) AHRLR 111 (ACHPR 2003). This case was brought by the *Association pour la Sauvegarde de la Paix au Burundi*, a Belgian-based NGO against the Democratic Republic of Congo, Ethiopia, Kenya, Rwanda, Tanzania, Uganda and Zambia, after the embargo declared by these countries against Burundi on 31 July 1996, following the *coup d'état* carried out by the Burundian army on 25 July 1996 against the democratically-elected government.

80 As above.

81 n 78 above.

82 n 68 above, 8.

83 These measures ultimately caused thousands of refugees to flee their homes. Many were left no other choice but to return to Sierra Leone, whereas others were forcibly returned to their home country by the authorities.

had been violations of the right to non-discrimination; the right to life and integrity of the person; the right to dignity and freedom from torture, cruel, inhuman and degrading treatment; the prohibition against mass expulsions; as well as the right to property. In addition, it was also held that the principle of non-discrimination guaranteed in article 4 of the OAU Refugee Convention had been violated. Whilst there are similarities between these two cases, there are also distinctive differences, the most notable of which is in relation to remedies ordered. Thus, in the first of these cases, the Rwandan authorities were simply urged to 'adopt measures in conformity with this decision' and, in the second case, the African Commission recommended that a joint commission of the Sierra Leonean and Guinean governments be established to assess the losses incurred by various victims with a view to compensating them.

The issue of the repatriation or return of refugees has also come to the fore in three cases before the African Commission. In the case of *Malawi African Association and Others v Mauritania*,⁸⁴ a host of violations were alleged during the period between 1986 and 1992, much of which centred around events of April 1989, which saw the Mauritanian government expel almost 50 000 people to Senegal and Mali with the consequent loss and destruction of property. Many of those expelled were black Mauritians and bearers of Mauritanian identity cards.⁸⁵ Upon their return to Mauritania, large numbers of these refugees were arrested 'as a generalised reprisal'.⁸⁶ In response to the assertion by the respondent state that 'all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth' and the affirmation of the establishment of a government department responsible for the resettlement of these individuals, the African Commission made it plain that, whilst 'laudable', these efforts did not 'annul the violation committed by the state'.⁸⁷ Having declared grave or massive violations of the African Charter, and in particular the provisions of articles 2, 4, 5(6), 7(1)(a), (b), (c) and (d), 9(2), 10(1), 11, 12(1), 14, 16(1), 18(1) and 26, the Commission recommended *inter alia* that diligent measures be taken

to replace the national identity documents of those Mauritanian citizens which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation for the deprivations of the victims of the above events.

84 (2000) AHRLR 149 (ACHPR 2000).

85 Note that these identity cards were torn up by the authorities when these individuals were arrested or expelled, thus leaving them with no way to prove their Mauritanian identity.

86 n 84 above, para 15.

87 n 84 above, para 126.

It further recommended that appropriate measures be taken to 'ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations'.

The second case, *Doebbler v Sudan*,⁸⁸ concerned allegations brought prior to the implementation of the cessation clause in Sudan under article 1(c)(5) of the 1951 UN Refugee Convention. The African Commission held that it had found no evidence of the *refoulement* of refugees and that the communication had effectively been filed 'in anticipation of a violation, which did not happen in actual fact after the implementation of the cessation clause set in motion'.⁸⁹ As such, the Commission did not engage with the nature of repatriation or the obligations on the repatriating or receiving state.

The final case, *Sudan Human Rights Organisation and Another v Sudan*,⁹⁰ touched upon state obligations where refugees had been voluntarily returned to their country of origin, with the African Commission requiring that 'all necessary and urgent measures to ensure protection of victims of human rights violations' be taken, including the rehabilitation of 'economic and social infrastructure, such as education, health, water, and agricultural services ... in order to provide conditions for return in safety and dignity for the IDPs and refugees'.⁹¹

3.1.3 Recommendations and compliance

Whilst a number of the African Commission's recommendations have been very broad, compliance with these recommendations has generally not been forthcoming. In a study measuring compliance with the Commission's decisions between 1987 and mid-2003, full compliance was recorded in only six out of 44 cases.⁹² Measures taken on the part of the Commission to remedy this situation – requiring states to report back to it – either in its periodic state party reports⁹³ or within a specified period of time,⁹⁴ and the adoption in

88 n 65 above.

89 n 65 above, para 163.

90 (2009) AHRLR 153 (ACHPR 2009).

91 n 90 above, para 229(e).

92 See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 1 8-11. Note that none of the cases cited above in relation to asylum seekers or refugees was amongst the six in which full compliance was achieved.

93 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003); and *Interights & Others (on behalf of Bosch) v Botswana*, (2003) AHRLR 55 (ACHPR 2003).

94 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005); *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa Zimbabwe* (2009) AHRLR 268 (ACHPR 2009); *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009); *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009); *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009); and *Interights & Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004).

2006 of a Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties, requesting states found in violation to inform the Commission of the measures taken as well as obstacles in implementation within a period of 90 days, have done little to engender greater compliance.⁹⁵ Whilst the Commission's new Rules of Procedure, adopted in 2010, provide for a number of follow-up measures, including the drawing of the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to instances of non-compliance, it remains to be seen whether these measures go far enough in addressing the lack of compliance with decisions and the Commission's lack of follow-up.⁹⁶

3.2 Promotion of the rights of asylum seekers and refugees

The African Charter lists amongst the activities falling within the Commission's promotional mandate the collection of documents; the undertaking of studies and researches; the organisation of seminars, symposia and conferences; the dissemination of information; encouraging national and local institutions concerned with human and peoples' rights and, should the case arise, making recommendations to governments; the formulation of principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms; and co-operation with other African and international institutions concerned with the promotion and protection of human and peoples' rights.⁹⁷ The Commission's Rules of Procedure augment this list with the inclusion of the function of the examination of state party reports which, in terms of article 62 of the African Charter, are to be submitted by state parties every two years, detailing 'the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'. In fulfilment of its promotional mandate in respect of asylum seekers and refugees, the African Commission has taken a number of measures with varying levels of success, many of its efforts in this regard being hamstrung by institutional weaknesses.

In February 1994, the African Commission convened a seminar entitled 'The Protection of African Refugees and Internally-Displaced Persons' in Harare, Zimbabwe,⁹⁸ which concluded that the 'plight of

95 See ACHPR/Res 97(XXXX).06. The African Commission does not appear to have followed up on this resolution.

96 See Rule 112 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2010).

97 Arts 45(1)(a), (b) & (c) African Charter.

98 See Conclusions of the Seminar on Protection of African Refugees and Internally-Displaced Persons Held in Harare 16-18 February 1994, as reprinted in 7th Annual Activity Report of the African Commission 1993-1994; also reprinted in (1994) 4 *Review of the African Commission on Human and Peoples' Rights* 168 and C Heyns (ed) *Human rights law in Africa* (1999) 335.

African refugees and internally-displaced persons is a flagrant violation of human dignity and basic human rights' and further highlighted the threat which their plight poses to 'orderly and peaceful development in African countries'. However, beyond accentuating the plight of refugees on the continent and making a number of recommendations of which only a handful actually came to fruition, nothing more came of this seminar. Nevertheless, it heralded the start of dialogue between various institutions involved in refugee protection on the continent. Thus, in November 1999, discussions were convened between the UNHCR and the African Commission at the Commission's 26th session, as to co-operation between the two institutions, ultimately leading to the signing in May 2003 at the Commission's 33rd ordinary session in Niamey, Niger of a memorandum of understanding. This memorandum had as its aim the more effective promotion and protection of the rights of asylum seekers, returnees and other persons of concern to both institutions.⁹⁹ Ten years after the signing of this document, it would, however, appear that little progress has been achieved.

Further in fulfilment of its promotional mandate, the African Commission has over the years adopted a number of country-specific as well as thematic resolutions touching specifically on refugees and displaced persons – drawing attention to their plight as well as singling them out within the context of special measures of protection for vulnerable groups.¹⁰⁰ However, without a mechanism to follow up on recommendations made within the context of resolutions adopted by the Commission, their practical effect has been negligible.

With regard to the state party reporting procedure, the African Commission has in the last nine years highlighted in a relatively small number of its concluding observations that have been made public, areas of concern as well as the need for action in respect of the protection of the rights of asylum seekers and refugees.¹⁰¹ Thus, in respect of the first periodic report by South Africa, the Commission urged the government to 'take appropriate administrative measures to

99 Art 1 Memorandum of Understanding.

100 See eg Resolution on Human and Peoples' Rights Education, ACHPR/Res.6(XIV)93; Resolution on the Human Rights Situation in Africa, ACHPR/Res.14(XVI)94; Resolution on Sudan, ACHPR/Res.15(XVII)95; Resolution on Burundi, ACHPR/Res.24(XIX)96; Resolution on the Observance of the 30th Anniversary of the OAU Convention Governing the Specific Aspects of Refugees in Africa (1999), ACHPR/Res.43(XXVI)99; Resolution On Darfur, ACHPR/Res.68(XXXV)04; Resolution on Migration and Human Rights, ACHPR/Res.114 (XXXII) 07; Resolution on the Human Rights Situation in Côte d'Ivoire, ACHPR/Res.182(EXT.OS/IX)2011; Resolution on the Situation of the North of the Republic of Mali, ACHPR/Res.217 (XXXXXI)2012; and Resolution on the Right to Nationality, ACHPR/Res.234 (2013).

101 The increased prominence accorded to this issue coincides with the appointment by the African Commission of a Rights of Refugees, Asylum Seekers and IDPs (see the discussion in respect of the Special Rapporteur below).

ensure the speedy consideration of the applications for asylum seekers'.¹⁰² In relation to the periodic report of Sudan, a recommendation was made that the government 'ensure that measures are taken for specific protection of the rights of the refugees and displaced persons in Sudan'.¹⁰³ In commenting on a subsequent report submitted by Sudan, the Commission further expressed concern at the failure to integrate as 'full citizens' into Sudanese society, more than 1 million refugees, the vast majority of whom had been in the country since the 1960s.¹⁰⁴ With regard to Ethiopia, the Commission addressed the issue of unaccompanied and separated children, recommending that the authorities 'take all measures to guarantee the protection of minor refugees in line with the provision of the African Charter and international refugee laws'.¹⁰⁵ It further recommended that the Ethiopian government 'take the necessary steps to address through legislative measures concerns regarding ... refugee children ...'.¹⁰⁶ In respect of Mauritius, the Commission expressed concern at the fact that no provision had been made for the 'granting of asylum or refugee status in accordance with the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol' in Mauritian law.¹⁰⁷ To remedy this, the Commission recommended that measures be taken, including the enactment of laws providing for the protection of refugees.¹⁰⁸ With regard to Angola, the Commission recommended the expedition of the 'process to finalise the study and review of the Law on the Status of Refugees by the Inter-Sectoral Commission in order to guarantee the rights of refugees in Angola'.¹⁰⁹ With respect to Rwanda, the Commission noted that measures taken to facilitate the return of refugees and displaced persons to their original places of residence

102 See para 26 of the Concluding Observations, 38th ordinary session of the African Commission, 21 November to 5 December 2005, Banjul, The Gambia.

103 The Sudanese report was presented to the 35th ordinary session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 21 May to 4 June 2004 (see para 27).

104 Para 39 Concluding Observations and Recommendations on the 3rd Periodic Report of the Republic of Sudan (2003-2008), 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia.

105 See para 69 of the Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia, 47th ordinary session of the African Commission, 12-26 May 2010, Banjul, The Gambia.

106 n 105 above, para 71.

107 See para 41 of the Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th Periodic Reports of the Republic of Mauritius, 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia.

108 n 107 above, para 60.

109 See para 41 XXII of the Concluding Observations and Recommendation on the 2nd, 3rd, 4th and 5th Cumulative Periodic Reports of the Republic of Angola, adopted at the 12th extraordinary session of the African Commission, 30 July-4 August 2012.

were 'insufficient'.¹¹⁰ In this regard, the Commission recommended that the state take measures to¹¹¹

guarantee the effective protection of returning refugees and displaced persons, by according them equal rights in all areas including economic and social rights, without discrimination, thereby allowing their social reinsertion/reintegration which should lead to genuine national reconciliation.

The Commission similarly expressed concern at the insufficiency of measures for the repatriation of refugees, the resettlement of IDPs and secure reception centres for displaced persons in Côte d'Ivoire.¹¹² In relation to the initial report of the Republic of Kenya, the African Commission noted its concern at the closing of the borders with Somalia as well as reports of violations of the principle of *non-refoulement*.¹¹³ Finally, in a handful of reports, the Commission lamented the absence of information in respect of asylum seekers and refugees.¹¹⁴

These comments represent an important shift in focus on the part of the Commission and would appear to signal a greater willingness to engage with states on the issue of the protection of asylum seekers and refugees. However, there are a number of factors which operate in order to diminish the effectiveness of the Commission's recommendations in respect of state party reports. The first of these is the lack of state compliance with regard to its reporting obligations, with only eight out of 53 states having complied with all its periodic reporting obligations and a further 11 countries having never submitted a report as at October 2012.¹¹⁵

Furthermore, the fact that the Commission's concluding observations have not been well or uniformly publicised means that it is very difficult to ascertain the true extent to which the Commission is prioritising refugee rights. The lack of publication in this regard also

110 Para 24 Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Rwanda, 36th ordinary session, 23 November to 7 December 2004, Dakar, Senegal.

111 n 110 above, para 32.

112 See para 54 of the *Observations Finales sur le Rapport Périodique Initial et Cumulé de la République Côte d'Ivoire*, 52nd ordinary session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, 9-22 October 2012.

113 See para 23 of the Concluding Observations, adopted at the 41st ordinary session of the African Commission, 16-30 May 2007, Accra, Ghana.

114 See, in this regard, para 21 of the Concluding Observations and Recommendations on the 7th and 8th Periodic Report of the Arab Republic of Egypt, 37th ordinary session, 27 April-11 May 2005, Banjul, The Gambia; para 35 of the Concluding Observations of the African Commission on the 3rd Periodic Report of the Republic of Uganda, 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia. Also see part V paras (o) and (q) and para 22 of the Concluding Observations and Recommendations on the 7th and 8th Periodic Reports of the Republic of Burkina Faso, adopted at the 35th ordinary session of the African Commission, 21 May-4 June 2004, Banjul, The Gambia.

115 See Combined 32nd and 33rd Activity Reports of the African Commission on Human and Peoples' Rights, para 16.

makes it difficult for any possible domestic pressure and follow-up to occur in instances where the Commission has made recommendations affecting the rights of asylum seekers and refugees. Finally, the lack of visible follow-up on its own concluding observations, in spite of the rather vague provisions of the Commission's 2010 Rules of Procedure, which stipulates that Commission members are to follow up on concluding observations 'within the framework of their promotion activities to the states parties concerned', means that states are largely able to escape accountability in this regard.

3.3 Taking the rights of asylum seekers and refugees seriously: The appointment by the African Commission of a Special Rapporteur on the Rights of Refugees, Asylum Seekers, Internally-Displaced Persons and Migrants

Whereas the African Commission has made some headway in respect of its protective as well as promotional mandate with regard to the rights of asylum seekers and refugees, one of the most significant developments has been the appointment in 2004 of a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally-Displaced Persons.¹¹⁶ The Special Rapporteur is mandated to examine the situation of persons falling within its mandate, to 'act upon information', to undertake fact-finding missions to refugee and IDP camps, to assist states in the development of appropriate legal and policy frameworks, to raise awareness about these groups and to promote implementation of both the UN and OAU Refugee Conventions. Activities undertaken by the Special Rapporteur in fulfilment of this mandate to date have been limited, with budgetary constraints frequently cited as a reason for this. Nevertheless, the Special Rapporteur has given greater visibility to issues pertaining to asylum seekers and refugees within the African human rights system. The four Special Rapporteurs who have fulfilled this mandate up to July 2013 have issued press statements condemning violations, written to governments to enquire about specific measures taken or to be taken in respect asylum seekers and refugees, undertaken fact finding missions to Mali, Mauritania and Senegal, participated in a number of seminars and conferences and, in the case of Bahame Tom Nyanduga, the first Special Rapporteur, also participated in the

¹¹⁶ See Resolution on the Special Rapporteur on Refugees, Asylum Seekers and IDPs, ACHPR/Res.72 (XXXVI). On the extension of the mandate of the Special Rapporteur, see ACHPR/Res.95 (XXXIX)06. On the appointment of Commissioner Mohamed Fayek to the position of Special Rapporteur for a two-year period commencing in November 2009, see ACHPR/Res.160(XLVI)09. On the appointment of Commissioner Kayitesi Zainabo Sylvie to the position as of May 2011 for a period of two years, see ACHPR/Res.180 (XLIX) 2011. Finally, on the appointment of Maya Sahli-Fadil for a two-year period as of November 2011, see ACHPR/Res.203 (2011).

drafting of an AU Convention on the Protection and Assistance of Internally-Displaced Persons in Africa.¹¹⁷

4 African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee, like the African Commission, has a promotional as well as a protective mandate. Whereas the African Commission has developed a relatively substantial body of jurisprudence in respect of its protectional functions, the work of the 11-member African Children's Committee had until 2011 been limited to promotional activities which included the issuing of a small number of concluding observations in respect of state party reports in which the issue of asylum-seeking and refugee children was addressed. Thus, the Committee recommended in respect of Kenya that 'special measures be taken to declare refugee and displaced children'.¹¹⁸ With regard to Rwanda, the African Children's Committee noted the need to improve support and facilities for foreign refugee children in Rwanda as well as returned Rwandan

117 See in this regard Report of Activities for the Inter-Session Period June-November 2006 for Commissioner Bahame Tom Nyanduga, presented to the 40th ordinary session of the African Commission on Human and Peoples' Rights, 15-29 November, 2006, Banjul, The Gambia; Report of Intersession Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur on Refugees, Asylum Seekers, Migrants and IDPs in Africa to the 41st session of the African Commission on Human and Peoples' Rights, 16-30 May 2007, Accra, Ghana; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period November 2007 to May 2008; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period May-November 2008; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period November 2008 to May 2009; and Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period May to November 2009. Also see Report of the Activities by Commissioner Mohamed Fayek, Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the Intersession Period between November 2009 and May 2010 and Zainabo Sylvie Kayitesi, Activities as Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally-Displaced Persons for the period between the 49th ordinary session in May 2011 and the 50th ordinary session of the African Commission on Human and Peoples' Rights. Finally, see Maya Sahli-Fadel, Activities as Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally-Displaced Persons presented at the 51st ordinary session of the African Commission on Human and Peoples' Rights, 18 April to 2 May 2012 and Maya Sahli-Fadel, Report of the Mechanism of the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons and Migrants in Africa Since its Creation, presented to the 52nd ordinary session, 9-22 October 2012.

118 Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child.

refugee children.¹¹⁹ It also recommended that the Rwandan government ensure the best possible conditions for the return of refugee children to their country of origin.¹²⁰ In relation to Tanzania, the Children's Committee expressed concern at the fact that family-tracing programmes were being conducted by an NGO as well as the lack of clear and updated information, allowing for family reunification.¹²¹ The Tanzanian government was also requested to enact legislation and establish mechanisms allowing for the implementation of the National Refugee Policy and further information was requested in relation to the manner in which children's rights were dealt with during the repatriation of Burundian refugees.¹²²

In March 2011, the African Children's Committee handed down its first decision in *Nubian Children in Kenya v Kenya*,¹²³ a case which, whilst not directly addressing the rights of asylum seekers and refugees, nonetheless provides important guidance on issues of nationality and statelessness. This case was brought as an *actio popularis* on behalf of Nubians in Kenya who, in spite of having lived in the country for more than a century, had effectively been denied Kenyan nationality. The applicants argued that this violated a number of provisions of the African Children's Charter. The African Children's Committee concurred, finding violations of the rights of Nubian children to non-discrimination, nationality and protection against statelessness, as well as consequential violations of the rights to health and education. On the issue of statelessness, the Children's Committee emphasised in particular the negative consequences thereof on children, including the 'difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country'.¹²⁴ Furthermore, the Children's Committee also noted the 'devastating' impact of the denial of nationality on the realisation of children's socio-economic rights, such as access to health care and education.¹²⁵ Amongst the measures ordered, the Committee required the Kenyan authorities to report on the implementation of these recommendations within a six-month period from the date of notification of the decision.¹²⁶ This does not appear

119 *Recommandations par le Comité Africain D'Experts sur les Droits et le Bien Etre De L'Enfant au Gouvernement du Rwanda.*

120 As above.

121 Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of Tanzania Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child.

122 As above.

123 Communication 002/2009.

124 *Nubian Children* (n 123 above) para 46.

125 As above.

126 *Nubian Children* (n 123 above) para 69(5). Other measures ordered included a recommendation that the Kenyan government take legislative, administrative as well as other measures in order to ensure that children of Nubian descent are

to have occurred, and at the Children's Committee's 18th session held from 27 November to 1 December 2011 in Algiers, Algeria, the Committee appointed one of its members as the individual responsible for following up on the implementation of this decision.¹²⁷ Subsequently, three members of the Committee were designated to visit Kenya in order to follow up on the decision.¹²⁸ It remains to be seen whether the Committee will be able to engender compliance in a way that the African Commission has to date failed to do.

5 African Court on Human and Peoples' Rights

As noted at the beginning of this article, the Protocol Establishing an African Court on Human and Peoples' Rights was adopted in 1998 in order to 'complement' the African Commission's protective mandate, addressing in particular the issue of the lack of legally-enforceable judgments.¹²⁹ This instrument, as well as the subsequent Protocol on the Statute of the African Court of Justice and Human Rights, merging the African Court with the African Court of Justice,¹³⁰ have been criticised for their failure to allow for automatic individual and NGO access – requiring states instead to make a declaration accepting the Court's jurisdiction in terms of article 34(6). As at July 2013, only six states have made this declaration.¹³¹ As the initial cases before the African Court demonstrate, including the very first case of *Michelot Yogogombaye v The Republic of Senegal*¹³² in which the applicant requested amongst its prayers that the Court rule that Senegal

registered immediately after birth and that those who would otherwise be stateless are able to acquire a Kenyan nationality and the proof of such a nationality at birth. The Committee also recommended that the state take measures to ensure, as a matter of priority, that existing children of Nubian descent whose Kenyan nationality is not recognised are afforded the benefit of these measures. Finally, a recommendation was also made that the Kenyan government implement its birth registration system in a non-discriminatory manner and adopt short, medium and long-term plans, so as to ensure the fulfilment of the rights to health and education (see paras 69(1)-(5)).

127 See ACERWC/Rpt (XVIII).

128 See ACERWC/Rpt (XIX) para 99.

129 With regard to the issue of binding judgments, see art 27(1) of the Protocol which explicitly provides that, in the event of finding a violation of human and peoples' rights, the Court may make any order to remedy the violation, including the payment of compensation. Art 30 of the Protocol further provides that the '[s]tate parties ... undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.

130 This instrument was adopted on 1 July 2008 in Sharm El Sheikh, Egypt.

131 These states are Burkina Faso (declaration signed on 14 July 1998 and deposited on 28 July 1998); Ghana (declaration signed on 9 February 2011 and deposited on 10 March 2011); Malawi (declaration signed on 9 September 2008 and deposited on 9 October 2008); Mali (declaration signed on 5 February 2010 and deposited on 19 February 2010); Tanzania (declaration signed on 9 March 2011 and deposited on 29 March 2010); and Rwanda (declaration signed on 22 January 2013).

132 Application 001/2008.

violated the African Charter and the OAU Refugee Convention, it is likely that the African Commission will for some time yet be the primary institution through which asylum seekers and refugees will seek to have their rights vindicated.¹³³ The willingness, however, of the African Commission to bring cases to the African Court, as illustrated by *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*,¹³⁴ may, if this trend is continued, lead to cases dealing with the rights of asylum seekers and refugees to come before the Court. Similarly, the possibility of advisory opinions being sought on the rights of asylum seekers and refugees may also force the Court to confront the issue of refugees in Africa.¹³⁵ If such cases were to arise, it is imperative that the Court takes a strong, courageous stance in favour of protecting the rights of some of the most vulnerable members of society.

6 Conclusion

While refugees were initially viewed within the context of the OAU as a natural outflow of the struggle against colonialism and, as such, tended to be welcomed in the receiving states, more recent events, in particular the expulsion of non-nationals by African states, would seem to indicate that this traditionally generous approach has begun to wane. Whilst the institutions with responsibility for human rights promotion and protection in Africa have made some strides in the advancement of the rights of asylum seekers and refugees on the continent, it is apparent that there are a number of challenges impeding the effective protection of their rights, the most important of which include the lack of political will on the part of states to implement recommendations of the institutions with responsibility for rights promotion and protection on the continent; the unwillingness

133 See Application 002/2011, *Soufiane Ababou v People's Democratic Republic of Algeria*; Application 005/2011, *Daniel Amare and Mulugeta Amare v Republic of Mozambique*; Application 008/2011, *Ekollo Moundi Alexandre v République du Cameroun et République Fédérale du Nigéria*; Application 012/2011, *National Convention of Teachers Trade Union v the Republic of Gabon*; Application 002/2012, *Delta International Investments SA, Mr and Mrs AGL de Lange v The Republic of South Africa*; Application 004/2012, *Emmanuel Joseph Uko & Others v The Republic of South Africa*; and Application 005/2012, *Amir Adam Timan v The Republic of Sudan*, in which the Court held that it did not have jurisdiction due to the fact that the respondent states in question had not made a declaration recognising the right to individual petition provided for in art 34(6) of the African Court Protocol. Similarly, the request for provisional measures in Application 007/2012, *Baghdadi Ali Mahmoudi v The Republic of Tunisia*, was also rejected for failure on the part of the Tunisian authorities to have made the declaration in terms of art 34(6).

134 Application 004/2011. This case was brought by the African Commission to the African Court after 'successive complaints' had been submitted to it alleging serious and widespread violations of human rights by the government of Libya.

135 As of July 2013, four advisory opinions had been sought by Libya (Request 002/2012); Mali (Request 003/2012); the Socio-Economic Rights and Accountability Project (SERAP) (Request 001/2012); the Pan-African Lawyers Union (PALU); and the Southern Africa Litigation Centre (SALC).

of the African Commission to clearly separate admissibility from the merits of cases brought before it; the lack of genuine engagement with the normative provisions by the African Commission in respect of both the African Charter and the African Women's Protocol; the lack of follow-up mechanisms embedded within the Commission's procedures; and the restricted access granted to individuals under the African Court Protocol. It is only once these issues have been addressed fully that asylum seekers and refugees on the continent will be able to fully enjoy the rights afforded to them by the African human rights system.