Editorial

With the publication of this issue of the *African Human Rights Law Journal* , the second of 2010, we mark the end of the first ten years of the *Journal's* existence. In reaching this milestone, we look back with satisfaction and celebrate the fact that we have to a great extent achieved our two main objectives: to provide a forum for African voices often not commonly heard; and to stimulate discourse on human rights in Africa. As the present editors, we warmly thank everyone who has made it possible for the *Journal* to reach this milestone: the international editorial advisory board, editorial assistants, subscribers, contributors, reviewers and readers. Three individuals must be singled out: Christof Heyns, now chairing the international editorial advisory board, and who was one of the driving forces behind the *Journal* and part of the initial editorial team; Isabeau de Meyer, whose title of 'Publication manager' spectacularly fails to do justice to her dedication and incalculable contribution to ensure the high quality and regular and timely publication of the *Journal* ; and Annelize Nienaber, now part of the editorial team, who has been responsible for implementing the *Journal* 's approach of working with authors on the language editing of their contributions, where required.

Next year will see two commemorative events of particular significance to the *Journal* : On 27 June 2011 it will be 30 years since the adoption of the African Charter on Human and Peoples' Rights; and on 21 October 2011 it will be 25 years since its entry into force. Focusing on the second of these events, the *Journal* plans to devote the second issue of 2011 to papers providing historical perspectives of or overviews of developments in the African regional human rights system. We therefore invite contributions on the theme 'The significance of 25 years in the life of the African Charter'. These contributions should reach us by the end of May 2011. Selected authors may be invited to present their papers at a conference, co-organised by the *Journal* and the African Human Rights Moot Court Competition which, like the *Journal* , is a project of the Centre for Human Rights.

In the last six months of 2010 a number of important developments took place pertaining to the African regional human rights system. In July, at the African Union Assembly's session in Kampala, Uganda, the following four judges were elected to the African Court on Human and Peoples' Rights for six-year terms: Mr Fatsah Ouguergouz (Algeria); Mr Augustino SL Ramadhani (Tanzania); Mr Duncan Tambala (Malawi); and Ms Elsie Nwanwuri Thompson (Nigeria). Mr Sylvain Ore (Côte d'Ivoire) was elected for a four-year term. The following members of the Committee of Experts on the Rights of the Child have also been elected for five-year terms: Ms Amal Muhammad Al-Hanqari (Libya); Mr Alfas M Chitakunye (Zimbabwe); Mr Benyam Dawit Mezmur (Ethiopia); Ms Fatima Delladj-Sebaa (Algeria); Mr Clement Julius Mashamba (Tanzania); and Ms Félicité Muhimpundu (Rwanda). (Benyam Dawit Mezmur is a regular contributor to this *Journal* ; see for example the last contribution under 'Recent developments' in this issue.)

The vacancy on the African Commission on Human and Peoples' Rights which was left by Commissioner Melo who took up a position with UNESCO, was eventually filled by the election of Mrs Lucy Asuagbor, member of the judiciary of Cameroon, for the remaining three-year term. It should be noted that the terms of three of the most progressive commissioners come to an end after the next session of the African Commission. They are the present Chairperson (Commissioner Alapini-Gansou from Benin), the present Vice-Chairperson (Commissioner Malila from Zambia) and Commissioner Pansy Tlakula from South Africa. Civil society in the relevant countries should mobilise in time to ensure that these individuals are again nominated by their governments, and should work with others to ensure their re-election by the African Union Assembly in July 2011.

The African Union has also embarked upon devising a Human Rights Strategy and Governance Architecture. The next AU Assembly session, in January 2011, is earmarked for a discussion of 'African values'. As human rights may be viewed as the legal formulation of the normative consensus about human dignity and worth, this topic resonates with the 'values debate'. In this regard, the AU Assembly decision at its most recent meeting, in Kampala in July 2010, is disconcerting in its 'strong rejection' of 'any attempt to undermine the international human rights system by seeking to impose concepts or notions pertaining to social matters, including private individual conduct, that fall outside the internationally-agreed human rights legal framework, taking into account that such attempts constitute an expression of disregard for the universality of human rights' (Decision on the Promotion of Co-operation, Dialogue and Respect for Diversity in the Field of Human Rights, Assembly/AU/Dec.328(XV)). In our view, the AU debate on values should use as its starting point the numerous human rights treaties adopted by the OAU and AU, in particular the African Charter, the Protocol thereto on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, the Charter on Democracy, Elections and Governance, and the Convention for the Protection and Assistance of Internally Displaced Persons. In respect of treaties that have entered into force, the jurisprudence and other interpretations of the treaty-monitoring bodies should supplement the understanding of these treaties.

In this regard, it is regrettable that the African Commission recently – by a slender majority – rejected the application of the Coalition of African Lesbians (CAL) for observer status. It is clearly untenable. The rights bearers under the African Charter are 'everyone', 'every human being' and 'every individual' (see articles 2 to 17 of the Charter). These rights are thus available to everyone without any distinction. This position is underlined in article 2 of the Charter, which provides that there is no ground on which any person may be denied the protection of the Charter. In other words, every person enjoys the Charter's rights, irrespective of her or his sexual orientation or gender identity. (Such an interpretation is supported by articles 60 and 61 of the Charter: 'Sex', one of the specific grounds for non-discrimination in article 2, has also been interpreted by the UN Human Rights Committee in *Toonen v Australia* to include 'sexual orientation'; and the Commission is empowered to have reference to international law in interpreting the Charter by virtue of these two articles.)

The decision to refuse the application is similarly incompatible with the African Commission's own practice, since the Commission itself has on numerous occasions acknowledged that the rights of sexual minorities are included in its mandate. This inclusive approach appears from the exercise of the Commission's principal mandate to examine state reports. On numerous occasions, the Commission posed questions on the situation of sexual minorities during the examination of state reports. In one notable example, when it examined Cameroon's state report, in October 2006, not only did three of the commissioners pose questions related to the abuse of 11 gay men's rights, but the Commission as a whole included 'concern for the upsurge of intolerance towards sexual minorities' in its official record of the proceedings, the Concluding Observations. In addition, special mechanisms of the Commission have also on numerous occasions engaged with and protected the rights of sexual minorities. The Commission has also made reference to the prohibition of discrimination on the grounds of sexual orientation in its case law. (See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 169.)

For many years now, the African Commission has allowed numerous 'mainstream' non-governmental organisations (NGOs) with observer status to raise, during public sessions, issues pertaining to the protection of the rights of gays, lesbians and other sexual minorities. The logical conclusion from this

practice is that an NGO with a direct interest in these issues is better placed to raise these issues and should therefore be granted observer status.

In this issue, contributing authors cover aspects of the human rights systems in particular countries: Ethiopia, Kenya, Malawi, Nigeria and South Africa. For instance, De Wet and Du Plessis deliberate on the meaning for constitutional environmental rights in South Africa of certain substantive obligations distilled from international human rights instruments; Asaala explores transitional justice as a vehicle for social and political transformation in Kenya; Abebe explores more liberal standing rules to enforce constitutional rights in Ethiopia; and two articles deal with education in Nigeria – one by Akinbola and another by Coetzee.

We acknowledge with appreciation and sincerely thank the independent reviewers who gave their time and talents to ensure the consistent quality of the *Journal* : Ernest Ako, Yvonne Dausab, Lee Anne de la Hunt, Solomon Dersso, Solomon Ebobrah, Yonatan Fessha, Jacqui Gallinetti, Paul Graham, Ilze Grobbelaar-Du Plessis, Michelo Hansungule, Victor Jere, Thoko Kaime, Serges Djoyou Kamga, Ivy Kihara, Magnus Killander, Joanna Mansfield, Remember Miamingi, George Mukundi, Godfrey Musila, Thandabantu Nhlapo, Dejo Olowu, David Padilla, Don Rukare, Werner Scholtz, Ann Skelton, Gina Snyman, Nahla Valji, Johan van der Vyver and Dunia Zongwe.