

**CELEBRATING THE
AFRICAN CHARTER AT 30:
A GUIDE TO THE AFRICAN
HUMAN RIGHTS SYSTEM**



**African Commission on
Human and Peoples' Rights**



Celebrating the African Charter at 30: A guide to the African human rights system

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**Banjul Declaration of the African Union on the 25th
Anniversary of the African Charter on Human and Peoples'
Rights in 2006**

'... the African Charter has provided a legal framework for the promotion and protection of human and peoples' rights on our continent and the jurisprudence of the African Commission on Human and Peoples' Rights attests to this achievement.'

INTRODUCTION: A CAUSE FOR CELEBRATION

Between 1981, when member states of the Organisation of Africa Unity (now African Union) adopted the African Charter on Human and Peoples' Rights, and 2011, Africa has experienced scores of human rights catastrophes of extreme proportions: the scourge of poverty, the HIV/AIDS pandemic, the 1994 Rwandan genocide, the Darfur crisis, and civil wars in Somalia, Sierra Leone, Côte d'Ivoire and Liberia. Is there then any reason to celebrate the thirtieth anniversary of the Charter?

The answer is: Yes. The African Charter helped to steer Africa from the age of human wrongs into a new age of human rights. It opened up Africa to supra-national accountability. The Charter sets standards and establishes the groundwork for the promotion and protection of human rights in Africa. Since its adoption 30 years ago, the Charter has formed the basis for individuals to claim rights in an international forum. The Charter also dealt a blow to state sovereignty by emphasising that human rights violations could no longer be swept under the carpet of 'internal affairs'.

The Charter established the African Commission on Human and Peoples' Rights to promote, protect and interpret the rights enshrined under the Charter. The jurisprudence of this Commission has been a robust resource for national jurisdictions, NGOs and other regional systems. The state reporting mechanism established under the Charter has provided an opportunity for constructive dialogue and review. It has also helped member states to keep stock of their human rights achievements and challenges. The establishment of the African Court of Human and Peoples' Rights with powers to render legally binding decisions has further tightened the noose on human rights violators in Africa. While the Court is gradually establishing itself, the provisional order against Libya has demonstrated the potential for cooperation among the human rights institutions in Africa.

One can only imagine what the continent would have been without the Charter. In view of these, Africa certainly has good reason to celebrate the African Charter. In the spirit of this celebration, it is crucial also to reflect on the past achievements, present endeavours and future challenges in realising the rights set out in the Charter.

HISTORY OF THE AFRICAN CHARTER

The idea of drafting a document establishing a human rights protection mechanism in Africa was first conceived in the early 1960's. At the first Congress of African Jurists, held in Lagos, Nigeria in 1961, the Congress adopted a declaration otherwise referred to as the 'Law of Lagos' calling on African governments to adopt an African convention on human rights with a court and a commission. However, at the time African governments did not make serious efforts to promote this concept.

The Charter establishing the Organisation of Africa Unity (OAU) imposed no explicit obligation on member states for the protection of human rights. The OAU founding Charter only required states parties to have due regard for human rights as set out in the Universal Declaration of Human Rights in their international relations. In spite of the absence of a clear human rights mandate, the OAU took bold steps to address a number of human rights issues such as decolonisation, racial discrimination, environmental protection and refugee problems. The continental organisation however ignored the massive human rights abuses wantonly perpetrated by some despotic African leaders against their own citizens. This was due largely to the OAU's preference for socio-economic development, territorial integrity and state sovereignty over human rights protection, as well as firm reliance on the principle of non-interference in the internal affairs of member states.

At the first Conference of Francophone African Jurists held in Dakar, Senegal, in 1967, participants again revived the idea of the Law of Lagos on the need for a regional protection of human rights in Africa. In the Dakar Declaration, adopted after the Conference, the participants asked the International Commission of Jurists to consider in consultation with other relevant African organisations the possibility of creating a regional human rights mechanism in Africa.

The United Nations also facilitated a series of seminars and conferences in a number of African countries. The UN Human Rights Commission set up an ad hoc working group and adopted a resolution calling on the UN Secretary General to provide necessary assistance for the creation of a regional human rights system in Africa. These initiatives of the United Nations with a view to getting African states

to consent to the adoption of a regional human rights convention failed. Participants at one of the conferences decided to set up a follow-up committee mandated to carry out visits to African heads of state and other relevant authorities on the need for an African regional human rights system. Subsequent to the committee's visit to Senegal, the then president of Senegal, President Léopold Sédar Senghor, promised to table the proposition before the OAU Assembly at its next session.

In 1979, the Assembly of Heads of States and Government of the OAU meeting in Monrovia, Liberia, unanimously requested the Secretary General of the OAU to convene a committee of experts to draft a regional human rights instrument for Africa, similar to the European and Inter-American human rights conventions.

Extracts of the OAU Assembly's decision

AHG/Dec.115 (XVI) Rev. 1 1979

The Assembly reaffirms the need for better international cooperation, respect for fundamental human rights and peoples' rights and in particular the right to development ... The Assembly calls on the Secretary-General to:

(b) organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an "African Charter on Human and Peoples' Rights" providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights.

A conference of twenty African experts presided over by Judge Kéba M'baye was organised in 1979 in Dakar, Senegal. It is important to note that the work of the Expert Committee was greatly influenced by the opening address of the host president, President Senghor, who enjoined the Committee to draw inspiration from African values and tradition and also to focus on the real needs of Africans, the right to development and the duties of individuals. After deliberations for about 10 days, the Committee prepared an initial draft of the Charter.

As a result of the hostility of certain African governments to regional human rights protection in Africa, a conference of plenipotentiaries scheduled for Ethiopia to adopt the draft charter could not take place. This period was the most dramatic in the history of the Charter. The Charter project was clearly under threat. Amidst this strained atmosphere and at the invitation of the OAU Secretary-General, the President of The Gambia convened two Ministerial Conferences in Banjul, The Gambia, where the draft Charter was adopted and subsequently submitted to the OAU Assembly. It is for this historic role of The Gambia that the African Charter is also referred to as the 'Banjul Charter'. The Banjul Charter was finally adopted by the OAU Assembly on 28 June 1981, in Nairobi, Kenya. After ratifications by the absolute majority of member states of the OAU, the Charter came into force on 21 October 1986. By 1999, the African Charter had been ratified by all the member states of the OAU.

Important dates

- 28 June 1981 Adoption of the Charter in Nairobi, Kenya
- 21 October 1981 First ratification of the African Charter (Mali)
- 21 October 1986 Charter came into force
- 2 November 1987 Establishment of the Commission
- 2 November 1987 First ordinary session of the Commission
- 28 April 1988 First resolution adopted, on the Headquarters of the Commission
- 28 April 1988 First Activity Report of Commission adopted
- 12 June 1989 Inauguration of Commission's headquarters in Banjul, The Gambia
- 21 October 1989 The Commission at its 5th Ordinary Session held from 3 – 14 April 1989, adopts 21 October as 'African Human Rights Day'.
- 13 – 14 June 1989 First extra-ordinary session of the Commission
- 10 June 1998 Adoption of the Protocol on African Human Right Court
- 22 December 1999 Last ratification of the African Charter (Eritrea)
- 11 July 2003 Adoption of the Protocol on the Right of Women in Africa
- 25 January 2004 Court's Protocol entered into force
- 25 November 2005 Women's Protocol entered into force
- 15 December 2009 African Court delivered its first judgment

MAIN FEATURES OF THE AFRICAN CHARTER

The Charter has the following unique features:

- The Charter recognises the indivisibility of all rights: All ‘generations’ of rights are recognised. Socio-economic rights are justiciable.

‘Clearly, collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.’

SERAC v Nigeria, para 68

- No derogations are allowed.

‘... the African Charter does not contain a derogation clause. Therefore the limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances. The only legitimate reasons for limitations to the rights and freedoms of the Charter are found in article 27(2) ...’

Media Rights Agenda v Nigeria, paras 68 & 69

- Recognition of peoples’ rights such as the peoples’ rights to development, free disposal of natural resources, and self-determination.

‘The African Commission wishes to emphasise that the Charter recognises the rights of peoples.’

Endorois case, para 155

- Imposition of duties on both states and individuals.

‘The enjoyment of rights and freedom also implies the performance of duties on the part of everyone.’

Preamble of the African Charter

SUBSEQUENT STANDARDS SUPPLEMENTING THE AFRICAN CHARTER

Article 66 of the Charter allows state parties to the Charter to make special protocols or agreements where necessary to supplement the provisions of the Charter. A number of protocols and conventions have been adopted to supplement the substance of the Charter.

1 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child was adopted in Addis Ababa, Ethiopia, on 11 July 1990, and entered into force on 29 November 1999. As of 21 October 2011, 46 member states of the AU have ratified the Children Charter.

The Charter defines a ‘child’ as every human being below the age of 18 years. Four principles underpin the Charter. These are: non-discrimination, participation, the best interest of the child, and survival and development. More specifically, the Charter prohibits child marriage, child labour and child abuse. It also addressed such children rights-related themes as juvenile justice, armed conflict, adoption, drug abuse, sexual exploitation and human trafficking.

The African Children’s Charter established the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Rights Committee) to promote and protect the rights and welfare of the child. The Committee comprises 11 members elected by the AU Assembly for a term of 5 years. The seat of its Secretariat is in Addis Ababa, Ethiopia.

The Committee is mandated to promote and protect the rights stipulated in the Children’s Charter, monitor its implementation, and to interpret its provisions. State parties to the Children’s Charter are required to submit state reports setting out measures they have adopted to implement the provisions of the Charter. The Committee is also competent to receive communications from individuals, groups, NGOs and state parties to the Children’s Charter. The Committee’s first finding, in 2011, dealt with the failure of Kenya to register and provide nationality to children of Nubian descent in the country. The Committee held Kenya in violation of the African Children’s Charter.

‘ ... although states maintain the sovereign right to regulate nationality, in the African Committee’s view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children’s Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.’

Children of Nubian Descent in Kenya case, para 48

For more information on the African Children’s Rights Committee, visit www.acerwc.org

2 Protocol on the African Human and Peoples’ Rights Court

The Protocol on the Establishment of an African Court on Human and Peoples’ Rights was adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004. All member states of the AU except Eritrea and Cape Verde have signed the Protocol, but so far only 26 states have ratified it. Under article 34(6) of the Protocol, states may also make an optional declaration, accepting the competence of individuals and NGOs with observer status before the Commission to submit cases *directly* to the Court. By 21 October 2011, five states have made such a declaration: Burkina Faso, Ghana, Mali, Malawi and Tanzania.

3 Protocol to the African Charter on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Women’s Protocol) was adopted in Maputo, Mozambique, in July 2003 and entered into force in November 2005. It was inspired by a recognised need to compensate for the inadequate protection afforded to women by the African Charter on Human and Peoples’ Rights. While the African Charter guarantees non-discrimination on the basis of sex, equality before the law, and the elimination of discrimination against women, it does not

articulate specific violations of women's rights which result from discrimination.

The Women's Protocol is comprehensive with its inclusion of civil and political rights, economic, social and cultural rights, group rights and, for the first time in an international treaty, health and reproductive rights. It also contains innovative provisions that advance women's rights further than any existing legally binding international treaty. For example, the legal prohibition of female genital mutilation is prescribed as well as the authorisation of abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. Furthermore, the Protocol is the first international human rights treaty to explicitly refer to HIV/AIDS, in this case, in the context of sexual and reproductive health rights. Other provisions address violence against women, harmful traditional practices, child marriage, polygamy, inheritance, economic empowerment, women's political participation, education, and women in armed conflict. Notably, the Women's Protocol recognises that certain women suffer multiple forms of discrimination and accordingly, separate provisions for widows, elderly women, and disabled women are included.

Thirty countries have ratified the Women's Protocol as of 21 October 2011.

4 Other relevant human rights standards subsequent to the Charter

In addition to the foregoing instruments, the African Union (AU) has also adopted a number of treaties relevant to the promotion and protection of human rights in Africa. These instruments include the Constitutive Act of the AU 2000, Protocol on the Pan-African Parliament 2001, Protocol on the Peace and Security Council 2002, Statute of the Economic, Social and Cultural Council 2004, Convention on the Prevention and Combating of Terrorism 1999, Convention on the Conservation of Nature and Natural Resources 2003, Convention on the Prevention and Combating Corruption 2003, African Charter on Democracy, Elections and Governance 2007, and the Convention for the Protection and Assistance of Internally Displaced Persons 2009. The AU, as well as the African

Commission, has also adopted various declarations and resolutions relevant to the understanding and advancement of the African Charter provisions.

For more information on these human rights instruments, see Heyns C & Killander M (eds) (2010) *Compendium of key human rights documents of the African Union*.

THE AFRICAN COMMISSION

Creation

The African Charter established the African Commission on Human and Peoples' Rights. The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat has subsequently been located in Banjul, The Gambia.

Composition

The Commission consists of 11 members elected by the AU Assembly from experts nominated by the state parties to the Charter. The Assembly considers equitable geographical and gender representation in electing the members of the Commission. Members of the Commission are elected for a six-year term and are eligible for re-election.

Once elected, the commissioners serve in their personal capacity and not as representatives of their respective countries. Previously, some members of the Commission held high political offices at the national level, which affects the Commission's independence. The AU in April 2005 issued a *note verbale* to member states prescribing guidelines for nomination of members to the Commission which excluded senior civil servants and diplomatic representatives.

Bureau of the Commission

The Commission elects its Chairperson and Vice-Chairperson as the Bureau of the Commission. They are elected for a term of two years and are eligible for re-election once. The Bureau coordinates the activities of the Commission and supervises and assesses the work of the Commission's Secretariat. The Bureau is also empowered to take decisions on matters of emergency between the sessions of the Commission. It is however obligated to present a report on the situation to members at the next session of the Commission.

Secretariat of the Commission

The Chairperson of the AU Commission appoints the Secretary of the African Commission including other support staff necessary for the effective discharge of the Commission's mandate. The Secretariat provides administrative, technical and logistical support to the Commission.

Mandate of the Commission

Article 45 of the Charter sets out the mandate of the Commission.

Promotion of human and peoples' rights

- The Commission carries out sensitisation, public mobilisation and information dissemination through seminars, symposia, conferences and missions.

Protection of human and peoples' rights

- The Commission ensures protection of human and peoples' rights through its communication procedure, friendly settlement of disputes, state reporting (including consideration of NGOs' shadow reports), urgent appeals and other activities of special rapporteurs and working groups and missions.

Interpretation of the Charter

- The Commission is mandated to interpret the provisions of the Charter upon a request by a state party, organs of the AU or individuals. No organ of the AU has referred any case of interpretation of the Charter to the Commission. However, a handful of NGOs have approached the Commission for interpretation of the various articles of the Charter. The Commission has also adopted many resolutions expounding upon the provisions of the Charter.

Rules of Procedure

The detailed activities and procedures of the Commission are regulated by its Rules of Procedure. The Commission adopted its first Rules of Procedure in 1988, which were amended in 1995. With the advent of the African Court on Human and Peoples' Rights, the Commission adopted new Rules of Procedure, which entered into force on 18 August 2010.

MEMBERS OF THE AFRICAN COMMISSION

Current Commissioners (as at July 2011)

- Ms Reine Alapini-Gansou (2005 – 2011) Benin
Chairperson
- Mr Mumba Malila (2005 - 2011) Zambia
Vice-Chairperson
- Ms Catherine Dupe Atoki (2007 – 2013) Nigeria
- Mr Musa Ngary Bitaye (2005 – 2011) The Gambia
- Mr Mohamed Bechir Khalfallah (2009 – 2015) Tunisia
- Ms Soyata Maiga (2007 – 2013) Mali
- Ms Zainabo Sylvie Kayitesi (2007 – 2015) Rwanda
- Ms Faith Pansy Tlakula (2005 - 2011) South Africa
- Mr Yeung KJY Sik Yuen (2007 – 2013) Mauritius
- Ms Lucy Asuagbor (2010 – 2013) Cameroon

(Mr Mohamed Fayek (Egypt) resigned in 2011.)

In June 2011, Commissioners Alapini-Gansou and Tlakula were re-elected for another six-year term each; and Commissioners Malila, Bitaye and Fayek were replaced by Commissioners Kaggwa (Uganda, 2011 - 2017), Sahli Fadel (Algeria, 2011 - 2017) and Manirakiza (Burundi, 2011 - 2015).

Former members of the Commission

• Amb Grace S. Ibingira	(1987 – 1989)	Uganda
• Mr M. Alioune Blondin Beye	(1987 – 1998)	Mali
• Dr Ali Mahmoud Behedma	(1987 – 1993)	Libya
• Dr Ibrahim Ali Badawi El-Sheikh	(1987 – 2003)	Egypt
• Mr Alexis Gabou	(1987 – 1993)	Congo
• Mr Sourahata Semega Jannah	(1987 – 1995)	The Gambia
• Judge Moleleki D Mokama	(1987 – 1993)	Botswana
• Mr CLC Mubanga-Chipoya	(1987 – 1992)	Zambia
• Justice Youssoupha Ndiaye	(1987 – 1999)	Senegal
• Prof Isaac Nguema	(1987 – 2001)	Gabon
• Justice Habesh Robert Kisanga	(1987 – 1997)	Tanzania
• Prof U. Oji Umzurike	(1989 – 1997)	Nigeria
• Justice Vera De MD Martins	(1993 – 1999)	Cape Verde
• Prof Victor Dankwa	(1993 – 2005)	Ghana
• Judge Atsu Kofi Amega	(1993 – 1999)	Togo
• Mr Mohamed H Ben Salem	(1992 – 2003)	Tunisia
• Amb Kamel Rezzag-Bara	(1996 – 2007)	Algeria
• Mrs Julienne Ondziel-Gnelenga	(1995 – 2001)	Congo
• Dr Nyameko Barney Pityana	(1997 – 2003)	South Africa
• Mr. Andrew R Chigovera	(1999 – 2005)	Zimbabwe
• Mrs Florence Butegwa	(1999 – 2001)	Uganda
• Dr Vera Mlangazuwa Chirwa	(1999 – 2005)	Malawi
• Mrs Jainaba Johm	(1999 – 2005)	The Gambia
• Mr Yasser SAhmed El-Hassan	(2001 – 2007)	Sudan
• Dr Angela Melo	(2001 – 2010)	Mozambique
• Amb (Mrs) Salimata Sawadogo	(2001 – 2007)	Burkina Faso
• Justice Sanji M Monageng	(2003 – 2009)	Botswana
• Mr Bahame TM Nyanduga	(2003 – 2009)	Tanzania
• Mr Mohammed AO Babana	(2003 – 2007)	Mauritania
• Mr Mohamed Fayek	(2009 – 2011)	Egypt

For more information on the activities of the Commission, contact:

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SESSIONS OF THE AFRICAN COMMISSION

As at October 2011, the Commission had held 50 ordinary sessions and nine extraordinary sessions.

Ordinary sessions

The Commission holds two ordinary sessions each year. The duration of the session varies in each case from 10 to 15 days depending on needs and finance. The date for an ordinary session is fixed by the Commission upon a proposal by the Chairperson of the Commission in consultation with the Chairperson of the AU Commission. The Secretary of the African Commission must communicate to the members the date and venue of the ordinary session at least 60 days ahead of the session.

Extraordinary sessions

The Commission may hold extraordinary sessions. Extraordinary sessions are convened by the Chairperson of the Commission upon a request by the Chairperson of the African Union Commission or majority of the members of the Commission. Notice of an extraordinary session must be sent to members as soon as possible before the session.

Agenda

The agenda of an ordinary session is usually first drawn by the Commission's Secretary in consultation with the Bureau of the Commission. Apart from the items proposed at the previous session, the Chairperson, members of the Commission, state parties, AU organs, NHRIs, NGOs and any specialized institution of the UN may suggest additional items for inclusion in the agenda. However, the Bureau of the Commission has the final say on which items finally make it to the provisional agenda. In the case of extraordinary sessions, the provisional agenda includes only the items contained in the notification of the extraordinary session issued by the Chairperson. The provisional agenda must be circulated to members

of the Commission not later than 60 days before the session, and in the case of other stakeholders, 45 days. Certain items of the provisional agenda and documents relating to those items may however be distributed 30 days prior to the session.

Activity reports

The Commission submits to every Ordinary Session of the AU Assembly a report of its activities during sessions and inter-sessions. The Executive Council considers the report on behalf of the Assembly. The Report is presented by the Chairperson of the Commission or his/her representative. The Commission may publish information about its protective activities (communications and protective missions) only after the report has been adopted by the Executive Council and Assembly. The Executive Council has withheld its authorisation for the publication of the Commission’s two last Activity Reports. The basis for this decision is not clear. Prior to the adoption of the Activity Report by the AU Assembly, the Commission usually issues a communiqué immediately after the session.

Ordinary sessions and Activity Reports of the Commission since 1987

Session	Date	Host country	Activity Report
1st	2 November 1987	Ethiopia	1st
2nd	8 - 13 February 1988	Senegal	1st
3rd	18 - 28 April 1988	Gabon	2nd
4th	17 - 26 October 1988	Egypt	2nd
5th	3 - 14 April 1989	Libya	2nd
6th	23 Oct - 4 Nov 1989	The Gambia	3rd
7th	18 - 28 April 1990	The Gambia	3rd
8th	8 - 21 October 1990	The Gambia	4th
9th	18 - 25 March 1991	Nigeria	4th
10th	8 - 15 October 1991	The Gambia	5th
11th	2 - 9 March 1992	Tunisia	5th
12th	12 - 21 October 1992	The Gambia	6th
13th	29 March - 7 April 1993	The Gambia	6th
14th	1 - 13 December 1993	Ethiopia	7th

15th	18 - 27 April 1994	The Gambia	7th
16th	25 Oct - 3 Nov 1994	The Gambia	8th
17th	13 - 22 March 1995	Togo	8th
18th	2 - 11 October 1995	Cape Verde	9th
19th	26 March - 4 April 1996	Burkina Faso	9th
20th	21 - 31 October 1996	Mauritius	10th
21st	15 - 24 April 1997	Mauritania	10th
22nd	2 - 11 November 1997	The Gambia	11th
23rd	20 - 29 April 1998	The Gambia	11th
24th	22 - 31 October 1998	The Gambia	12th
25th	26 April - 5 May 1999	Burundi	12th
26th	1 - 15 November 1999	Rwanda	13th
27th	27 April - 11 May 2000	Algeria	13th
28th	23 Oct - 6 Nov 2000	Benin	14th
29th	23 April - 7 May 2001	Libya	14th
30th	13 - 27 October 2001	The Gambia	15th
31st	2 - 16 May 2002	South Africa	15th
32nd	17 - 23 October 2002	The Gambia	16th
33rd	15 - 29 May 2003	Niger	16th
34th	6 - 20 November 2003	The Gambia	17th
35th	21 May - 4 June 2004	The Gambia	17th
36th	23 Nov - 7 Dec 2004	Senegal	18th
37th	27 April - 11 May 2005	The Gambia	18th
38th	21 Nov - 5 Dec 2005	The Gambia	19th
39th	11- 25 May 2006	The Gambia	20th
40th	15 - 29 November 2006	The Gambia	21st
41st	16 - 30 May 2007	Ghana	22nd
42nd	15 - 28 November 2007	Rep of Congo	23rd
43rd	7 - 22 May 2008	Swaziland	24th
44th	10 - 24 November 2008	Nigeria	25th
45th	13 - 27 May 2009	The Gambia	26th
46th	11- 25 November 2009	The Gambia	27th
47th	12 - 26 May 2010	The Gambia	28th
48th	10 - 24 November 2010	The Gambia	
49th	28 April - 12 May 2011	The Gambia	
50th	24 Oct - 7 Nov 2011	The Gambia	

Extraordinary sessions of the Commission

Extraordinary session	Date	Host country	Activity Report
1st	13 - 14 June 1989	The Gambia	2rd
2nd	18 - 19 December 1995	Uganda	9th
3rd	18 - 19 September 2004	South Africa	18th
4th	17 - 23 February 2008	The Gambia	24th
5th	21 - 29 July 2008	The Gambia	25th
6th	30 March - 3 April 2009	The Gambia	26th
7th	5 - 12 October 2009	Senegal	27th
8th	22 Feb - 3 March 2010	The Gambia	28th
9th	23 Feb - 3 March 2011	The Gambia	

The Activity Reports and information about past ordinary and extraordinary Sessions of the Commission are available at: http://www.achpr.org/english/_info/past_en.html

COMMUNICATIONS

Communication is one of the mechanisms employed by the Commission to ensure compliance of states with the human rights enshrined in the Charter. The Commission may receive complaints from states against another state (inter-state complaints) or by individuals and NGOs against one or more states (individual complaints) on alleged violations of human rights in accordance with its mandate under articles 48, 49 and 55 of the African Charter. Over 400 individual communications have been received.

Inter-state communication

The first and only inter-state communication the Commission has handled was decided on the merits in 2004.

DRC v Burundi, Rwanda and Uganda
(2004) AHRLR 19 (ACHPR 2003)

This communication was filed by the Democratic Republic of Congo (DRC) against the Republics of Burundi, Rwanda and Uganda. DRC alleged that Burundi, Rwanda and Uganda (respondent states) had committed grave violations of human and peoples' rights in the Congolese provinces through the activities of rebels groups which the applicant alleged were supported by the respondent states.

Drawing inspiration from general principles of international law as well as the UN Charter and resolutions of the UN General Assembly, the Commission stated that the actions of the respondent states in occupying the territories of the complainant violated the rights of the Congolese people to self-determination and constituted a threat to national and international peace and security. The Commission further stated that the killings and massacres committed in Congolese provinces occupied by the military forces of the respondent states violated the Fourth Geneva Convention and articles 2 and 4 of the African Charter. The Commission stated that the acts of barbarism displayed by the respondent states in the Complainant's territories constitute an affront on 'the noble virtues' of African tradition. The Commission further found that by taking charge of several natural resource producing areas of the complainant's territory, the respondent states had deprived the Congolese people of their rights to freely dispose of their natural resources.

The Commission therefore concluded that the respondent states were in violation of several provisions of the African Charter and urged them to take measures to abide by their obligations under the UN Charter, the OAU Charter and the African Charter and to further pay adequate reparations to the victims of the violations.

Who may bring an individual communication?

Any individual or NGO may bring a communication before the Commission. The Charter is silent on the issue of standing and the Rules of Procedure of the Commission does not provide for a victim requirement. A communication may be submitted by the victim(s) or anyone on their behalf. An individual or NGO submitting a communication on behalf of another need not obtain the express consent of the victim. The NGO also does not have to enjoy an observer status with the Commission. The individual or NGO need not be a citizen or be registered in the state against which the communication is made.

Against whom can a communication be brought?

A communication can only be brought against a state that has ratified the African Charter.

Legal aid

The Commission may on its own motion or after a request by the author of a communication facilitate access to free legal aid to the author of a communication. In arriving at this decision, the Commission must be convinced that the author has no sufficient means to meet all or part of the cost of the communication and that a legal aid is essential to ensure equality of parties and for the proper discharge of the Commission's duties.

Admissibility criteria (article 56)

Before any communication is declared admissible by the Commission, it must comply with all these requirements:

- Communications must indicate their author(s).
- Communication must be compatible with the AU Constitutive Act and the African Charter.
- Communication must not be written in disparaging or insulting language.
- Communication must not be based exclusively on media report.
- Domestic remedies must have been exhausted unless the domestic procedure is unduly prolonged.
- Communication must be submitted within a reasonable time after exhausting local remedies.
- The issues raised in the communication must not have been settled under other UN or AU procedures.

Exhaustion of local remedies

Exhaustion of domestic remedy is the most important requirement for admissibility of cases before the African Commission and other international human rights bodies. This is because of the subsidiarity of international adjudicatory system. The rationales for the requirement of exhausting domestic remedy are to notify the government of the violation thereby affording the state an opportunity to remedy the violation and to give domestic courts a chance to decide upon the case.

Only remedies of judicial nature that are available, effective and sufficient to redress the wrong are required to be exhausted. A remedy is available if it is readily accessible without any impediments; it is effective when it offers some likelihood of success; and it is sufficient when it is capable of redressing the wrong.

A complainant however need not exhaust local remedy where the complaints fall into any of the following categories: If:

- the victims are indigent (*Purohit v The Gambia*);
- the complaints involve serious or massive violations (*Free Legal Assistance Group v Zaïre*);
- domestic legislation ousts the jurisdiction of national courts (*Media Rights Agenda v Nigeria*);
- the rights claimed are not guaranteed by domestic laws (*SERAC v Nigeria*);
- it is physically dangerous for the complainant to return to the erring state in order to exhaust local remedy (*Jawara v The Gambia; Abubarkar v Ghana*);
- the complaint involves 'impractical number' of potential plaintiffs (*African Institute for Human Rights and Development v Guinea*);
- the procedure for obtaining domestic remedy will be unduly prolonged (article 56(5) of the African Charter); or
- it is simply illogical to require exhaustion of local remedy.

Communication procedure

- 1 Registration of communication at the Secretariat of the Commission
 - Submission of communication
 - Allocation of file number
 - Acknowledgment of communication by the Secretariat
- 2 Seizure of communication by the Commission
 - Secretariat prepares a list and summary of all submitted communications.
 - The list and summary is distributed to all Commissioners.
 - Approval of communication from not less than seven Commissioners.
 - Where the Secretariat does not receive the minimum approval, the communication is presented to the Commission at its next session and it may by a simple majority approve the communication.
- 3 The state party concerned is notified of the communication.
- 4 Invitation for comments from state party and author of communication (within three months).
- 5 Commission makes a decision on admissibility.
- 6 If communication is admissible, parties are requested to send their observations on the merits.
- 7 If parties are willing, the Commission appoints a rapporteur for amicable resolution of the complaint.
- 8 If amicable resolution could not be attained, the Commission decides the communication on the merits.
- 9 The Commission makes its final recommendations which are not legally binding on the state.
- 10 If the Commission has found a violation, the Secretariat sends follow-up letter(s) enquiring about the implementation of the recommendations.

For more information, see the Commission's Rules of Procedure (Chapter 3) and the Guidelines of the Submissions of Communication (Information Sheet No 3).

Provisional measures

Once a communication has been admitted, the Commission may direct the state concerned to take one or more provisional measures pending the finalisation of the communication. Provisional measures are necessary to prevent irreparable damage being done to the victim of an alleged violation. If a state fails to comply with a request by the Commission for the adoption of provisional measures after the period specified, the Commission under rule 118(2) of its 2010 Rules of Procedure may refer the communication to the African Court on Human and Peoples' Rights.

Amicable settlement

The Rules of Procedure of the Commission require it to promote amicable settlement of disputes between parties. Before a settlement is reached, the terms must be acceptable to both parties. The settlement must comply with human rights principles

Findings/recommendations

If the Commission finds a violation, the Commission may simply declare that the state is in violation. In some cases, the Commission has included in its findings far reaching recommendations. For instance, it may recommend that the state should take necessary measures to comply with the Charter including payment of compensation to the victim(s).

Follow-up on Commission's recommendations

The 2010 Rules of Procedures of the Commission sets out the following follow-up procedures:

- Once the Activity Report containing the Commission's decision has been adopted by the AU Assembly, the Secretary of the Commission must notify parties within 30 days that they may disseminate the decision.
- State parties are obliged to notify the Commission in writing within 180 days of the Commission's decision of all measures taken or being taken to implement the decision.

- Within 90 days of receiving the response of the state party concerned, the Commission may invite the state to submit further information on other measures it has taken.
- Where no response is received in the case of the first 180 days or the subsequent 90 days, the Commission shall send a reminder to the state giving it additional 90 days within which to respond.
- The rapporteur for the communication has a duty to monitor the measures taken by the state in relation to the Commission's decision. The rapporteur is required to present a report of its findings to the Commission.
- The Commission may also notify the Executive Council or the Sub-Committee of the Permanent Representatives Committee of situations of non-compliance.

SOME LANDMARK DECISIONS OF THE COMMISSION

SERAC v Nigeria (2001) AHRLR 60 (ACHPR 2001)

In this case, the government of Nigeria through its state-owned oil corporation, Nigeria National Petroleum Corporation (NNPC) and a multinational company, Shell Petroleum Development Corporation, was alleged to have caused severe environmental degradation to the Ogoni people. The land and water sources were poisoned as a result of oil exploration, thereby making farming and fishing (the two principal means of livelihood of the Ogoni) impossible. The complainant also alleged that Nigerian government condoned the violations because despite several petitions, the government failed to ask the oil companies to conduct environmental or social impact studies of its activities.

‘Governments have a duty to respect their citizens, not only through appropriate legislation and enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties.’

SERAC case, para 57

The communities were also not consulted before the companies began operation. Security forces were unleashed to attack, burn and destroy their villages, homes and farmlands whenever they tried to protest. The complainants alleged that these activities of the Nigerian government violated the rights of the Ogoni people to enjoy the best attainable state of physical and mental health, clean environment, property, natural resources and adequate housing.

‘The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation...The minimum core of the right to food requires that...government should not destroy or contaminate food sources.’

SERAC case, para 65

The Commission found the Nigerian government in violation of the Charter. It appealed to the government to stop attacks on Ogoni communities, ensure adequate compensation for victims of the violations and also to undertake appropriate environmental and social impact assessments for future oil development.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2009) AHRLR 75 (ACHPR 2009)

In this ground-breaking decision, the Commission pronounced on the right to development under the African Charter. The Charter is the only international binding human rights instrument to recognize this right. The Commission also elaborated on the rights of indigenous people in Africa.

In this case, the Kenyan government forcibly removed the Endorois people, an indigenous community, from their ancestral lands around the Lake Bogoria area of Kenya without proper consultation or compensation. As a result, the Endorois people could not access their religious sites located in the Bogoria Lake region. The complainants alleged that this violated the African Charter.

‘The right to development is a two-pronged test... it is useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development...it is not simply the state providing, for example, housing for individuals or peoples, development is instead about providing people with the ability to choose where to live...’

Endorois case, paras 277 & 288

The Commission found that the Endorois culture, religion and traditional way of life are intimately intertwined with their ancestral lands. It found the government of Kenya to be in violation and urged the government to allow the Endorois community unrestricted access to Lake Bogoria and the surrounding sites for religious and cultural rights to pay adequate compensation to the community for all loss suffered, to pay royalties to the Endorois from existing economic activities, and to report to the Commission of the implementation of these recommendations.

Jawara v Gambia (2000) AHRLR 107 (ACHPR)

In this communication, the Commission explored in detail article 56 of the African Charter which lays down the rules for admissibility of communications. The communication was brought by the former president of The Gambia (Sir Dawda Kairaba Jawara) who had been ousted in a military coup, The communication was brought against the military government of The Gambia and alleged various violations of the African Charter. The communication alleged blatant abuse of power by the respondent state as well as disregard for due process of the law through the respondent state's indiscriminate and arbitrary arrest, detention and extra-judicial executions of former officials and sympathisers of the complainant's government. The communication further alleged that the respondent's state through the introduction of decrees had ousted the jurisdiction of the courts as well as blatantly disregarding the judiciary. The respondent challenged admissibility of the communication on the ground that it did not comply with two of the admissibility criteria under article 56 of the Charter.

In its decision, the Commission stated that it would be futile to exhaust local remedies if conditions makes it impossible to exhaust such remedies. In assessing whether an individual has exhausted local reliefs in respect of a violation suffered, three things must be considered which are availability, effectiveness and efficiency of the remedies. The remedy is available if it can be pursued without hindrance, it is effective if there is a prospect of succeeding and it is sufficient if it can redress the grievance adequately. The Commission concluded that the situation in The Gambia at the time prevented exhaustion of local remedies. The Commission further noted that the fact that parts of the communication were based on media report does not render it inadmissible.

'Remedies the availability of which is not evident cannot be invoked by the state to the detriment of the complainant.'

Jawara case, para 34

Dealing with the merits, the Commission stated that by suspending the Bill of Rights of the Gambian Constitution, the military regime had violated the rights enshrined in the Charter protected under the Constitution. Most importantly, the Commission

stated that the military regime through the *coup d'état* had violated the right of the Gambian people to self-determination by denying them the right to freely choose their government. The Commission found the government in violation and urged it to bring its laws into conformity with the Charter provisions.

Purohit and Another v The Gambia (2003) AHRLR 96 (ACHPR 2003)

In this communication, the Commission addressed among other issues the right to health and treatment of persons with mental incapability. The communication was brought by the complainants on behalf of patients detained at the Psychiatric Unit of the Royal Victoria Hospital in The Gambia. The communication alleged that the provisions of the Lunatics Detention Act (LDA) was inadequate in that it failed to define who a 'lunatic' is and it did not prescribe requirements to guarantee safeguard of rights during diagnosis and detention of patients. The communication further alleged that the conditions of detention were unfavourable and violated the rights of patients. The complainants stated that the system did not provide for any independent examination of administration at the Unit or the facilities available. The Act did not make any provision for legal aid of inmates in addition to the fact that it was silent as to compensation for patients in the event of violation of their rights. The communication also alleged that patients were being denied their rights to vote.

'Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination.'

Purohit case, para 57

In its decision, the Commission emphasised that human dignity is an inherent right which must be respected at all times irrespective of the mental capability of a person and persons with mental disability have the right to a decent life just like all others. Such persons must not be denied their right to healthcare which is necessary for their survival in society and they should be accorded special treatment to enable them to attain the highest level of health. The state must make

provisions to enable persons wrongfully detained and whose rights have been violated to access legal aid and seek redress

The Commission stated that the right to health is vital for the enjoyment of all other rights and includes the right to access health care facilities and health services without discrimination. The Commission further noted that states have the duty to ensure that mental health patients be accorded with special treatment by virtue of their condition. The state also has an obligation to take 'concrete and targeted steps' to ensure the full realisation of the right to health. The Commission found that the government was in violation of the Charter and urged it to repeal the LDA and to provide adequate medical as well as material care for mental health patients.

STATE REPORTING

State reporting is one of the means of gauging states compliance with their obligations under the Charter. Article 62 of the Charter requires states to submit periodic report to the Commission. To give effect to that article of the Charter, the Commission in October 1988 adopted a general guideline on the form and content of state reporting. In 1998, more concise Guidelines to Periodic Reporting were also issued. Article 26 of Women's Protocol also requires states parties to the Protocol to include in their periodic report to the Commission pursuant to article 62 of the Charter a report on legislative and other measures they have taken to implement the provisions of the Protocol. The report of states party to both the Charter and the Women's Protocol must consist of two parts, the first part relates to the Charter and the second to the Protocol. In 2009, the African Commission adopted the Guidelines for Reporting on the Women's Protocol.

State reporting procedure serves as a forum for constructive dialogue. It enables the Commission to monitor implementation of the Charter and identify challenges impeding the realisation of the objects of the Charter. States are able to take stock of their achievements and failures in the light of the Charter.

The Charter requires states to submit two types of report: initial report and periodic report. Initial reports are required to be submitted by states two years after ratification or accession to the Charter. Periodic reports are required to be submitted every two years after the initial report.

Contents of a state report on the African Charter

A state report submitted by a state party to the Charter must address the following:

- Measures taken to give effect to the provisions of the Charter
- Progress made so far
- Challenges affecting the implementation of the Charter and the relevant supplementary instruments

Procedure for state reporting

Submission and consideration of state reports pass through the following stages:

- Submission of report to the Secretariat of the African Commission
- Secretariat uploads the report on the Commission's website, indicating when the report will be considered
- Circulation of copies of report to Commissioners and relevant NGOs
- Interested stakeholders wishing to contribute to the examination of the report submit their contributions including shadow reports to the Commission's Secretary at least 60 days prior to the date fixed for the examination of the report
- The Secretary may invite specific institutions to submit information relating to the Report
- Preparation of questions by the Secretariat based on report
- Communication of questions to all Commissioners
- Communication of questions to the reporting state (accompanied by a letter requesting the attendance of state's representatives)
- Examination of state report in open session, as scheduled
- Presentation of report by state representative
- Questioning by Commissioners
- Answers to questions by State delegation (sometimes supplemented by subsequent written responses)
- Summation and conclusion by the chairperson of the Commission
- Adoption and dissemination of concluding observations

Contents of a state report on the Women's Protocol

A state report submitted to the Commission under the Women's Protocol must address the following issues:

- The state's overall legal framework as it relates to women
- Legal and administrative measures taken to give effect to the provisions of the Protocol
- Challenges faced in the implementation of the Protocol
- Measures the state has taken to implement recommendations prior concluding observations of the Commission in respect of that country

Concluding observations

At its 29th Ordinary Session in 2001, the Commission started to adopt concluding observations after examination of state reports. Concluding Observations are usually brief and touch on both positive and negative aspects that have emerged through the examination of the report. The concluding observations specify the steps which the state should adopt to remedy identified shortcomings.

Extracts of the Concluding Observations on the Second Periodic Report of the Republic of South Africa

'The African Commission recommends that the Government of South Africa should;

28. Ensure that the provisions of the African Charter are widely known and understood by adults and children alike, in both rural and urban areas.

29. Consider lifting the reservation made on Article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;

35. Make the declaration under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of An African Court on Human and Peoples' Rights;

38. Inform the African Commission, in its next Periodic Report, of the steps it has taken to address the areas of concern, as well as how it has implemented the recommendations in this Concluding Observations.'

Full texts of the Commission's conclusion observations since 2001 are available at http://www.achpr.org/english/_info/statereport_considered_en.html

Follow-up

It is the duty of the Commissioners as part of their promotional mandate to ensure follow-up on the recommendations arising from the Concluding Observations. The Commission also transmits to the AU Assembly its Concluding Observations accompanied with copies of states reports submitted to it as well as the reactions of the reporting states to questions posed during the examination of the report.

When the representatives of a given states are unable to provide satisfactory answer in respect of one or more questions posed to them by the Commission during the consideration of their report, the Commission writes a follow up letter to the state concerned requesting additional information in respect of such question(s).

Examination without state representation

In case a state fails to send any representatives, the Commission may after two notifications to the state proceed with the examination of the report and forward its observations to that state.

Non-submission of report

It is the duty of the Secretary to inform the Commission of non-submission of reports by state parties. A reminder is sent to any state concerned every three months and a list of non-reporting states is usually attached to Commission's Activity Reports.

Status on submission of state reports to the Commission as at July 2011

States that have not submitted any reports to the Commission	Comoros, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Gabon, Guinea-Bissau, Liberia, Malawi, São Tomé & Príncipe, Sierra Leone, Somalia
State that have submitted some reports but still owe more	Algeria, Angola, Burundi, Cape Verde, Central African Republic, Chad, Egypt, Gambia, Ghana, Guinea, Kenya, Lesotho, Mali, Mauritania, Mozambique, Namibia, Niger, Rwanda, SADR, Senegal, Seychelles, South Africa, Swaziland, Togo, Tunisia, Zambia, Zimbabwe
States that have submitted all reports	Benin, Botswana, Burkina Faso, Cameroon, Congo, DRC, Ethiopia, Libya, Madagascar, Mauritius, Nigeria, Sudan, Tanzania, Uganda

NON-GOVERNMENTAL ORGANISATIONS (NGOs) AND THE AFRICAN COMMISSION

The Commission has a very robust relationship with NGOs. Article 45(1) of the Charter requires the Commission to cooperate with other African and international institutions concerned with the promotion of and protection of human and peoples' rights. Since 1988, the Commission has been granting observer status to NGOs. In 1999, the Commission adopted a resolution on the criteria for granting observer status to NGOs. As at 21 October 2011, a total of 428 NGOs have been granted observer status by the Commission.

NGOs play a prominent role in the activities of the Commission. Primarily, they draw the attention of the Commission to violations of the Charter, bring communications on behalf of individuals, monitor states' compliance with the Charter, and help to increase awareness about the Commission's activities by organizing conferences and other activities. NGOs participate in the Commission's public sessions and engage with the reporting procedure by submitting shadow reports and popularising concluding observations. NGOs having observer status with the Commission are required to submit a report of their activities every two years.

NGOs' engagement with the Commission is coordinated and spearheaded by the NGO Forum, which is held before every session of the Commission to deliberate and produce reports on thematic and regional situations in Africa. The NGO Forum, organised by the Banjul-based African Centre for Democracy and Human Rights Studies, serves as a medium through which NGOs acquaint themselves with the Commission's activities. The NGO pre-session report is usually considered by the Commissioners during the opening ceremony of the session.

Criteria for grant of NGO observer status

- (i) The objectives of the NGO must be in consonance with the principles of the Constitutive Act of the AU and the African Charter.
- (ii) The NGO must be working in the field of human rights.
- (iii) Written application to the Secretariat which must be accompanied by:
 - Proof of legal existence, list of members, constituent organs and source of funding
 - Declaration of financial resources
 - Last financial statement
 - Statement of activities.

COALITION FOR AFRICAN LESBIANS (CAL) APPLICATION FOR OBSERVER STATUS

CAL, a network of organisations committed to promoting African lesbian equality, applied for observer status at the Commission in May 2008. They submitted all necessary documentations and met all the Commission's administrative and legal requirements for observer status. The Commission postponed consideration of the applications on three occasions. In November 2008, it was postponed to May 2009 and later postponed to November 2009 when the application was formally presented to the Commission by the Special Rapporteur on Freedom of Expression in Africa, Commissioner Pansy Tlakula, who indicated that CAL's application met all the Commission's criteria for grant of observer status to NGOs. The Commission deferred its decision on the application to May 2010.

At its 48th Ordinary Session in October 2010, the Commission rejected CAL's application because 'the activities of the said organisation (CAL) do not promote and protect any of the rights enshrined in the African Charter'. Many civil society organisations have criticised the Commission's stance on CAL's application. Given the spate of homophobic violence on the continent, many voices have called on the Commission to reconsider its decision on CAL's application and LGBTI rights generally.

The Commission has made reference to LGBTI rights during examination of state reports and has considered shadow reports from LGBTI organisations. While granting observer status to CAL may not promote sexual orientation as a right, it will protect enjoyment of the 'rights guaranteed by the Charter' to which sexual minorities are entitled and often deprived as a result of their sexual orientation.

NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs) AND THE AFRICAN COMMISSION

NHRIs are statutory bodies established by governments in Africa and charged with the responsibility of promoting and protecting human rights institutions in their respective countries. The establishment and operations of this institution must conform to the UN Principles relating to the Status and Functioning of National Institution for the Protection and Promotion of Human Rights, otherwise called the Paris Principles.

The relationship between the Commission and NHRIs began in 1998 when the Commission adopted the resolution on the Granting of Affiliate Status to NHRIs. The resolution provides for among other the criteria for the grant of affiliate status to NHRIs.

Criteria for granting of affiliate status

To be granted affiliate status, the prospect NHRIs must fulfil the following requirements:

- It must be a national institution of a state party to the Charter.
- It must be duly established by law.
- It should conform to the 'Paris Principles'.
- It must formally apply to the Commission for affiliate status.

The basis of the relationship between the Commission and NHRIs is traceable to articles 26 and 45(1)(c) of the African Charter. The grant of affiliate status to NHRIs has promoted mutual cooperation between the Commission and NHRIs. Although the rights and obligations of affiliated NHRIs are similar in some respects to those of NGOs granted observer status, NHRIs are also required to assist the Commission in the promotion of the human rights at the country level. For instance, NHRIs have encouraged their countries to ratify human rights treaties. They have also played and continue to play a significant role in enhancing the protective and promotional activities of the Commission. Their contributions include raising awareness of the Commission's activities. NHRIs affiliated to the Commission are entitled to attend and participate in the Commission's public sessions.

Like NGOs, they are required to submit report on their activities to the Commission every two years.

As of 21 October 2011, the Commission has granted affiliate status to about 22 national human rights institutions. The list of NHRIs affiliated to the Commission is available at:

http://www.achpr.org/english/_info/affiliate_en.html

NHRIs from the following states have 'affiliate' status with the African Commission:

Algeria	Niger
Burkina Faso	Nigeria
Cameroon	Rwanda
Chad	Senegal
DRC	Sierra Leone
Ethiopia	South Africa
Kenya	Tanzania
Mali	Togo
Malawi	Uganda
Mauritius	Zambia

SPECIAL MECHANISMS OF THE COMMISSION

Article 46 of the Charter mandates the Commission to employ any appropriate method of investigation in carrying out its responsibilities. A similar inference can also be made from article 45 of the African Charter. Pursuant to these provisions, the Commission has established over the years not less than 15 special mechanisms comprising special rapporteurs and working groups. A summary of quick facts and mandates of the special mechanisms are provided below. Special mechanisms investigate human rights violations, research human rights issues and undertake promotional activities through country visits. Their reports form the basis of some of the Commission's resolutions.

Special mechanisms under the African human rights system

	Special Rapporteurs	Date of establishment	Mandate
1	Prisons and conditions of detention	1996	Examines condition of prisons and detention centres
2	Rights of women in Africa	1999	Undertakes promotional missions and assists states to develop gender policies
3	Refugees, asylum seekers and internally displaced persons (IDP)	2004	Seeks, receives and examines information, undertakes studies and fact-finding missions on Refugee, Asylum Seekers and IDP in Africa
4	Freedom of expression and access to information in Africa	2004	Analyses media legislations, undertakes missions, and monitors states' compliance with the Principles of Freedom of Expression
5	Human rights defenders	2004	Develops strategies, raise awareness, and acts upon information on the situation of human rights defenders in Africa

	Working Groups	Date of establishment	Mandate
6	Indigenous population/ communities in Africa	2000	Scrutinises the concept of indigenous peoples and examine the implication of the Charter provision on their rights and welfare
7	Specific issues	2004	Recommends improvements on the Commission's internal procedures and the Commission's relationship with external bodies
8	Economic, social and cultural rights in Africa	2004	Undertakes studies on specific socio-economic rights and to prepare draft principles and guidelines on economic, social and cultural rights in Africa
9	Committee for the Prevention of Torture in Africa (previously Robben Island Guidelines Committee)	2004	Implements the Robben Island Guidelines
10	Death penalty	2005	Develops concept paper and strategy for the abolition of death penalty, and monitor the situation of death penalty in member state
11	Older persons and people with disabilities in Africa	2007	Articulates the rights of older persons and people with disabilities and prepare a concept paper that may form the basis for a protocol

12	Extractive Industries and Human Rights Abuse in Africa	2009	Examines the impact of extractive industries in Africa within the context of the African Charter on Human and Peoples' Rights
13	Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV	2010	Investigates, requests, analyses and acts on information on the situation of the rights of PLHIV, monitor states responsibilities on their duties to protect the rights of PLHIV and make recommendations for the implementation of effective strategies for the protection of PLHIV
14	Study group on freedom of association in Africa	2011	Conducts a study on the laws governing freedom of association and practices that violate freedom of association in Africa

Challenges of the special mechanism

- The Commissioners double as Special Rapporteurs. This poses a great challenge to how much time they dedicate to their roles as Special Rapporteur which invariably affects their efficiency.
- Resources are insufficient to undertake all required activities.
- State consent is required for visits, but is often not given.

MISSIONS UNDERTAKEN BY THE COMMISSION

The primary mandate of the Commission is to enhance the promotion and protection of human rights in Africa and to ensure that member states comply with their obligations undertaken under the Charter. Article 46 of the Charter which requires the Commission to use ‘any appropriate method of investigation’ is the legal basis for missions. Promotional missions are governed by the Commission’s Guidelines for Missions and the Format for Pre-mission Reports. The Commission also draws up terms of reference for each promotional mission.

Two categories of mission have been undertaken by the Commission since its establishment. These are the protective mission and promotional missions. Special Rapporteurs also undertake missions focusing on human rights violations within their mandates.

- **Protective missions (on-site/fact-finding)**

There are two types of protective mission: on-site mission and fact-finding mission. The on-site mission is usually undertaken to a state against which a number of communications have been submitted. The purpose of such mission usually is to explore avenue for amicable settlement or to investigate specific facts relating to the communications. The Commission may also undertake fact-finding missions whenever there is an allegation of a general nature or widespread reports of human rights violations against a state party. Fact-finding missions do not require any prior communication to have been submitted to the Commission before the mission is undertaken.

- **Promotional missions**

Promotional visits or missions are undertaken by the commission or its special mechanisms to sensitise states about the role of the African Charter, encourage states which have not ratified the Charter or any other human rights instrument to ratify them or to persuade non-reporting states to comply with their reporting obligations. For the purpose of promotional visits, the 53 state parties of the African Charter are distributed among the commissioners.

Reports of missions undertaken by the Commission are available at:
http://www.achpr.org/english/_info/reports_en.html

Obligations of states during a protection mission

State parties must:

- Refrain from taking reprisal action against persons or entities that furnished the mission with information, testimony or evidence
- Guarantee free movement of members of the mission including any necessary internal authorisation
- Provide the mission with any information or document which the mission considers necessary in order to prepare its report
- Take steps to protect members of the mission.

Role of civil society

Civil society facilitates the Commission's decision to undertake missions by raising concerns on gross human rights violations. They usually accompany the Commission/Commissioners during visits and are known for playing the role of interlocutors.

RESOLUTIONS BY THE AFRICAN COMMISSION

Article 45 of the Charter empowers the Commission to ‘formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights.’ Pursuant to this provision, the Commission adopts resolutions to address diverse human rights issues. These resolutions could generally be classified into three: thematic, administrative and country specific resolutions.

Thematic resolution

A thematic resolution elaborates in greater detail specific human right themes or a particular substantive right covered in the Charter. It defines the states’ obligations in respect of such right and describes the standard set by the Charter. A thematic resolution is similar to the general comments of the UN treaty bodies. The Commission has passed a number of thematic resolutions covering a wide range of themes including death penalty, indigenous peoples, situation of women and children, socio-cultural rights, HIV/AIDS, electoral process and good governance, prisons, freedom of association, and fair trial.

Resolution on the status of women in Africa

(adopted in 2005)

The Commission through this resolution called on member states to: ratify and domesticate the Protocol to the Africa Charter on the Rights of Women in Africa, increase women’s participation in peace keeping operation, implement affirmative actions, and respect their commitments under CEDAW and the Beijing Platform of Action.

Administrative resolution

Administrative resolutions deal with the Commission’s procedures, internal mechanisms and relationship between the Commission and other organs of the AU, intergovernmental organisations, NHRIs and

NGOs. Some of the Commission's administrative resolutions include resolutions on the appointment and mandate of special rapporteurs and working groups, resolutions on the criteria for grant of observer status to NGOs and affiliate status to NHRIs, and the resolution on the protection of the name, acronym and logo of the Commission.

Resolution on Cooperation between the Commission and the African Committee of Experts on the Rights and Welfare of the Child

(adopted in 2009)

This resolution established a formal relationship of cooperation between the Africa Commission and the Committee on the Rights and Welfare of the Child. The resolution emphasised that the protection and promotion of the rights of children especially the girl child in Africa is of vital importance and has further been reiterated by various instruments such as African Charter on the Rights and Welfare of the Child. The resolution also appointed the Special Rapporteur on the Rights of Women in Africa to work with states parties and organisations working on children's rights in Africa.

Country-specific resolution

Country resolutions address pertinent human rights concerns in member states. This genre of resolution has proven very useful whenever there are widespread violations in a member state but no individual has submitted any communications to the Commission in respect of those violations. The Commission has passed specific resolutions to address the human rights situation in Sudan, Uganda, Zimbabwe, Ethiopia, Eritrea, Somalia, Kenya, DRC, Côte d'Ivoire, Comoros, Libya, Tunisia, Guinea Bissau, Liberia, Burundi, Rwanda and many other countries.

Resolution on the human rights situation in The Gambia

(adopted in 2008)

This resolution was passed as a result of what the Commission called ‘the deteriorating human rights’ situation in The Gambia. The resolution condemned the unlawful arrests, unfair trials, torture and extrajudicial executions of alleged coup plotters, journalists and human rights defenders.

The Commission called for the immediate release by The Gambian government of all political prisoners and, requested Gambia to investigate the allegations of extra-judicial executions and torture in detention. It also called on the Gambian government to implement the ECOWAS Court judgment of 8 June 2008 dealing with human rights violations in the country.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The African Court on Human and Peoples' Rights (African Court) was established through a Protocol to the African Charter. The Protocol on the Establishment of an African Court on Human and Peoples' Rights was adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004. The Court was established in order to complement the protective mandate of the Commission. Its decisions are final and binding on state parties to the Protocol.

The Court consists of 11 judges elected by the AU Assembly from a list of candidates nominated by member states of the AU. The judges are elected in their personal capacity but no two serving judges shall be nationals of the same state. Due consideration is also given to gender and geographical representation. The judges are elected for a period of six years and are eligible for re-election only once. Only the president of the Court holds office on full time basis. The other 10 judges work part-time. The first judges of the Court were sworn in on 1 July 2006. The seat of the Court is Arusha, Tanzania.

Current judges (as at 21 October 2011)

• Justice Gérard Niyungeko President of the Court	(2006 – 2012)	Burundi
• Justice Sophia A. B. Akuffo Vice-President of the Court	(2006 – 2014)	Ghana
• Justice Jean Mutsinzi	(2006 – 2012)	Rwanda
• Justice Bernard Makgabo Ngoepe	(2006 – 2014)	South Africa
• Justice Modibo Tounty Guindo	(2006 – 2012)	Mali
• Justice Fatsah Ouguergouz	(2006 – 2016)	Algeria
• Justice Joseph N Mulenga	(2008 – 2014)	Uganda
• Justice Augustino Ramadhani	(2010 – 2016)	Tanzania
• Justice Duncan Tambala	(2010 – 2016)	Malawi
• Justice Elsie N Thompson	(2010 – 2016)	Nigeria
• Justice Sylvain Ore	(2010 – 2014)	Côte d'Ivoire

Former judges

- Justice Kelello Justina Mafoso-Guni (2006 – 2010) Lesotho
- Justice El Hadji Guissé (2006 – 2010) Senegal
- Justice Hamdi Faraj Fanoush (2006 – 2010) Libya
- Justice Githu Muigai (2008 – 2009) Kenya
- Justice George W. Kanyeihamba (2006 – 2008) Uganda
- Justice Jean Emile Somda (2006 – 2008) Burkina Faso

Jurisdiction of the Court

The Court's jurisdiction applies only to states that have ratified the Court's Protocol. As at 21 October 2011, only 26 states have ratified the Protocol. The Court may entertain cases and disputes concerning the interpretation and application of the African Charter, the Court's Protocol and any other human rights treaty ratified by the state concerned. The Court may also render advisory opinion on any matter within its jurisdiction. The advisory opinion of the Court may be requested by the AU, member states of the AU, AU organs and any African organisation recognised by the AU. The Court is also empowered to promote amicable settlement of cases pending before it. The Court can also interpret its own judgment.

The temporal jurisdiction of the Court extends to the time the Court Protocol entered into force in respect of a particular state except in cases of continuing violations. The principle of continuing violation was earlier endorsed by the African Commission in *Lawyers for Human Rights v Swaziland*.

'The Commission has to differentiate between allegations that are no longer being perpetrated and violations that are ongoing...The Commission is only competent *ratione temporis* to consider events which happened after that date [date of ratification of the Charter] or, if they happened before then, constitute a violation continuing after that date.

Lawyers for Human Rights v Swaziland, paras 43 & 44

The following entities are competent to submit communications to the Court: the African Commission, state parties to the Court's Protocol, African Inter-governmental Organisations, NGOs with observer status before the Commission and individuals.

Admissibility criteria for cases brought before the Court

In respect of cases brought by NGOs and individuals, articles 6 and 34(6) of the Protocol establishing the Court provides for the following admissibility requirements: In addition to the seven admissibility requirements under article 56 of the African Charter, cases brought directly before the Court by individuals and NGOs are admissible only when the state against which the complaint is brought has made a declaration under article 5(3) of the Court's Protocol accepting the competence of the court to receive such complaints. As at 21 October 2011, only Ghana, Tanzania, Mali, Malawi and Burkina Faso have made the declaration.

Provisional measures ordered against Libya

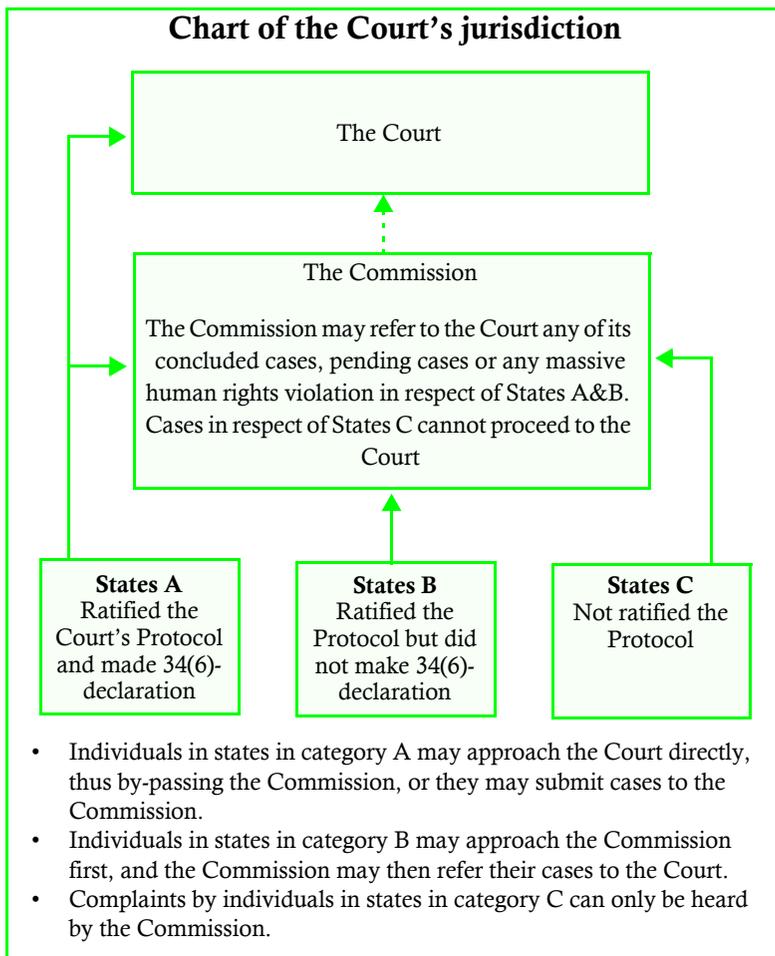
In response to numerous allegations of human rights violations in Libya, during early 2011, the African Commission for the first time referred a case to the African Human Rights Court. The Court ordered provisional measures, to which Libya had to respond in 15 days.

'Whereas, in the opinion of the Court, there is therefore a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application, in particular, in relation to the rights to life and to physical integrity or persons as guaranteed in the Charter ... For these reasons, The Court, unanimously orders [that] Libya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party.'

African Commission v Libya, paras 22 & 25

For more information on the Court, visit www.african-court.org

Chart of the Court's jurisdiction



- Individuals in states in category A may approach the Court directly, thus by-passing the Commission, or they may submit cases to the Commission.
- Individuals in states in category B may approach the Commission first, and the Commission may then refer their cases to the Court.
- Complaints by individuals in states in category C can only be heard by the Commission.

Relationship between the Court and the Commission

The relationship between the Court and the Commission is governed by the Protocol establishing the Court, Rule 29 of the Court's Interim Rules of Procedure 2010 and Part IV of the Rules of Procedures of the Commission 2010. These instruments set out the relationship of the Court with the Commission as follows:

- The Court complements the protective mandate of the Commission in the promotion and protection of human rights.
- The Court may transfer a matter to the Commission of which it is seized.
- Whenever the Court decides a case, its judgment shall be transmitted to the Commission in addition to the parties concerned.
- The Commission may of its own accord submit a communication to the Court in respect of massive violations of human rights.
- The Commission may at any stage of the consideration of a communication, seize the Court with the examination of a communication.
- The Commission can submit communications to the Court on grounds of failure or unwillingness of a state to comply with its decisions or provisional measures.
- Whenever the Commission is requested to interpret any provision of the Charter, it shall inform the President of the Court and a copy of the Commission's interpretation should be sent to the President of the Court as soon as it has been adopted by the Commission.
- The Court may request the opinion from the Commission when deciding on issues of admissibility.
- The Court can give advisory opinion upon request by the Commission.
- In drawing up its own rules, the Court is required to consult with the Commission as appropriate.
- The Commission and the Court must meet at least once a year or whenever it is necessary in order to guarantee a good working relationship between both institutions.
- The Bureau of the Commission must meet with the Bureau of the Court as often as necessary to undertake any function that may be assigned to them by both institutions.

SUCCESSSES AND CHALLENGES OF THE AFRICAN CHARTER AND COMMISSION

SUCCESSSES OF THE COMMISSION

- **Interpretative advances**

The Commission has interpreted not only the civil and political rights provisions of the Charter but also the more unusual rights contained in the Charter such as the right to protection of language, right to national and international peace and security, protection of family life, right to development, right to existence and self-determination. The Commission through the doctrine of 'implied rights' interpreted the right to life and health to include also the right to food. The Commission also implied the right to housing from the right to property and protection of the family.

'... Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to ... health, the right to property, and the protection accorded to the family forbids wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected ... [T]he combine effect of articles 14, 16 and 18 reads into the Charter a right to shelter or housing ...'

SERAC v Nigeria, para 60

- **Advancement of women's rights**

The Commission has taken steps to advance women's rights in Africa. Aside from its most notable achievement in this respect, the adoption of the Women's Protocol, it has passed resolutions on the following specific women's rights issues: the status of Women in Africa (2005); women and girl victims of sexual violence (2007); and maternal mortality in Africa (2008).

The appointment of a Special Rapporteur on the Rights of Women in Africa, in 1998, has contributed significantly to these advancements and the mandate-holder continues to promote implementation of the Women's Protocol and serve as the Commission's focal point for the promotion and protection of women's rights in Africa.

- **Robust relationship with NGOs and NHRIs**

The Commission has a healthy relationship with NGOs and NHRIs. NGOs make statements and interventions during public sessions of the Commission and are represented on the working groups established by the Commission.

- **Promotion of the right of indigenous peoples**

The Commission has been in the fore-front of the promotion of the rights of indigenous peoples in Africa. The Commission has made notable pronouncements on indigenous peoples' rights prominent among which is the *Endorois case*. The Commission also established a working group on Indigenous populations and communities in Africa. The report of the working group has been adopted by the Commission.

'The African Commission is ... aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.'

Endorois case, para 148

- **Generous standing rule before the Commission**

Any individual or NGO may bring a communication before the Commission. The author of the communication does not have to be the victim of the alleged violation.

'Article 56(1) of the Charter demands that any persons submitting communications to the Commission relating to human rights must reveal their identity. They do not necessarily have to be victims of such violations or members of their families.'

Malawi African Association v Mauritania, para 78

- The Commission interpreted the ‘claw back clauses’ in the Charter progressively.

‘According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one’s opinions; this would make the protection of the right to express one’s opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.’

Media Rights Agenda and Others v Nigeria, para 66

CHALLENGES OF THE COMMISSION

Commission and its Secretariat

The time-lag between submission of complaints and final decision by the Commission is lengthy. This affects the impact of its decisions. In spite of the backlog of communications with the Commission, the Commission has not demonstrated much enthusiasm in making referrals to the Court. The Commission also delays in the adoption of reports of Special Rapporteurs. The Commission lacks a follow-up mechanism to monitor compliance of its recommendations.

A prominent challenge facing the Commission is finding a proper balance between the exercise of its promotional and protective mandates.

States

Many states lag behind with their obligation to submit state reports under the Charter, thus depriving the Commission of a regular opportunity for reviewing the state’s human rights record. States have generally lacked political will to comply with the recommendations of the Commission.

AU

The AU political organs provide insufficient support to Commission and sometimes stall the work of the Commission for example by preventing the publication of its Activity Reports. There is also a serious lack of coordination between AU organs or bodies with a human rights-related mandate. This problem has been addressed in the AU's 'Human Rights Strategy', adopted in 2011.

IMPACT OF THE AFRICAN CHARTER ON DOMESTIC HUMAN RIGHTS IN AFRICA

In the 25 years of its existence, the African Commission established itself firmly as the primary human rights body on the African continent. Through its progressive interpretation of the Charter, the Commission has given guidance to states about the content of their obligations under the Charter, and its provisions have inspired domestic legislation. In a number of countries, the Charter is an integral part of national law by virtue of the constitutional system in place, and in at least one state, Nigeria, it has explicitly been made part of domestic law through domesticating legislation.

The normative impact of the Charter has been significant. In its thematic resolutions, the Commission clarified the scope of rights and provided a yardstick for the development of domestic law, in particular in the ‘Principles and Guidelines on the Right to a Fair Trial’ and the ‘Principles of Freedom of Expression’. It urged states to adopt a moratorium on the death penalty, thus supporting the trend towards abolition in Africa. The principle that indigenous peoples are rights-holders under the Charter was clearly established. In its Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples, the Commission addressed the concerns of African states about this Declaration, and thus contributed to its eventual adoption by most African states. Through its active participation in the adoption of the Women’s Protocol, the Commission provided clarity about the rights of women in the African context, and provided invaluable guidance to African states. A process to adopt a Model Law on Access to Information in Africa is on-going.

The sessions of the Commission provide an important space for the articulation of issues that are neglected or silenced domestically. More and more, NGOs and NHRIs benefit from interactions at these sessions, and are informed, strengthened and better equipped to perform their functions. Engagement with the African human rights system shapes the agenda of these role players.

Even if the findings and concluding observations of the Commission are not formally binding, states take serious note of them. The *Endorois* decision, for example, led to an intensive national

dialogue about the accommodation of indigenous communities in Kenya.

The missions undertaken to state parties sensitise and support continuing efforts at the national level to improve human rights and inspire legal or institutional reform. Commissioners acting as Special Rapporteurs also engage with states in order to address allegations falling within the domain of the Special Rapporteurs.

The Charter's complaints mechanism provides an important avenue for recourse to complainants who could not find redress at the national level. The Commission's findings have in a number of instances been implemented. In many instances, the finding of the Commission assisted in garnering international awareness and solidarity, as was the case in Nigeria during the Abacha regime.

National courts are increasingly influenced by and use the Charter and the Commission's findings to assist them in interpreting national law. Prominent examples are the Constitutional Court of Benin, which in numerous cases made reference to the African Charter, and in some applied it directly; and the Supreme Court of Lesotho, which relied on the African Charter together with other international human rights treaties in *Molefi Ts'ephe v The Independent Electoral Commission*.

The findings of the Commission also reverberated in the jurisprudence of national courts outside Africa, in the judgments of regional courts (such as the case of *Campbell v Zimbabwe*, decided by the SADC Tribunal), and even the International Court of Justice (for example, in the case of *Diallo (Republic of Guinea v Democratic Republic of the Congo)*).

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Report
AHSG	Assembly of Heads of State and Government
AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
CAL	Coalition for African Lesbians
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
ECOWAS	Economic Community of West African States
FGM	Female Genital Mutilation
HIV	Human Immune Virus
IDP	Internally Displaced Persons
LDA	Lunatic Detention Act
LGBTI	Lesbian Gay Bisexual Transgender and Intersex
NHRI	National Human Rights Institution
OAU	Organisation of African Unity
PLHIV	Persons Living with HIV
SERAC	Social and Economic Rights Action Centre
UN	United Nations

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