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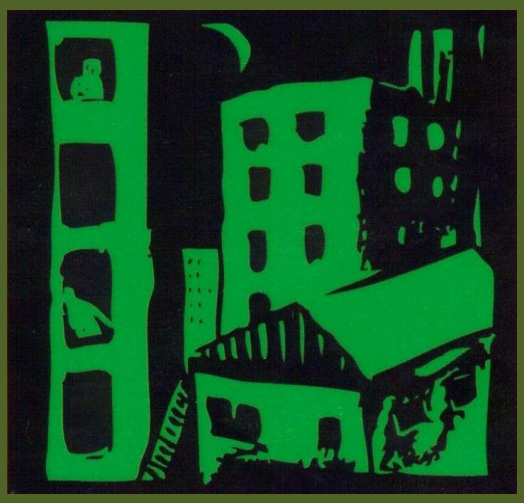

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From a cat into a lion? An overview of the progress and challenges of the African human right system at the African # Ï Í Í É Ó Ó É Ï Î õ Ó year mark

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1 INTRODUCTION

The roots of the African human rights system lie in the African Charter on (Õ Í Á Î Á Î Ä 0 Å Ï Ð Ì Å Ó õ 2 É Ç È Adopted in 1981, the Charter entered into force in 1986. Its treaty monitoring body, the African Commission on

[1] Organisation of African Unity, African Charter Ï Î (Õ Í Á Î Á Î Ä 0 Å Ï Ð Ì Å Ó õ 2 É Ç È Ô June 1981, entered into force on 21 October 1986; AU Doc CAB/LEG/67/3/Rev 5. For these and other OAU/AU human rights instruments, see Heyns C & Killander M (eds) *Compendium of key human rights documents of the African Union* (2010); and also the Ï ÆÆ É Ã É Á Ì Ò Å Ð Ï Ó É Ô Ï Ò Ù Ï Æ Ô È www.au.int.

(Õ Í Á Î Á Î Ä 0 tå (Commission), was set up in 1987. In 2012, the Commission celebrated 25 years of existence. It initially functioned under the political auspices of Ô È Å / Ò Ç Á Î É Ó Á Ô É Ï Î Ï Æ ! Æ Ò É Ã Á Î 5 Î É Ô Ù ¡ / ! 5 Q ň Â Õ successor, the African Union (AU). This overview focuses on the African Charter and the # Ï Í Í É Ó Ó É Ï Î ň Á Î Ä Ã Ï Ö Å Ò Ó Á Ó Ð Å Ã Ô Ó Ï Æ ç u Ù Å Á Ò Ó Ï

Compared to the other two established regional human rights systems, in Europe and the Americas[2], the African system is the most recent[3]. In fact, what is quite surprising is that the Charter was adopted at a time when most African states were still very rigid and guarded about possible dilution of state sovereignty, and quite a number were repressive regimes. In many respects, the Charter came about as a compromise between a genuine attempt to curtail state sovereignty in order to enhance rights protection, on the one hand, and efforts to construct a human rights friendly façade to deflect criticism, strengthen international legitimacy and facilitate donor funding, on the other.

4 È Å # Ï Í Í É Ó Ó É Ï Î É Î Ô È Å Ð Á Ó Ô È Á Ó Â Å Å Î Ì Á Â Å Ô È Å Ò Â Ñ ê ì Ä Ï Ç ī However, this image may well be misplaced. The Commission was not designed to fit the image of a powerful and awe-inspiring sentinel. Especially its ambiguous protective mandate, weakened by the recommendatory status of its findings, the requirement of Á × Á É Ô É Î Ç Á Î ! Ó Ó Å Í Â Ì Ù Ò Ò Å Ñ Õ Å Ó Ô ō Â Å Æ Ï Ò Å É Î Ö Å Ó Ö É Ï Ì Á [5] and the lack of any explicit competence to recommend precautionary or remedial measures, belie this image. If recourse is to be had to a metaphor related to domesticated animals, perhaps the Commission more closely fits the image of the cat. While it may, at first glance, be unassuming as potential guardian, one would Õ Î Ä Å Ò Å Ó Ô É Í Á Ô Å Ô È Å Æ É Å Ò Ã Å Î Å Ó Ó Ï Æ É Ô Ó Ä Å Æ Å Î Ã Å × É Ô È Ï Õ Ô È Ï × Å Ö Å Ò È Á Ö É Î Ç Ï Î Å õ Ó ì like caution and Å Á Ô Å Î despite being part of a system largely designed for failure[6], the Commission, often quite Ã Õ Î Î É Î Ç Ì Ù ň Æ Ï Õ Î Ä × Á Ù Ó Ï Æ Á Í Å Ì É Ï Ò Á Ô É Î Ç Ô È Å mandate.

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[2] These two systems are the European and Inter-American, respectively established under the Council of Europe and the Organisation of American States (OAS). The Council of Europe was founded in 1949, and its main human rights treaty, the European Convention on Human Rights, was adopted in 1950, and entered into force in 1953. The OAS traces its existence to the Pan-American Union, founded in 1910; and its rights-based system is based on the OAS Charter and the American Declaration of the Rights and Duties of Man, both of 1948, thus antedating the Universal Declaration of Human Rights, as well as the 1969 American Convention on Human Rights.

[3]) Ô Ó È Ï Õ Ì Ä Â Å Ð Ï É Î Ô Å Ä Ï Õ Ô Ô È Á Ô Ô È Å Ô Å Ò Í Õ Ó Ù Ó Ô Å Í ō É Ó one should remain mindful of the fact that the coherence and coordination implied by this term may be absent from the African human rights *system*.

[4] See eg 5 Ä Ï Í Â Á Î Á . * Õ 4 Ï × Á Ò Ä Ó Ô È Å ! Æ Ò É Ã Á Î # Ï Õ Ò Ô Ï Î (Õ Í Á Î Á (2000) 3 *Yale Human Rights and Development Law Journal* 45 at 64 Á Î Ä Ô È Å # Ï Í Í É *Report on Communications*, presented at its 53rd ordinary session, Banjul, The Gambia, April 2013, referring to Ô È Å Ì Á Ã Ë Ï Æ Ó Ô Á Ô Å É Í Ð Ì Å Í Å Î Ô Á Ô É Ï Î Ï Æ Ô È Å # Ï Í Í É Ó Ó É Ï Î É Ó Á Ô Ï Ï Ô È Å # Ï Í Í É Ó Ó É Ï Î ň Ð Á Ò Á ç u Ï Æ Ô È Å *Report*).

[5] Art 58 of the African Charter.

[6] 3 Å Å 6 É Ì Ê Ï Å Î & Õ (Õ Í Á Î Ò É Ç È Ô Ó É Î ! Æ Ò É Ã Á ą Î Ï Ò Í Á Ô É Ö Å ň É Ä É Ó Ô É Î Ã 2 0 1 0) 1 8 *South African Journal of International Affairs* 191 at 199-200.

Some significant developments have taken place over the past 25 years, resulting in an expansion of the norms and institutions making up the African regional system of human rights promotion and protection. At the same time, the African system has been facing and still faces a number of challenges. This article aims to provide a brief overview of some of the most salient advances, over a quarter of a decade, in particular as they relate to individual communications dealt with by the Commission. Even if the ! Æ Ò É Ã Á Î # Ï Õ Ò Ô Ï Î (Õ Í Á Î Á Î Ä 0 Å Ï Ð Ì Å Ó õ 2 É Ç È Ô Ó complement the Comm Ó Ó É Ï Î õ Ó Ð Ò Ï Ô Å Ã Ô É Ö Å Í Á Î Ä Á Ô Å ħ É Ô È Á # Ï Í Í É Ó Ó É Ï Î õ Ó Ã Ï Í Ð Ì Á É Î Ô Ó Í Á Î Ä Á Ô Å 8 & Ï Ò ʐ Ï Î Å ħ Í among them some of the most likely respondents before either the Court or the Court -- have not yet accepted Ô È Å # Ï Õ Ò Ô õ Ó and even for those that have, Ê Õ É Ó Ï É Ã Ô É Ï Î ħ Ò Á Ô É Æ É Å Ä Ô È Å 0 Ò Ï Ô Ï Ã Ï Ì Ô Ï Ô È Å ! Æ Ò É Ã Á Î # È Á Ò Ô % Ó Ô Á Â Ì É Ó È Í Å Î Ô Ï Æ Á Î ! Æ Ò É Ã Á Î # Ï Õ Ò Ô Ï Î (Õ Í Á Î ability of citizens and NGOs to access the Court directly unless a Member State permits such access[8].) Î Ó Ï Æ Á Ò Á Ó Ô È Å # Ï Í Í É Ó Ó É Ï Î õ Ó Ð Ò Ï Í Ï Ô É also included in the discussion[9].

2 PROGRESS

One of the major advances in the African human rights system is the universal regional acceptance of the Charter as a common regional framework.[10] This milestone was reached in 1999, just before the OAU transformed itself into the AU, when the last remaining OAU non-state party, Ethiopia, ratified the Charter. Soon after joining the OAU after years of splendid isolation from common continental fora, South Africa acceded to the Charter in 1996.

Normatively, the provisions of the Charter have been expanded in two main subsequent treaties: the African Charter on the Rights and Welfare of the Child (African # È É Ì Ä Ò Å Î õ Ó 2 É Ç È Ô Ó # È Á Ò Ô Å Ò Q ħ Á Ä and the Protocol ρ ω ω π Ô Ï Ô È Å ! Æ Ò É Ã Á Î # È Á Ò Ô Å Ò Ï Î Ô È Å 2 É Ç È Ô Ó Ï Æ 7 Ï adopted in 2003 and in force since 2005.[12]

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[7] By 31 March 2013, 26 states (out of 54 AU members) had become party to the Protocol.

[8] Protocol Arts 5(3) and 34(6).

[9] 4 È Å Á Ò Ç Õ Í Á Î Ô É Ó Î Ï Ô Ô È Á Ô Ô È Å # Ï Í Í É Ó Ó É Ï Î õ Ó Ð Ò Ï Í Ï Ô É promotional mandate remains of great relevance in a continent where human rights and the African regional system specifically are not very well-known and understood.

[10] After South Sudan joined the AU in 2011, the membership of the AU increased to 54. South Sudan is the only party that was, at the end of 2012, yet to ratify the African Charter.

[11] Organisation of African Unity, African Charter on the Rights and Welfare of the Child, adopted on 11 July 1990, entered into force on 29 November 1999; AU Doc CAB/LEG/24.9/49.

[12] ! 5 ħ 0 Ò Ï Ô Ï Ã Ï Ì Ô Ï Ô È Å ! Æ Ò É Ã Á Î # È Á Ò Ô Å Ò Ï Î (Õ Í Á Î Á Î Ä 0 Å Á Ä Ï Ð Ô Å Ä Ï Î ρ ρ * Õ Ì Ù ς π π σ ħ Å Î Ô Å Ò Å Ä É Î Ô Ï Æ Ï Ò Ã Å Ï Î ς υ . African Prot Ï Ã Ï Ì Ï Î 7 Ï Í Å Î õ Ó 2 É Ç È Ô Ó *Journal of African Law* 72-74 for an ŏ j ς π π φ Å Ø Ô Ò Å Í Å Ì Ù Ô È Ï Ò Ï Õ Ç È Å Ø Ð Ì Á Î Á Ô É Ï Î Ï Æ Ô È Å È É Ó Ô Ï Ò Ù Â Å È É Î introduction to the Protocol to the African Charter on Human and Peo Ð Ì Å Ó õ 2 É Ç È Ô Ó Ï Î Ô È Å 7 Ï Í Å Î É Î ! Æ Ò É Â Washington and Lee *Journal of Civil Rights and Social Justice* 11, for a comparison

A number of other treaties adopted by the OAU and the AU also have relevance to human rights. These include treaties dealing with refugees (the OAU Convention on the Specific Aspects of Refugee Problems in Africa, dating back to 1969) and with the rights of internally displaced persons (the AU Convention on the Protection and ! ÓÓÉÓÔÁ Î ÃÅ ÏÆ) Î ÔÅÒ Î Á Ì Ì Ù $ ÉÓÐ Ì ÁÃÅÄ 0 ÅÒÓ Ï Î Ó ň Convention is one of the most recent normative additions and entered into force in late 2012, after being adopted in 2009.[13] It is the first international treaty to deal specifically with the rights of internally displaced persons (IDPs). Even if these treaties explicitly provide for rights holders and duty bearers, other AU treaties also contribute to foster an inclusive, open democratic political landscape in which human rights may prosper, even if they do not use the language of rights entitlement. Such treaties include the 2007 African Charter on Democracy, Elections and Governance, which also entered into force in 2012;[14] and the 2011 African Charter on Values and Principles of Public Service and Administration, which is yet to enter into force.[15]

Advances to expand the protective ambit of the umbrella of rights would have been mere rhetoric if not accompanied by some institutional strengthening. The Commission has been notoriously under-resourced and was all but invisible for a decade or so after its establishment. Over time, however, its budget has increased,[16] and it established itself as a credible if largely ineffectual monitoring body. To its credit, the Commission allowed itself to be supported by, and often acted upon the instigation of, an increasingly vibrant civil society. Two human rights institutions have been added to further support a tangible regional impetus for human rights on the continent: The first is the African Committee of Experts on the Rights and Welfare of the Child (African # ÈÉÌÄÒÅÎ õÓ 2 ÉÇÈÔÓ # Ï Í Í ÉÔÔ Å Å Q ň Á Î Ä ÔÈ Å ÓÅÃ Ï initially expressed about the creation of a separate, new monitoring body responsible Æ Ï Ò ÔÈ Å ! ÆÒ É Ã Á Î # È É Ì Ä Ò Å Î õ Ó 2 ÉÇ Ì Ô Ó Ò Å Ç Ï Ò Ô Å Ò ň established itself as an important African human rights forum. The Court has been set Õ Ð Ô Ï Ã Ï Í Ð Ì Å Í Å Î Ô Ô È Å mandate complementarity lies mainly É Î Ô È Å Ì Å Ç Á Ì Æ Ï Ò Ã Å Ï Æ Ô È Å # Ï Õ Ò Ô õ Ó Ä Å Ã É Ó É Ï Î Ó prospects of compliance with findings of the Commission, which are generally regarded as recommendatory.[18] ! Ì Ó Ï ň Ô È Å proceedings are held in public, and not behind closed doors, unlike those of the Commission, thus allowing for more visibility of and media interest in these proceedings.

Â Å Ô × Å Å Î Ô È Å 7 Ï Í Å Î õ Ó 2 É Ç È Ô Ó 0 Ò Ï Ô Ï Ã Ï Ì Á Î Ä Ô È Å 3 Ï Õ Ô È Å Gender Protocol.

[13] Adopted 23 October 2009; entered into force 6 December 2012.

[14] Adopted on 30 January 2007; entered into force 15 February 2012.

[15] Adopted 31 January 2011; by the end of 2012, only three state had become parties to it.

[16] See Combined 32nd and 33rd Activity Report of Ô È Å ! ÆÒ É Ã Á Î # Ï Í Í É Ó Ó É Ï Î Ï Î (Õ Í Á Î EX.CL/782(XXII) Rev.2, Table 1, showing the lowest level of support in 1993/94, with around USD 430 000 (or 1.54% of the total AU budget) being allocated to the Commission, increasing to just over USD 6 million in 2008 (4.28% of the total AU budget).

[17] 3 Å Å Ç , Ì Ï Ù Ä ! Õ) Î Ó Ô É Ô Õ Ô É Ï Î Ó × É Ô È Ò Å Ó Ð Ï Î Ó É Â É Ì É Ô Ù Æ Ï (2004) 48 *Journal of African Law* 165 at 175.

[18] 3 Å Å ň È Ï × Å Ö Å Ò ň 6 É Ì Ê Ï ň Ô È Å Ï Ê Ì Ç Á Ô É Ï Î Ó Ï Æ Ô È Å ! Æ Ò É Ã Á Î # Ï Í Í É Ó Ó É Ï Î : From moral Ð Å Ò Ó Õ Á Ó É Ï Î Ô Ï Ì Å Ç Á Ì Á Ä Ö Á Î Ã Å *Journal of African Law* Ì Ï ō ĵ ς π τ Q τ ψ

Different to United Nations human rights treaties, State parties to the Charter automatically, as a consequence of their treaty adherence, accept the right of individual complaint.[19] Focusing on the Commission, the body thus far mainly responsible for finalising cases in the African regional human rights system, the conclusion is inescapable that significant jurisprudential advances have taken place as the # Ï Í Í É Ó Ó É Ï Î Å Ó Ô Á Â Ì É Ó È Å Ä É Ô Ó Å Ì Æ Á Î Ä Ç Á É Î Å Ä É findings in individual communications were very brief, lacked substantive reasons and were silent about remedial steps required by states.[20] Over time, however, the # Ï Í Í É Ó Ó É Ï Î õ Ó Ò Å Á Ó Ï Î É Î Ç Â Å Ã Á Í Å Í Õ Ã È Í Ï Ò Å Å substantiated reasons and analyses, and extensive and often relatively intrusive recommendations as to remedial measures.[21] A number of factors may have informed Ô È Å Ó Å Ã È Á Î Ç Å Ó É Î Ô È Å # Ï Í Í É Ó Ó É Ï Î õ Ó Á Ð Ð Ò Ï Á Ã È importance are the post-1990 changes in the political climate at the domestic level in most African states. The effect of the increased number of multiparty electoral democracies in states previously under dictatorship or under one-Ð Á Ò Ô Ù - Þ Á Ò Ô Ù õ Ç Ò Õ Ì Å Æ É Ì Ô Å Ò Å Ä Õ Õ Ð õ Ô Ï Ô È Å Ò Å Ç É Ï Î Á Ì Ì Å Ö Å Ì ň Á A OAU/AU itself, and in regional bodies, such as the Commission. Some states nominated and the OAU/AU elected more independent minded and assertive individuals as Commissioners. The Commission gradually became better resourced, providing it with stronger secretarial support. Apart from these more general factors, the specific situation of the Abacha dictatorship in Nigeria presented a pivot to ease in this evolution. In the mid- to late 1990s, the Commission was called upon to decide numerous cases arising from this context.[22] Not only did the allegations relate to very brutal and blatant governmental action, they also represented an aberration from the new evolving African democratic hegemony. Against this background, the Commission gained the confidence to take its first firm steps towards a new-found jurisprudential adolescence.

As far as the substance of its decisions is concerned, the Commission in the main adopted a purposive, progressive and generous approach to the Charter. Crucially, the Commission proved wrong the view of initial commentators that Ô Ô È Å # È Á - Ò Ô Å Ò õ Ó Â Á Ã Ë Ã Ì Á Õ Ó Å Ó õ × Ï Õ Ì Ä Ã Á Õ Ó Å Ó õ when it interpreted Article 27(2)[23] Ï Ó É Ï Î Ì of the Charter as imposing a general limitation clause, to be applied as part of a proportionality test in respect of all rights.[24] In its first judgment on the merits, the Court ȝ Ä Ò Á × É Î Ç Ó Ô Ò Ï Î Ç Ì Ù Ï Î Ô È Å ȝ # ollowed a Ó Ê Ï Ó É Ï Î õ Ó Ê

[19] African Charter, Arts 55 and 56.

[20] See eg *-ÁÔÁÎÇÅÓÅ OÅÏÐÌÅÓ # Ï ÎÇÒÅÓÓ Ö :ÁÈÒÅ* (2000) AHRLR 72 (ACHPR 1995).

[21] See eg *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* No. 276/03 (ACHPR 2009) (27th Activity Report) (*Endorois* case)

[22] On Nigeria and the African Commission, see eg Okafor OC, *The African human rights system: Activists forces and international institutions* (2007).

[23] 3 Å Å Ç ' É Ô Ô Ì Å Í Á Î 2 Ð 4 È Å " Á Î Ê Õ Ì # È Á Ò Ô Å Ò Ï Î (Õ Í Á Î Á Î Ä Meltzer RI (eds) *Human rights and development in Africa* ȝ ρ ω ψ τ Ɋ Á Ô ρ υ ω ŋ Á Î Ä 4 Á Ë É Ò Á Í Â of Ô È Å ! Æ Ò É Ã Á Î # È Á Ò Ô Å Ò Ï Î (Õ Í Á Î Á Î Ä *Lesotho Law Journal* 3 É Ç È Ô Ó ɺ at 50-52.

[24] See eg *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Activity Report) paras 64 ȝ 70.

approach to the limitation of rights under the Charter.[25] Another pertinent example is the reading-in of certain socio-economic rights that were not explicitly guaranteed in the Charter. In the *Ogoniland* case,[26] dealing with the responsibility of the Nigerian government for oil pollution by the Nigerian National Petroleum Company, a government controlled consortium with Shell, the Commission categorically accepted the justiciable nature of the socio-economic rights guaranteed in the Charter.[27] The case also saw the Commission extending the limited scope of the explicitly guaranteed socio-economic rights to the right to housing and food, on the basis of the implied rights theory. When the AU, after sustained activism over a long period of time, in 2003 ÁÄÏÐÔÅÄ ÔÈÅ 7ÏÍÅÎ'ÓRIGHTS PROTOCOL, the extended scope of socio-economic rights, as elaborated by the Commission in the *Ogoniland* case, was formalised as part of the standards of the African regional human rights system.[28][29]

!ÌÔÈÏÕÇÈ ÔÈÅ ÒÉÇÈÔÓ ÈÏÌÄÅÒÓ [30]ÏÆ ÄÉÓÁÂÉÌÉÔÉÅÓ ÈÁÖÅ ÎÏÔ ÙÅÔ ÂÅÅÎ included as a ground for non-discrimination in the Charter,[31] the first case explicitly ÐÇÅ ÏÎ ÄÅÁÆ ÂÌÉÎÄÎÅÓÓ Ãonly reached the African Commission in 2006, and was decided by it in 2011.[32] However, this finding demonstrates that the Charter provides a very meaningful protective shield to women in states (such as Egypt) that have not become ÐÁÒÔÙ ÔÏ ÔÈÅ 7ÏÍÅÎ'ÓRIGHTS PROTOCOL. In this matter, the Commission found that the ÐÈÙÓÉÃÁÌ ÁÓÓÁÕÌÔ ¡ÆÏÒ ØÁÍÐÌÅ ÔÈÒÏÕÇÈ ËÉÃË ÃÌÏÔÈÅÓ female protesters and journalists constitute gender-based violence and inhuman treatment.[33] 4ÈÅ #ÏÍÍÉÓÓÉÏÎ ÆÕÒÔÈÅÒ ÃÈÁÒÁÃÔÅÒÉÓÅÄ investigate, prosecute and punish the perpetrators of these deeds as violations of the #ÈÁÒÔÅÒ ÉÎ ÐÁÒÔÉÃÕÌÁÒ derived from Article 1 of the Charter to take positive measures to protect its population during protest and to fight impunity if transgressions occur.

Not only women, but other population groups requiring specific protection have also benefited from tÈÅ #ÏÍÍÉÓÓÉÏÎ'Ó ÉÎÔÅÒÐÒÅÔÁÔÉÏÎ ÏÆ ÉÎÄÉÇÅÎÏÕÓ ÐÅÏÐÌÅÓ8 !ÌÔÈÏÕÇÈ ÔÈÅ ÔÅØÔ ÐÉÏÎÅÅÒÓ #ÏÍÍÉÓÓÉÏÎ ÆÏÕÎÄ ÔÈÁÔ ÍÅÍÂÅÒ ÓÔÁÔÅ

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[25] *Tanganyika Law Society and Another; Mtikila v Tanzania*, Applications 9/2011, 11/2011 (joined), 14 June 2013, at paras 106.1 and 107.2.

[26] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (12th Activity Report) (*Ogoniland* case).

[27] *Ogoniland* case (above) para 52.

[28] Adopted 11 July 2003.

[29] 7ÏÍÅÎ'Ó 2ÉÇÈÔÓ 0ÒÏÔÏÃÏÌ ! ÒÔÓ ρς and ρφ. ÔÈÅ ÒÉÇÈÔ ÔÏ ÅÄÕÃ welfare rights; Art 14: the right to health and reproductive rights; Art 15: the right to food security; and Art 16: the right to adequate housing. Further, Art 18: the right to a healthy and sustainable ÅÎÖÉÒÏÎÍÅÎÔ ÁÎÄ !ÒÔ ρω and ρψ. ÔÈÅ ÒÉÇÈÔ ÔÏ ÓÕÓÔÁÉÎÁÂÌÅ Rights Protocol is couched in language that protects the socio-economic interests of women.

[30] -ÏÓÔ ÏÆ ÔÈÅ #ÈÁÒÔÅÒ ÐÒÏÖÉÓÉÏÎÓ ÄÅÓÉÇÎÁÔÅ ÐÅÒÓÏÎÓ ÉÎÄ

[31] Under art 2 of the Charter.

[32] *Egyptian Initiative for Personal Rights and Interights v Egypt* Communication 323/2006, (adopted at ÔÈÅ #ÏÍÍÉÓÓÉÏÎ'Ó 18th Extraordinary Session, 12-16 December 2011).

[33] This factual finding reflected violations of Arts 2, 3, 5 and 18(3) of the Charter.

protection.[34] $ ÅÓÐÉÔÁÂÉÌÉÔÙ ÆÏÒ Î ÔÂÅÎÇ ÍÅÎÔÉÏÎÅÄ discrimination, the Commission extended the open-ended non-discrimination clause to cover the rights of persons with disabilities.[35]

The Charter is also the first international instrument to guarantee the right to development as a justiciable right.[36] In some sense, the right to development represents ÔÈÅ ÁÃÃÕÍÕÌÁÔÅÄ ÎÏÎ-ÅÎÆÏÒÃÅÍÅÎÔ ÃÕÍÕÌÁÔÉÖÅ ÅÆÆÅÃÔ very least, access to basic social goods. In the *Endorois* case,[37] the Commission found a violation of this right, highlighting the added benefit of the right to development in serving as a bridge between socio-ÅÃÏÎÏÍÉÃ ÁÎÄ ÐÏÌÉÔÉÃÁÌ ÁÎÄ ÐÏÌÉ a violation of the right to development was found in relation to both the substantive outcome of a development project undertaken by the government of Kenya, and a procedural violation in respect of a lack of consultation with (or obtaining informed consent from) the affected community prior to the implementation of the development programme.[38]

Also, as regards making remedial recommendations to states, the Commission overcame its initial cautionary approach, informed by the lack of any clear competence in this regard, by adopting much more detailed recommendations, even to the extent of opening itself up to the criticism of being overly prescriptive to domestic legislatures and executives about the required form of implementation of its decisions. It also included in its first (1988) Rules of Procedure the competence to request provisional measures from states,[39] and requested such measures in a number of instances.[40] In its 2010 Rules of Procedure, the Commission established an elaborate internal system for the follow-up of its recommendations, and stipulates a period of six months after being notified of the decision within which violator-states have to report on measures taken to give effect to these decisions.[41] In respect of provisional measures, the period is appropriately much shorter, namely, 15 days.[42]

3 CHALLENGES

Even if the Commission has to a great extent corrected the design failures of the Charter, a number of challenges remain in the way of the accomplishment of its protective mandate. Some of them are discussed below.

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[34] See eg *Endorois* case.

[35] See *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003) at paras 57-61.

[36] Charter, Art 22; 7 Ï Í ÅÎ Ó 0 ÒÏ Ô Ï Ã Ï Ì ! ÒÔ ρ ω 8

[37] *Endorois* case.

[38] *Endorois* case at paras 277-278.

[39] This competence was reÓÔÁÔÅÄ ÉÎ ÔÈÅ #ÏÍÍÉÓÓÉÏÎ Ó ρ ω ω υ ÁÎÄ ς π ρ π

[40] See eg *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998), and see Viljoen F, *International human rights law in Africa* at 306.

[41] Rule 112(2).

[42] Rule 98(4).

3.1 A lack of genuine movement from inter-governmentalism to supra-nationalism

The AU Constitutive Act explicitly rejected the principle of non-interference in the domestic affairs of member states.[43] This rejection was predictable, given the recent emergence of independent nation states from periods of protracted liberation struggles. The centrality of the principles of sovereignty and non-interference in the domestic affairs of member states is a key difference between these two types of IO. The key difference between these two types of IO is that a more supra-national IO has significant centralised competences and authority, and is able to take decisions that bind its members, while a more inter-governmental organisation would see its members jealously guarding sovereignty and countering the influence of continental institutions by retaining as much authority and decision making competence as possible at the national level.[44] It also seems logical that a lack of continent wide consensus (for example, on the nature and value of democracy, and the scope and practice of human rights protection) would hamper any meaningful evolution towards supra-nationality.

The AU Constitutive Act does, however, set itself up as a departure from the OAU Charter in some respects. Examples are the introduction of a Court of Justice (in the AU Constitutive Act),[45] and the actual establishment of the Court, with the competence to take binding decisions, which states under the OAU Charter did not have. The AU also has the clear competence to impose sanctions on states that do not comply with its policies and decisions,[46] and to suspend members from the Organisation.[47] The inclusion of Article 4(h) in the AU Constitutive Act, allowing the AU to use force to intervene in member states where serious human rights violations have deteriorated into situations of genocide, crimes against humanity or war crimes, allows for a dramatic departure from the rigid rule of non-interference in the internal affairs of member states.

There are, however, also countervailing forces within the AU, and sobering practice. The Court gave its first judgment on the merits only in June 2013, some seven years after its establishment.[48] Although the Court has issued three orders for provisional measures,[49] there is no indication that the targeted states abided by the

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[43] Fagbayibo "The African Union: Is it Dead *de Jure* but Alive *de Facto*?" (2013) 4 *Mediterranean Journal of Social Sciences* 493.

[44] AU Constitutive Act, Art 5(1)(d).

[45] Protocol, Art 30.

[46] AU Constitutive Act, Art 23(1).

[47] AU Constitutive Act, Art 30.

[48] *Tanganyika Law Society and Another; Mtikila v Tanzania*, Applications 9/2011, 11/2011 (joined), 14 June 2013.

[49] *African Commission on Human and Peoples' Rights v Kenya*, Order for Provisional Measures, Application 4/2011, 25 March 2011. Available at http://www.african-court.org/en/images/ documents/Court/Cases/Orders/ORDER_._APPLICATION_NO._004.2011..pdf (accessed 29 May 2012); *African Commission on Human and Peoples' Rights v Kenya*, Order of Provisional Measures, Application No 006/2012. Available at http://www.african-court.org/en/i mages/documents/Orders-Files/ORDER. __of_Provisional_Measures_African_Union_v_Kenya.pdf. Last accessed 6 August 2013; *In*

ÏÒÄÅÒÓ 8 4ÈÅ #ÏÕÒÔÕÓ ÏÒÄÅÒ ÆÏÒ ÐÒÏÖÉÓÉÏÎÁÌ Í
conflict in Libya, for example, cannot in any meaningful sense be said to have been complied with or executed, and played no role in the ensuing political and diplomatic deliberations.[50] The case on the merits was subsequently struck off due to the failure of ÔÈÅ #ÏÍÍÉÓÓÉÏÎ ÔÏ ÐÒÏÄÕÃÅ ÔÈÅ ÎÅÃÅÓÓÁÒÙ ÉÎÆÏÒÍÁÔÉÏÎ ÆÏÒ ÉÔÓ ÅØÁÍÉÎÁÔÉÏÎ information, despite extended periods of extension.[51]

The AU has been very reluctant to impose sanctions for non-compliance by member states, in the face of evidence of routine failure to respect or implement decisions and policies. Although a number of states have been suspended following unconstitutional changes of government,[52] a cynical reading of the exercise of this competence would underscore the propensity of the Organisation to support incumbent leaders from being removed from power, even in the absence of any strong claim to democratic legitimacy on their own part, as they have come to power in unconstitutional ways themselves, and hardly failed in flawed subsequent elections to bolster their claims to democratic legitimacy.[53] On closer inspection, even Article 4(h) ÃÁÓÔÓ ÄÏÕÂÔ ÏÎ ÔÈÅ ×ÁÙÉÎÇ ÏÆ ÔÈÅ national sovereignty to the extent to ×ÈÉÃÈ !ÒÔÉÃÌÅ τ¡ÈÑ ÅÍÂÏÄÉÅÓ ÔÈÅ ÐÒÉÎÃÉÐÌÅ ÏÆ questioned in the light ÏÆ ÔÈÅ ÐÒÏÖÉÓÉÏÎõÓ ×ÏÒÄÉÎÇ¸ 7ÈÅÎ unwilling to protect those in its territory, and the failure to protect leads to massive violations constituting genocide, crimes against humanity or war crimes, the AU has the ÄÉÓÃÒÅÔÉÏÎ ÔÏ ÉÎÔÅÒÖÅÎÅ ¦ÁÎÄ ÔÈÅ ÏÂÌÉÇÁÔÉÏÎ -- or duty -- to intervene. In any event, the AU has so far shied away from explicitly relying on Article 4(h), despite the opportunity ¦if not demand -- to do so in Darfur, or the Democratic Republic of Congo, for example. A similar discrepancy exists with respect to the Pan-African Parliament. Despite the ÐÒÏÍÉÓÅ ÔÈÁÔ ÉÔÓ ÕÌÔÉÍÁÔÅ ÁÉÍ 8 ÓÈÁÌÌ ÂÅ ÔÏ

Commission on Human and Peoples' Rights v Libya - African Commission on Human and Peoples' Rights v Kenya, Order of Provisional Measures, Application No 006/2012. Available at http://www.african-court.org/en/images/documents/Orders -Files/ORDER. __of_Provisional_Measures_African_Union_v_Kenya.pdf. Last accessed 6 August 2013; *African Commission on Human and Peoples' Rights v Libya*, Order of Provisional Measures, Application No 002/2013, 15 March 2013. Available at http://www.african-court.org/en/images/documents/Orders -Files/ORDER_Application_0022013_African_Commission_v_Libya.pdf. (accessed 6 August 2013).

[50] *ÕÍÁ $ÖÐÅÄÉÃÔÉÏÎ ÔÈÅ !ÆÒÉÃÁÎ ÈÕÍÁÎ ÒÉÇÈÔÓ Ó ÁÇÁÉÎÓÔ , ÉÂÙÁ *Wiseodin Journal of International Law* 344 ¦373.

[51] *!ÆÒÉÃÁÎ #ÏÍÍÉÓÓÉÏÎ (ÕÍÁÎ ÁÎÄ ÐÅÏÐÌÅÓ 2ÉÇÈÔÓ Ö 4ÈÅ 'ÒÁÎÔ 3ÕÃÃÅÓÓÉÏÎ ,ÉÂÙÁ Î ÐÅÒÍÉÓÓÉÏÎ !ÒÁÂ *Á ÍÁÈÉÒÙÁÎ Order*, Application 4/2011, 15 March 2013 (*available at* http://www.african-court.org/en/images/documents/Press_Docs/DECISION_Application_004-2011_African__Commission_v_Libya_Struck_outEngl.pdf (accessed 6 August 2013).

[52] As at August 2013, the suspended states were: Madagascar (after Rajoelina took power with military support in 2009); Guinea Bissau (following a military coup in 2012); the Central African Republic (after a military take-over in 2013); and Egypt (following the ouster of President Morsi by the Egyptian military in 2013).

[53] See, for example, the situation of Bozize, who took power unconstitutionally in 2003, leading to the suspension of the Central African Republic (CAR) from the OAU/AU (by a decision of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution) (see AU doc EX/CL/Dec.42(III), 8 July 2003, whÉÃÈ ÄÉÄ ÎÏÔ ÈÏ×ÅÖÅÒ ÌÅÁÄ ÔÏ Á ! 5 ! suspension was lifted in 2005, by the Peace and Security Council (PSC/PR/Comm(XXXIII), 24 June 2005). When Bozize was removed in 2013, again by unconstitutional means, the AU took a decision to suspend the CAR in 2013.

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4 Ï ÔÈÉÓ ÄÉÓÍÁÌ ÓÔÁÔÅ ÏÆ ÁÆÆÁÉÒÓ ×Å ÓÈÏÕ Committee, since its establishment in 2002, has only completed one case.[58] The Court also has a modest record, with only one case decided on the merits and three provisional orders issued by mid-2013.[59]

It would be wrong to place the blame for this dearth of cases only at the doors of the three regional institutions. Surely they should take part of the blame, in that they have not made themselves visible enough and, by causing delays in the few cases that had actually been submitted to them, they eroded public confidence and trust. However, at least one institution, the Court, has taken innovative steps to raise its profile by organising a number of sensitisation seminars. The Court also undertook sensitisation visits to states to raise awareness and, in particular, to increase the number of Article 34(6) declarations.[60] 7 ÈÉÌÅ ÎÏÔ ÏÆ ÉÔÓ Ï×Î ÍÁËÉÎÇ ÔÈÅ ÒÅ seat (in Banjul, the Gambia) no doubt contributed to forge an impression of this institution as inaccessible. The number of cases submitted to the Court is in no small measure due to the failure by some of the most prominent human rights violator states to ratify the Protocol. If a state has not ratified the Protocol, the Commission may not refer cases against that states to the Court. A further constraint is the very small number of states that have accepted the competence of individuals to approach the Court directly.[61]

!Ó ÆÁÒ ÁÓ ÔÈÅ ÒÓÕÐÐÌÙ ÓÉÄÅ ÉÓ ÃÏÎÃÅÒÎÅÄ few complaints have thus far been brought. One obvious reason is the requirement that domestic remedies first have to be exhausted. The cumbersome procedures, overly formalistic jurisprudential approach, dysfunctional court structures, and pervasive corruption may all be important factors that inhibit the use of domestic courts. Obviously these factors will vary from country to country. Many Africans would, in any ÅÖÅÎÔ ÎÏÔ ÐÅÒÃÅÉÖÅ ÔÈÅ ÔÒÉÁÌÓ ÁÎÄ ÔÒÉÂÕÎÁ ÖÉÏÌÁÔÉÏÎ 8 &ÁÃÅd, they are unlikely to contemplate going to ÔÈÅ ÆÕÒÔÈÅÒ ÒÔÒÏÕÂÌÅ ÏÆ ÐÕÔÔÉÎ ÔÏÇÅÔÈÅÒ ÇÒÅÁÔ ÃÏÓÔ Á ÌÅÇÁÌ ÃÈÁÌÌÅÎÇÅ 8) Æ analysis, it would not be evident to most of them that the potential benefits of rights-based litigation are likely to outweigh the costs. The general illiteracy of many people, and,

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[58] *Institute for Human Rights and Development in Africa and others (on behalf of Children of Nubian Descent in Kenya) v Kenya* Communication 2/29.

[59] In most of its other decisions, the Court finds that it lacks jurisdiction, mostly because the matter before it had been instituted incorrectly against states that have not made a declaration allowing for direct access to the Court under Art 34(6) of the Court Protocol, or because the matter was instituted against the AU. The Court has declared one matter inadmissible (Mkandawire v Malawi, Application 003/2011). Its other orders relate to extension of time, admission of amicus curiae and joinder of cases. All decisions available at http://www.african-court.org/en/index.php/judgments/other-decisions. (accessed 6 August 2013.

[60] Such visits have been undertaken to eg Gabon, Mozambique, Nigeria, South Africa and Uganda (see 2011 Report of the African Court ion Human and Peoples 2 ÉÇÈÔÓ ! 5 $ *available at* 8 # , χ ρ ψ http://www.african-court.org/en/images/documents/Court/Activity%20Reports/AfCHPR%20Report%202011%20English.pdf. Last accessed 6 August 2013).

[61] By the mid-2013, only seven states had made the declaration under Art 34(6) of the Protocol: Burkina &ÁÓÏ 'ÈÁÎÁ -ÁÌÁ×É -ÁÌÉ 4ÁÎÚÁÎÉÁ 2×ÁÎÄÁ ÁÎÄ #ÔÄ

more specifically, a general lack of knowledge or awareness of even the existence of the African regional system, exacerbate any of the other factors. In a very real sense, one should not expect ordinary Africans to conceive of a problem in their life-worlds as a human rights issue, or to exhaust domestic remedies. The deep-seated problems with exhausting domestic Ò Å Í Å Ä É Å Ó Í Á Ù È Á Ö Å É Î Æ Ï Ò Í Å Ä Ô È Å # Ï approach, in terms of which it, for example, exempted complainants from exhausting these remedies in respect of massive violations.[62]

This is where the role of lawyers, and more pertinently, public interest lawyers or non-governmental organisations NGOs, come into play. The clear position is that they, too, are in general quite oblivious of the very existence of the system or at least of its potential for redress. If they are, they have not given much thought to the African human rights system. The reasons, again, are manifold. For lawyers, there may be little incentive, as there are no cost orders at the Commission level. For NGOs, the need to exhaust local remedies, the uncertain prospect of success, and the likelihood of a very protracted process spanning an average at least five years, may be strong disincentives.

An increase in the number of cases decided by the organs of the AU human rights system depends on a number of factors, including the effectiveness with which the relevant organs deal with submitted cases, and the extent to which potential litigants conceptualise their life-problems as legal issues.

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Many of the normative developments in the African human rights system reflect the tension of subscribing to an international consensus while at the same time articulating a specific regional understanding of human rights.[63] In respect of the not only the # È Á Ò Ô Å Ò ň Â Õ Ô Á Ì Ó Ï Ô È Å ! Æ Ò É Ã Á Î # È É Ì Ä Ò Å Î õ Ó 2 É Ç the regional embodiment of universality entails compatible normative complementarity.

Within the AU, one issue above all else has emerged as an instance of potential normative contradiction and divergence: the rights of sexual minorities, or, differently stated, the issue of equality based on sexual orientation and gender identity.

In the absence of the OAU/AU taking any explicit stand on this issue, it was left to the Commission to deal with it. For many years the Commission dealt with the matter pragmatically, raising concerns about sexual minority rights when they were pertinent,[64] and granting observer status to an NGO working with men who have sex

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[62] See eg *Ogoniland* case at para 38; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* Communication No. 296/05 (ACHPR 2009) (26th Activity Report) (*Darfur* case) at para 100.

[63] See eg the correspondence and divergence between the UN Convention on the Rights of the Child and Ô È Å ! Æ Ò É Ã Á Î # È É Ì Ä Ò Å Î õ Ó 2 É Ç È Ô Ó Á Î Ä 7 Å Ì Æ Á *Children's Rights International Journal on Children's Rights* 157 (2017) Ô È Å 2 É Ç È Ô Ó Á Î Ä 7 Å Ì Æ Á *International Journal on Children's Rights* 157 (2017)

[64] 3 Å Å Ç - Õ Ò Á Ù 2 Ç 6 *Human Rights Quarterly* 86 ž111.

with men (MSM).[65] However, the Commission as a collective did not explicitly condone ÔÈÅ ÉÎÃÌÕÓÉÏÎ ÏÆ ÓÅØÕÁÌ ÍÉÎÏÒÉÔÉÅÓ ×ÉÔÈÉÎ Ô brought to a head with the application for observer status of the Coalition of African Lesbians (CAL) in 2010, the Commission refused the application.[66] This refusal brought about the paradoxical position that NGOs with observer status are allowed to raise issues pertaining to sexual orientation and gender identity during Commission sessions, while CAL is prevented from doing the same.

3.4 Uneven quality of jurisprudence

! ÌÔÈÏÕÇÈ ÍÁÎÙ ÏÆ ÔÈÅ #ÏÍ-reasoned and convincingly ÁÉÓÉÏÎ substantiated, in particular in recent years, the quality of its jurisprudence remains uneven. The reasoning in some cases is incoherent; there are linguistic and stylistic inelegancies; the French and English versions do not always correspond; and translations from the one to the other language are sometimes awkward. The discrepancies between findings are of greater concern. Even if the Commission does not formally adhere to a strict system of precedent, the divergence of approach to a number of issues results in an impression of incoherence and a lack of institutional consistency. Non-compliance with provisional measures has been dealt with very differently in the *Saro-Wiwa* and *Bosch* cases.[67] 4ÈÅ ÐÒÏØÉÍÕÍ ÏÆ ÌÏÃÁÌ ÒÅÍÅÄ been applied consistently in respect of complainants finding themselves outside the state against which they are submitting a complaint.[68] The inconsistent approach to the right to self-determination in the *Katangese Secession* and the *Southern Cameroons* cases[69] undermines any claim to a coherent and intelligible case law. While the first of ÔÈÅÓÅ Ô× ÄÅÃÉÓÉÏÎÓ ÌÅÁÖÅÓ ÔÈÅ ÄÏÏÒ ÏÐÅÎ ÆÏ (extreme forms of oppression and domination) are met, the second firmly closes the door on such a possibility.

! ÒÅÌÁÔÅÄ ÃÏÎÃÅÒÎ ÁÂÏÕÔ the Commission's ÔÈÅ #ÏÍÍÉÓÓÉÏÎ inappropriate reliance on international norms,[70] and the comparatively infrequent reliance on African sources. While the Commission is clearly entitled to find interpretative guidance in international sources,[71] and without denying the value of tapping into the jurisprudence of the other well-established regional systems and the work of internationally acclaimed scholars from around the globe, the Commission

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[65] This NGO is called *Alternatives-Cameroun*.

[66] For the reasons for refusal, and a criticism of these reasons, see Viljoen (2012) at 266-267.

[67] *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) and *Interights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

[68] Compare, for example, the outcomes in the following cases: *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996), *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999), *Aminu v Nigeria* (2000) AHRLR258 (ACHPR 2000) and *Legal Defence Centre v The Gambia* (2000) AHRLR 121 (ACHPR 2000).

[69] *+ÁÔÁÎÇÅÓÅ OÅÏÐÌÅÓ #ÏÎÇÒÅÓÓ Ö :ÁÉÒÅ* (2000) AHRLR 72 (ACHPR 1995) and *Gunme and Others v* Cameroon (2009) AHRLR 9 (ACHPR 2009).

[70] See eg *Majuru v Zimbabwe* (2008) AHRLR 1τ φ ϳ ! # (0 2 ς π π ψ Ϙ ÁÔ ÐÁÒÁ ρ π ω ϱ Õ ' Ï ÓÉÍÉÌÁÒ ÒÅÇÉÏÎÁÌ ÈÕÍÁÎ ÒÉÇÈÔÓ ÉÎÓÔÒÕÍÅÎÔÓ 8 ÓÉØ ÍÏÎÔ

[71] Under Art 60 and 61 of the Charter.

should also strive to identify relevant judgments of African courts and writings of African academics. To be sure, this would sometimes be impossible. However, to invoke United States lawyer and writer Jerome Shestack as authority on the centrality of equality to human rights[72] is to forego an opportunity to include in a decision an account that resonates more closely with the world of the parties to the case, and the broader African setting.

3.5 Insufficient efforts to effectively address poverty

Another area that has remained a challenge to the Commission has been poverty and socio-economic inequality. Equal access to basic necessities, such as, housing, water, nutrition and sanitation, is of great importance in Africa. Although the Charter is celebrated as the first international human rights instrument to embody the principle of indiv É Ó É Â É Ì É Ô Ù Ï Æ Ò É Ç È Ô Ó j- Ô Ë Ä Ï É Ë Ã ñ ô Ô Ë Ë Ç È Ê Ì Ã Ì Õ Ë Á Î Ä Ð Ï Ì É Ô É Ã Á Ì ō Ò É Ç È Ô Ó Á Ó Å Ñ Õ Á Ì Ì Ù Ê Õ Ó Ô É Ã É Á Â Ì # È Á Ò Ô Å Ò Ï Î Ì Ù É Í Ð Ï Ó Å Ä Õ Î Å Ñ Õ É Ö Ï Ã Á Ì ht to health[73] and education, in order to save the fledgling states from having to be overly burdened. This historical background also explains the omission of the right to nutrition or food, shelter or housing, and water from the Charter.

Although the Commission extended the ambit of these rights in the *Ogoniland* case, discussed earlier, in a later case, the *Darfur* case, decided in 2009,[74] the Commission seemed to have second thoughts about the wisdom of extending the scope of socio-economic rights on the basis of the implied rights theory. In this case, the Commission was invited to find that the poisoning by the Janjaweed of the wells of the people in the Darfur region of Sudan amounted to a violation of the right to water.[75] As the right to water is not explicitly provided for in the Charter, accepting this argument would mean a further extension of the rights in the Charter on the basis of the implied rights theory. However, the Commission opted to reinterpret one of the existing rights in the Charter (the right to health) in an expansive way to encompass the right to access to water, thus facilitating a finding that the poisoning of the wells violated the right to health.[76]

As far as its promotional mandate is concerned, the Commission only quite belatedly dedicated special mechanisms to social justice and the effects and causes of poverty. The first, established in 2004, is the Working Group on Economic, Social and Cultural Rights and the second, set up in 2009, the Working Group on Extractive Industries, Environment and Human Rights Violations. Thus far, these mechanisms have not had much discernible effect. Although the first of the two was instrumental in the adoption of the State Party Reporting Guidelines for Economic, Social and Cultural

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[72] See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005), par 169.

[73] 2 Á Ð Ð Ï Ò Ô Å Ä Ï Ô Ï Õ Ï Ô Ë Å $ Ò Á Æ Ô ! Æ Ò É Ã Á Î # È Á Ô Ô Å Ò Ï Î (Õ Í Á Î Á Î Ä 0 Å Ï Ð Ì Á Ô ï 2 Ë Ç È Ô Ó, OAU Doc Cab/LEG/67/Draft.Rapt.Rpt (II) Rev.4, reproduced in Heyns C (ed) *Human rights law in Africa 1999* (2002) at 94.

[74] *Darfur* case.

[75] *Darfur* case at para 124.

[76] *Darfur* case at para 126.

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Guidelines), and the Draft Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter, these specific reporting guidelines have not been integrated into the general reporting guidelines, and the usefulness of the overly ÄÅÔÁÉÌÅÄ ÄÒÁÆÔ Ð'ÕÉÄÅÌÉÎÅÓ ÁÎÄ 0ÒÉÎÃÉÐÌÅÓ ÒÅ

On the basis of the above, one may conclude that the African regional human rights system has contributed to social justice by normative expansion, standard setting, and the affirmation of the standards in concrete cases relating to socio-economic rights. However, a major *caveat* should be added to this conclusion. The cases referred to, and other cases relevant to socio-economic rights, make up a very small proportion ÄÅÐÅÎÄÉÎÇ ÏÎ ÏÎÅ ÕÎÔÏÔÁÌ ÎÕÍÂÅÒ of decided cases – some 120 cases. The actual effect on the lives of people, occasioned by the norms and their interpretation, has unfortunately been quite limited. This *caveat* is the result partly of a lack of relevant cases brought by NGOs and others, but also by the failure, at least initially, of the Commission to prioritise socio-economic rights in its mandate and activities.

3.6 Lack of priority in dealing with urgent and massive violations

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Commission has a very poor record when it comes to large-scale and urgent violations. Under Article 58 of the Charter, the Commission may refer cases of massive or serious violations to the AU Assembly, with a request to the Assembly to allow the Commission to conduct in-depth studies of these violations.[77] Initially, the Commission referred a number of such cases to the then OAU Assembly, but the Assembly in no instance instructed the Commission to conduct in-depth studies. To its credit, the Commission adjusted its practice to deal with these cases as part of its ordinary mandate, rather than referring them to the OAU/AU Assembly. In the aftermath of the Rwanda genocide, the Commission adopted its first special mechanism, the Special Rapporteur on Extra-judicial, Summary and Arbitrary Execution. However, the failure of this Special Rapporteur to ever address the situation in Rwanda, or even visit the country, exacerbated the fact that this Rapporteurship fell into disuse after a number of years and was not subsequently revived. It was not only in Rwanda but also in Darfur that the Commission did not take concerted action, despite the promise of Article 4(h) of the AU Constitutive Act.[78] To its credit, again, the Commission did undertake an on-site visit to Sudan,[79] ÂÕÔ ÔÈÅÒÅ ÉÓ ÌÉÔÔÌÅ ÉÎÄÉÃÁÔÉÏÎ ÔÈÁÔ ÔÈÅ
brought to the attention of the political organs.

In terms of its 2010 Rules of Procedure, the Commission is allowed to refer cases of massive or serious violations of its own accord to the Court. The Commission did so

[77] See generally Art 58.

[78] This provision places a duty upon the AU to intervene in a member state, if the Assembly agrees; and ÏÎÌÙ ÉÎ ÔÈÅ ÅØÅÎÔ ÏÆ ÇÒÁÖÅ ÃÉÒÃÕÍÓÔÁÎÃÅÓ× ×ÈÉÃÈ ÃÁ
rights violations, such as, genocide or crimes against humanity.

[79] Undertaken in July 2004.

for the first time early in 2011, in respect of the situation in Libya. The Court consequently issued provisional measures, ordering the Libyan government to refrain from acts endangering the life and bodily security of the Libyan people.[80] Although the potential effect and impact of this judgment was clearly overshadowed by the nature of the political events, it is some consolation that the then government of Libya responded to this order, at least by corresponding and nominating its representatives to serve as its legal counsel.[81] In a move to ensure a more effective response to urgent situations, the Commission in 2012 extended the mandate of its Special Rapporteur on the Death Penalty in Africa to situations where judicial, summary or arbitrary killing is imminent or when such a killing has occurred.[82]

3.7 Priotitising promotion over protection

The Commission in the last few years has emphasised its promotional mandate at the risk of neglecting its protective mandate. The Commission now has some 18 special mechanisms, ranging from single Commissioner Special Rapporteurs,[83] and working groups consisting of one or more Commissioners serving together with experts including civil society representatives,[84] to committees of Commissioners and experts.[85] The prominence of promotion has contributed to the significant backlog of individual cases. Some of the reasons for privileging promotion over protection are the following. The position of Special Rapporteur is accorded to serving Commissioners, and not to experts external to the Commission. Commissioners are therefore often overburdened, sometimes serving on more than one special mechanism. Not only Commissioners but also secretarial staff members as a consequence prioritise time and resources towards

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80 *!ÈÒÉÃÁÎ #ÏÍÍÉÓÓÉÏÎ ÏÎ (ÕÍÁÎ ÁÎÄ ÐÅÏÐÌÅÓ 2ÉÇÈÔÓ Ö 4ÈÅ 'ÒÅÁÔ 3ÔÅÐÈÅÎÓ ,ÉÂÙÁ ÐÅÒÍÅÓ !ÒÁÂ *ÁÍÁÈÉÒÙÁ* Application No. 004/2011. Adopted at the 21st Ordinary Session of the African Court on Human and Peoples' Rights, 2011. Available at http://www.african-court.org/en/images/documents/Court/Cases/Orders/ORDER_._APPLICATION_NO._004.2011.pdf (accessed 29 May 2012).

81 *!ÈÒÉÃÁÎ #ÏÍÍÉÓÓÉÏÎ ÏÎ (ÕÍÁÎ ÁÎÄ ÐÅÏÐÌÅÓ 2ÉÇÈÔÓ Ö 4ÈÅ 'ÒÅÁÔ 3ÔÅÐÈÅÎÓ ,ÉÂÙÁ ÐÅÒÍÅÓ !ÒÁÂ *ÁÍÁÈÉÒÙÁ* Application No. 004/2011. Available at http://www.african-court.org/en/images/documents/Orders-Files/order-amicus.pdf (accessed 29 May 2012).

82 Resolution 227: Resolution on the expansion of the mandate of the Working group on Death Penalty in Africa, adopted by the African Commission, meeting at its 52nd Ordinary Session held from 9 to 22 /ÃÔÏÂÅÒ ςπρς ħ ÉÎ 9ÁÍÏÕÓÏÕËÒÏ ħ #ÉÔÅ ÄÕ)ÖÏÉÒÅ.

83 These mechanisms are (with dates of establishment provided): Special Rapporteur on Extra-Judicial, Summary or Arbitrary Execution, 1994; Special Rapporteur on Freedom of Expression and Access to Information, 2004; Special Rapporteur on Prisons and Conditions of Detention, 1996; Special Rapporteur on Human Rights Defenders, 2004; Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, 2004; and Special Rapporteur on Rights of Women, 1999.

84 Working Group on Economic, Social and Cultural Rights, 2004; Working Group on Death Penalty, 2005; Working Group on Indigenous Populations/Communities in Africa, 2000; Working Group on Specific Issues Related to the work of the African Commission, 2004; Working Group on Rights of Older Persons and People with Disabilities, 2007; Working Group on Extractive Industries, Environment and Human Rights Violations, 2009; Working Group on Fair Trial, 2009; and Working Group on Communications

85 Committee for the Prevention of Torture in Africa, 2004; Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, 2010; Study Group on Freedom of Association, 2011; and Advisory Committee on Budgetary and Staff Matters, 2009. .

ÔÈÅ #ÏÍÍÉÓÓÉÏÎ ÈÁÓ ÂÅÅÎ ÇÉÖÅÎ ÔÈÅ ÆÕÎÄÁÍÅÎÔÁÌ ÒÏÌÅ ÔÏ ÐÒÏÔÅÃÔ ÁÎÄ ÐÒÏÍÏÔÅ ÈÕÍÁÎ ÒÉÇÈÔÓ ÉÎ ÁÆÒÉÃÁ ÁÎÄ ÔÏ ÉÎÔÅÒÐÒÅÔ ÁÎÄ ÁÐÐÌÙ ÔÈÅ ÐÒÏÖÉÓÉÏÎÓ ÏÆ ÔÈÅ ÁÆÒÉÃÁÎ #ÈÁÒÔÅÒ ÏÎ ÈÕÍÁÎ ÁÎÄ ÐÅÏÐÌÅÓ ÒÉÇÈÔÓ ÁÎÄ ÏÔÈÅÒ ÒÅÌÅÖÁÎÔ ÉÎÓÔÒÕÍÅÎÔÓ ÉÎ ÔÈÅ ÃÏÎÔÅØÔ ÏÆ ÔÈÅ ÁÆÒÉÃÁÎ ÈÕÍÁÎ ÒÉÇÈÔÓ ÓÙÓÔÅÍ ÉÎ ÇÅÎÅÒÁÌ ÁÎÄ ÔÈÅ #ÏÍÍÉÓÓÉÏÎ ÉÎ ÐÁÒÔÉÃÕÌÁÒ ÈÁÓ ÂÅÅÎ ÓÅÔ ÏÕÔ ÉÎ ÔÈÅ ÐÒÅÖÉÏÕÓ ÐÁÒÔÓ ÏÆ ÔÈÉÓ ÃÏÎÔÒÉÂÕÔÉÏÎ ÔÈÅ ÐÒÉÍÁÒÙ ÆÏÃÕÓ ÈÁÓ ÆÁÌÌÅÎ ÏÎ ÔÈÅ ÒÏÌÅ ÏÆ ÔÈÅ #ÏÍÍÉÓÓÉÏÎ ÉÎ ÔÈÅ ÎÏÒÍÁÔÉÖÅ ÅÖÏÌÕÔÉÏÎ ÁÎÄ ÅÆÆÅÃÔÉÖÅ ÁÐÐÌÉÃÁÔÉÏÎ ÏÆ ÈÕÍÁÎ ÒÉÇÈÔÓ ÉÎ ÁÆÒÉÃÁ ×ÈÉÌÅ ÔÈÅ ÁÕ ÁÎÄ ÉÔÓ ÐÒÅÄÅÃÅÓÓÏÒ ÔÈÅ /!5 ÈÁÖÅ ÂÅÅÎ ÑÕÉÔÅ ÁÄÖÅÎÔÕÒÏÕÓ ÉÎ ÓÔÁÎÄÁÒÄ ÓÅÔÔÉÎÇ ÔÈÅÓÅ ÎÏÒÍÁÔÉÖÅ ÁÄÖÁÎÃÅÓ ÈÁÖÅ ÔÏ ÂÅ ÍÁÔÃÈÅÄ ÂÙ ÔÈÅÉÒ ÁÃÔÕÁÌ ÉÍÐÁÃÔ ÉÎ ÃÏÎÃÒÅÔÅ ÃÁÓÅÓ ÔÈÒÏÕÇÈ ÉÍÐÌÅÍÅÎÔÁÔÉÏÎ ÁÎÄ ÅÎÆÏÒÃÅÍÅÎÔ ! ÒÅÇÉÏÎÁÌ ÈÕÍÁÎ ÒÉÇÈÔÓ ÓÙÓÔÅÍ ÓÈÏÕÌÄ ÎÏÔ ÂÅ ÍÁÄÅ ÉÎÔÏ ! ÆÅÔÉÓÈ ÁÎÄ ÉÔÓ ÁÃÃÏÍÐÌÉÓÈÍÅÎÔÓ ÓÈÏÕÌÄ ÎÏÔ ÂÅ ×ÉÅ×ÅÄ ÉÎ ÉÓÏÌÁÔÉÏÎ ÆÒÏÍ ÔÈÅ ÄÏÍÅÓÔÉÃ ÌÅÖÅÌ ×ÈÅÒÅ ÉÔÓ ÁÃÔÕÁÌ ÉÍÐÁÃÔ ÉÓ ÓÏÕÇÈÔ) ÉÓ ÁÔ ÔÈÅ ÄÏÍÅÓÔÉÃ ÌÅÖÅÌ ÔÈÁÔ ÔÈÅ ÉÎÔÅÒÐÒÅÔÁÔÉÏÎ ÁÎÄ ÉÍÐÌÅÍÅÎÔÁÔÉÏÎ ÏÆ ÔÈÅ #ÈÁÒÔÅÒ ÁÎÄ ÏÔÈÅÒ ÈÕÍÁÎ ÒÉÇÈÔÓ ÉÎÓÔÒÕÍÅÎÔÓ ÈÁÖÅ ÔÏ ÂÅ ÆÅÌÔ ÁÎÄ ÒÅÓÏÎÁÔÅ