

**The impact of the
African Charter and
Women's Protocol
in selected African states**

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The impact of the African Charter and Women's Protocol in selected African states

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TABLE OF CONTENTS

Background	v
Benin	1
<i>Horace Adjolohoun</i>	
Burkina Faso	13
<i>Augustin Some</i>	
Cameroon	21
<i>Christèle Diwouta</i>	
Chad	29
<i>Francis Ngarhodjim</i>	
Congo	35
<i>Estelle Nkounkou</i>	
Côte d'Ivoire	41
<i>Armand Tanoh</i>	
Eritrea	49
<i>Muluberhan Hagos</i>	
Gambia	57
<i>Tem Fuh Mbuh</i>	
Kenya	65
<i>Conrad Bosire, Victor Lando and Waniguru Kaguongo</i>	
Lesotho	79
<i>Tebello Thabane and Itumeleng Shale</i>	
Mauritius	91
<i>Meskerem Geset Techane</i>	



Mozambique	105
<i>Aquinaldo Mandlate and Farida Mamad</i>	
Niger	115
<i>Hadiza Mahaman</i>	
Nigeria	121
<i>Victor Ayeni</i>	
Rwanda	137
<i>Christian Nsabimana Garuka</i>	
Senegal	143
<i>Horace Adjolohoun</i>	
Sierra Leone	153
<i>Augustine Marrah</i>	
South Africa	161
<i>Ayalew Getachew Assefa</i>	
Zimbabwe	175
<i>Tarisai Mutangi, Revai Makanje Aalbaek and Lloyd Kuvheya</i>	
Schematic summary of major trends	189
Bibliography	195

BACKGROUND

1 Background

The year 2011 marked the 25 years of the entry into force of the African Charter on Human and Peoples' Rights (African or Banjul Charter). In 2012, the African Commission on Human and Peoples' Rights (African Commission) celebrates 25 years since it came into operation in 1987. In 2003, the normative scope of the African Charter was enlarged by the adoption of the Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol).

All African Union member states (with the exception of newcomer South Sudan) have become state parties to the African Charter, and 26 of them have accepted the Women's Protocol.

In recognition of the central role it played in steering Africa from the age of human wrongs into a new age of human rights, various stakeholders have organised series of events to celebrate the successes of the Banjul Charter but also to reflect on its challenges in a continent still prone to numerous human rights abuses. In line with these objectives, this publication endeavours to evaluate the tangible changes brought about by the African Charter and its Protocol on the Rights of Women and its influence on

the country level in selected African states. The term 'impact' is used to describe both compliance by states, and more indirect forms of influence. It is expected that the outcome of this evaluation will provide data on the way forward towards a greater enjoyment of the rights enshrined in those instruments.

2 Methodology and structure of chapters

The research was conducted by alumni of the Centre's LLM in Human and Democratisation in Africa programme and the Alumni Association, under the overall supervision of the Centre. The publication is therefore the product of an Africa-wide network of alumni, representing a rich and diverse expertise in the fields of human rights and democratisation in Africa.

The initial phase of the research project included drafting a questionnaire, identifying the most relevant study countries, and recruiting alumni researchers through an advertisement. The research was conducted at country level through interviews, visits and documentary research, on the basis of a questionnaire. Upon submission by the

researchers, country reports were compiled. The research was then reviewed and an overview report compiled.

The researchers used the following questionnaire to conduct the study at country level:

- Identify government focal point

First of all, establish which department, person or 'bench' is the 'focal point' (in charge) of the state's response and responsibilities on the Charter and Women's Protocol. Perhaps there are different persons? What are their views about the channel of communication with the African Commission and the institutionalisation of the state's responsibilities in relation to the African Charter and the Women's Protocol?
- Ratification of African Charter and the Women's Protocol
 - What is the process of ratification: Role of Parliament or the Executive?
 - What are reasons for ratification – were any reasons articulated in parliamentary debates or elsewhere? Please identify sources.
- Domestication or incorporation
 - What is the constitutional status of the Charter and the Protocol? (between the Charter, the Protocol and the Constitution or other legislation, which prevails?)
 - To what extent do the Charter and the Protocol rights correspond to the domestic Bill of Rights? Are the Charter and the Protocol rights included in justiciable Bill of Rights? Has Bill of Rights been changed after state becoming a party to the Charter?
 - Has the Charter or the Protocol been domesticated or 'incorporated' into ordinary legislation (explicit reference to the Charter and the Protocol)? Find such legislation.
- Legislative reform or adoption
 - Was a compatibility study of domestic law with the Charter and the Protocol undertaken before ratification of the two instruments?
 - Has any implicit or explicit legislation been amended or adopted to give effect to the Charter and the Protocol?
- Policy reform or formulation
 - Has any government policy (HIV/AIDS Strategy, Poverty Reduction Strategy Paper (PRSP), plan of action, white paper, codes, etc.) been adopted or amended to give effect to the Charter and the Protocol? (explicit or implicit)
- Court judgments
 - Have the Charter, the Protocol, case-law by the African Commission or Resolutions adopted by the Commission been referred to as an interpretive source in any judgment by any of the domestic courts? If so, what was the effect on the judgment?
 - Have domestic courts used any provision of the Charter or the Protocol as a basis of a remedy (as self-executing)? If so, describe.
- Awareness and use by civil society
 - What is the extent of awareness of the Charter and the Protocol among civil society organisations?
 - To what extent have NGOs used the Charter and the Protocol in their work? Advocacy, promotional tools, policy reviews, litigation, law reform, etc. (explicit or implicit?). Also, do they use concluding observations issued after state reports and other reports or resolutions of Commission, etc.?
 - Have NGOs with observer status submitted shadow reports to the Commission?

- Awareness and use by lawyers (law societies and other practising lawyers)
 - What is the extent of awareness of the Charter and the Protocol among lawyers and the law society?
 - To what extent have lawyers used the Charter and the Protocol in their arguments before courts?
- Law school education
 - Does the curriculum of law schools include the Charter and the Protocol? If so, when was it introduced; what is its content?
- National human rights institutions (NHRIs, Ombudsman offices, etc.)
 - Do these institutions include reference to the Charter and the Protocol in their programmes?
 - Do these institutions follow up on the implementation of concluding observations and/or decisions of the Commission?
 - Are they involved in the submission of state reports to the Commission?
- Academic writing
 - To what extent do academics (especially in law) refer to or discuss the Charter and the Protocol in academic writing? If so, what views are expressed?
- State reporting
 - Which department(s) is responsible for state reporting under the Charter and the Protocol?
 - Describe the process of preparing a report (inclusion of civil society; cross-departmental).
 - Are concluding observations disseminated (by state, civil society)?
 - Has the government taken any steps to give effect to concluding observations? What steps?
- Communications
 - If any communication has been decided against the state, what exposure has been given to this finding?
 - Has the government taken any steps to give effect to this finding?
- Special mechanisms - promotional visits of the African Commission
 - Has a promotional, protective or fact-finding visit by the African Commission taken place to the country? If so, what has the effect been and has any recommendations been given effect to by government?
 - Has a special mechanism of the Commission visited the country and made recommendations to the country? What has its effect been?
- Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission
 - What are the factors that impede or enhanced the 'impact' of the African Charter in your country?
 - Consider whether a session of the Commission has ever taken place in your country, and, if so, what its role was.
 - Consider whether a national has been a member of the African Commission and, if so, what role this factor played.
 - Consider the role of the media.

This book includes chapters on the implementation of the African Charter on Human and Peoples' Rights and the Protocol thereto on the Rights of Women in Africa in the following African States: Benin, Burkina Faso, Cameroon, Chad, Congo, Côte d'Ivoire, Eritrea, Gambia, Kenya, Lesotho, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa and Zimbabwe.

The structure of chapters is based on the 15 research questions included in the

questionnaire used by the country researchers. In most of the reports, the ‘introduction and background’ includes information on who is the focal point of the government with regards to the country’s involvement with the African Commission. In some instances, depending on the way the researcher dealt with the question, information on the government focal point is found under the section on ratification. Sections indicating that “the researcher was not able to obtain any relevant information on this issue” account for instances where no information was provided.

OXFAM’s financial contribution to the research and publication is gratefully acknowledged.

3 Research in need of continuous updating

The Centre intends to use this research as the basis for a continuously updated database on the impact of the African regional human rights system.

We therefore invite anyone who has any information to supplement, update or correct the information in this publication, to contact us at chr@up.ac.za or hrda.alumni@up.ac.za

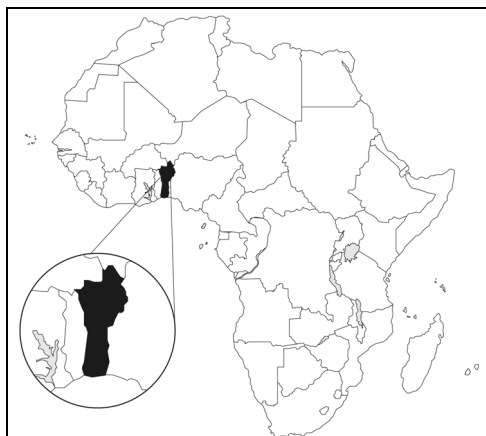
Information about the impact of the African regional human rights system in countries not covered here is also welcome. The ultimate aim is to provide a continuously updated database on the impact of the African regional human rights in all African Union member states.

4 Acknowledgments

This publication is based on research conducted as part of ‘The State of the Union’ initiative supported by OXFAM.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN BENIN

*Horace Adjolohoun**



1 Introduction and background

Benin obtained independence on 1 August 1960 as Dahomey. Until 1972, the country experienced political instability marked by frequent regime changes through civil and military *coups*. The country was then ruled by a dictatorship until 1989 when the demise of the Marxist-Leninist regime led to a national conference in 1990. Subsequently, a new constitution was adopted which opened an era of democracy. Prior to the 'democratic revival', Benin had, in 1986, become party to the African Charter on Human and Peoples' Rights (the African Charter), which had a great influence on the drafting of the 1990 Constitution and subsequent political reforms in general. Particularly, as may be seen in other constitutions in Francophone Africa, the 1990 Benin Constitution included explicit reference to international human rights instruments, among which is the African Charter.¹ However, the 1990 Constitution went further to make all duties and rights of

the African Charter part of the fundamental law.² In a more singular way, the full text of the African Charter is annexed to the 1990 Constitution in a 'copy-paste' style. Notably, the new 1990 Constitution entrusted the Constitutional Court of Benin with competence to adjudicate cases of human rights violations. As a consequence, the abundant human rights jurisprudence of the Constitutional Court of Benin is the expression of Benin's attachment to rights and duties contained in the African Charter. This attachment has also positively impacted on Benin's adherence to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African (the Women's Protocol).³

Internationally, Benin's duty to give effect to its obligations under both the African Charter and Women's Protocol lies in the President of the Republic who negotiates, signs, and ratifies treaties on behalf of the country.⁴ For effectiveness, the President may delegate some of his multiple constitutional functions to members of the cabinet. Benin has a

* LLM HRDA 2007, PhD Candidate and Alumni Coordinator, Centre for Human Rights, University of Pretoria. I would like to acknowledge the invaluable support of Assiba Medegan who conducted interviews with stakeholders in Benin.

¹ Preamble, Benin Constitution of 10 December 1990.

² Art 7 of the Constitution.

³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

⁴ Art 144 of the Constitution.

Ministry of Justice and Human Rights which serves as the 'focal point' of the state in responding to and upholding Benin's responsibilities under international human rights instruments including the African Charter and the Women's Protocol. The Directorate of Human Rights within the Ministry is in charge of drafting and submitting various reports to international treaty-monitoring bodies such as the African Commission on Human and Peoples' Rights (the African Commission). With regards to the Women's Protocol, the Directorate of Women and Gender Affairs within the Ministry of Family is in charge of preparing the report which is then included in the country's human rights report drafted by the Ministry of Justice.⁵ The process involves many other governmental⁶ and non-governmental organisations.⁷ State agents responsible for communicating with the African Commission are of the view that the institutionalisation of the state's responsibilities in relation to the African Charter and the Women's Protocol has raised the seriousness about Benin's international human rights obligations.⁸

2 Ratification of the African Charter and Women's Protocol

As mentioned above, the 1990 Constitution has vested in the President of the Republic, the prerogative to negotiate and ratify treaties. However, parliamentary approval is required prior to ratification in respect of treaties concerned

with freedoms and fundamental rights.⁹ Where Parliament decides that an international agreement includes a provision contrary to the 1990 Constitution, parliamentary approval for ratification of that agreement may only be granted upon amendment of the Constitution, so as to avert any conflict.¹⁰

Benin was still under dictatorship when it ratified the African Charter on 20 January 1986. For this reason one wonders at the rationale behind the ratification. Some have argued that many African dictatorships, including Benin, ratified the African Charter as a response to international pressure to bring about democratic reforms.¹¹ Beninese records of parliamentary debates on the ratification of the African Charter are of no relevance due to the fact that legislative powers were at that time exercised by the National Revolutionary Assembly. This institution had no capacity to appreciate the content and relevance of human rights treaties. Arguably, the actual motives behind the ratification of the African Charter should rather be sought in the socio-political situation prevailing in Benin in the 1980s.

Following almost two decades of suppression of liberties, the country experienced a severe financial crisis which led to social uprising and public demands for the termination of the 18 year-old regime.¹² Various human rights related events had also occurred in the

⁵ See interview with Erick Hacheme, Head of Office, Directorate of Human Rights (22 September 2011).

⁶ For instance the Benin Human Rights Commission and the recently government established Women Institute.

⁷ Recent processes have included Wildaf Benin, Africa for World's Rights, Unicef and Benin Women Lawyers Association. See Hacheme (n 5 above).

⁸ As above.

⁹ Art 98 of the Constitution.

¹⁰ Art 146 of the Constitution.

¹¹ See in general KO Kufuor *The African human rights system: Origins and evolution* Palgrave MacMillan (2010).

¹² BA Magnusson 'Testing democracy in Benin' in R. Joseph (ed) *State, conflict and democracy in Africa* (1999) 221; and Richard Banégas 'Action collective et transition politique en Afrique: la Conférence nationale du Bénin' (1995) 17 *Cultures et Conflits* 137.

region at the time, including the Lagos Conference of Jurists and the Dakar meeting organised at the instance of the former Senegalese President, Senghor. In the absence of records and written evidence on why Benin ratified the African Charter, one could eventually read a justification in the 'attachment of the people to human rights as defined by the African Charter' as restated in the Preamble of the 1990 Constitution.¹³ Notwithstanding these suggestions, the motive behind the ratification of the African Charter by Benin remains unknown or speculative at best.

3 Domestication or incorporation of the African Charter and Women's Protocol

Article 174 of the 1990 Constitution provides that 'duly ratified treaties or agreements have, upon publication, an authority superior to that of the law'. Although this provision defines Benin as a monist country which permits direct applicability to international instruments in the municipal sphere, two difficulties arise in both theory and practice. First, the Constitutional Court of Benin has, in the past, rejected petitions brought on the basis of the applicability of non-published international human rights instruments.¹⁴ Second, the law referred to in the aforementioned provision has raised questions as to whether it included the Constitution. According to the French jurisprudence, precedence of international law over municipal law

is not relevant to rules of a constitutional nature.¹⁵ In the case of Benin, the fact that a constitutional amendment is necessary prior to ratifying an inconsistent international agreement may be an indication of constitutional supremacy of international law over domestic law.¹⁶ In any case, the African Charter is also municipal law in Benin by virtue of its full incorporation into the 1990 Constitution.¹⁷ Benin ratified the Women's Protocol on 30 September 2005. As an international agreement, the Women's Protocol is also directly applicable since it does not need a specific legislative or an executive act to make it part of the municipal legal order.

Article 7 of the 1990 Constitution provides that 'all the duties and rights in the African Charter are part of the present Constitution'. As the first provision of the Bill of Rights, article 7 clearly makes all African Charter rights part of the Bill of Rights. As far as incorporation of the Protocol is concerned, the 1990 Constitution provides for equality between men and women¹⁸ in addition to a wide range of other rights relevant to women found in the African Charter. Benin's 1990 Constitution also provides for the 'protection of the family and particularly the mother and the child'.¹⁹ All the rights contained in the Bill of Rights are justiciable. Benin has not amended its Constitution since its adoption in 1990.

¹³ Para 5 of the preamble.

¹⁴ In DCC 03-009 of 19 February 2003 the Constitutional Court held that provisions of the Convention on the Rights of the Child did not apply in Benin for lack of publication even though Benin had ratified the convention.

¹⁵ See *M Sarran, Levacher et autres*, Conseil d'Etat, Assemblée, 30 October 1998; and *Pauline Fraïsse*, Cour de Cassation, 2 June 2000, Bulletin d'information 520 of 15 September 2000.

¹⁶ Art 146 of the Constitution.

¹⁷ This is through mention in the preamble, incorporation under art 7 and full adjunction to the Constitution.

¹⁸ Art 26(2) of the Constitution.

¹⁹ As above.

4 Legislative reform or adoption

The African Charter was adopted in 1986 prior to the new 1990 constitutional dispensation. The Charter would definitely have influenced such an important instrument as the Constitution. The same applies to the Women's Protocol. Between 1990 and 2005, when the Protocol was ratified, Benin's human rights protection grew in strength as a result of the effective operation of the 1990 Constitutional Court and various legislative and policy reforms. One might presume that any legislation in force at the adoption of the Constitution would have been annulled. However, this has taken time and has not always happened as quickly as ideally anticipated. For instance, it took Benin about a decade from 1995, when it was first put to the Parliament, to 2004, to adopt the Family Code which gave comprehensive effect to equality between men and women. Similarly, until it was declared contrary to the 1990 Constitution and in violation of the Family Code by the Constitutional Court, the two decade long discriminatory legal recognition of adultery by women with no such recognition in respect of men had been in place.²⁰ This said, Benin has engaged in purposive policy reform since 1990 and developed a legal framework that is conducive to an effective implementation of rights contained in both the African Charter and the Women's Protocol.

²⁰ See Benin's Constitutional Court Decision DCC 09-081 of 30 July 2009. The Court found that arts 336 and 339 of the Penal Code were contrary to the Constitution. Under the impugned provisions the adultery of the man was only constituted when it occurred in the marital house while that of the woman was constituted wherever it took place.

5 Policy reform or formulation

Benin's Poverty Reduction Strategy Paper (PRSP)²¹ includes a section on human rights and the document pledges to be human rights based.²² In 2004, Benin adopted the Family Code²³ which focuses on the realisation of gender equality, and provides better protection for women, children and the family. Its major innovations are probably to have outlawed polygamy and afforded children equal access to rights whatever their birth status. The country has also enacted key legislation including the Sexual Harassment Act,²⁴ the Anti-Child Trafficking Act,²⁵ and the Law on the Protection of People Living with HIV/AIDS.²⁶ Universal free primary education has also become a reality in Benin.²⁷ The government has also implemented a programme to provide free medical service to women giving birth by way of Caesarean opera-

²¹ Poverty Reduction Strategy Papers are prepared by the member countries through a participatory process involving domestic stakeholders as well as development partners, including the World Bank and International Monetary Fund. See International Monetary Fund 'Poverty Reduction Strategy Papers (PRSP)' (6 June 2012) <http://www.imf.org/external/np/prsp/prsp.aspx> (accessed 7 June 2012).

²² See République du Bénin 'Orientations stratégiques de développement du Bénin 2006-2011' 33 http://www.bj.undp.org/docs/Benin_emergent.pdf (accessed 26 September 2011); Gouvernement du Bénin 'Document de stratégie de réduction de la pauvreté' 2003-2005 <http://www.gouv.bj/spip.php?article273> (accessed 26 September 2011); and Hacheme (n 5 above).

²³ Loi no 2002-07 du 24 août 2004 portant Code des Personnes et de la Famille en République du Bénin.

²⁴ Loi no 2006-19 du 05 septembre 2006 portant répression du harcèlement sexuel et protection des victimes.

²⁵ Loi no 2006-04 du 10 avril 2006 portant condition de déplacement des mineurs et répression de la traite d'enfants en République du Bénin.

²⁶ Loi no 2005-31 du 05 avril 2006 portant prévention, prise en charge et contrôle du VIH SIDA en République du Bénin.

²⁷ Décret du 13 octobre 2006 portant gratuité de l'enseignement maternel et primaire.

tion at all public and selected private health facilities in Benin.²⁸ In 2011, Parliament abolished the death penalty²⁹ and enacted a piece of legislation to deal specifically with violence against women.³⁰ Various pieces of legislation have been enacted in other spheres, which further the implementation of both the African Charter and the Women's Protocol.

6 Court judgments

An overall examination shows that domestic courts in Benin neither use provisions of the African Charter and the Women's Protocol nor refer to resolutions or findings of the African Commission, as interpretative aids. The use of international human rights instruments in domestic courts in Benin is quite scarce, with the notable exception of the Constitutional Court of Benin. This Court has a mandate to adjudicate human rights complaints brought by individuals on the basis of rights guaranteed in the 1990 Constitution and in the African Charter. Since commencing operation in 1993, the Constitutional Court has heard tens of petitions in which the African Charter was frequently referred to, although less by way of a direct application than as an interpretative or reference tool.³¹ While the African Charter was the only international human rights instrument extensively

referred to by the Constitutional Court, not a single resolution or decision of the African Commission has ever been cited. In a few instances, the Constitutional Court reached its decision solely on the basis of the provisions of the African Charter.³² An interesting instance is the *Okpeitcha* case where the Court decided that for 'ceasing to ensure the upkeep and education of his children and thus of his family', Mr Okpeitcha had violated article 29(1) of the African Charter.³³

However, ordinary courts have made reference to other international instruments directly or indirectly. One of the most notable cases with explicit reference and 'discussion' of the International Covenant on Civil and Political Rights (ICCPR) was decided by the Benin Supreme Court. The issue in that case was whether provision for the right to life implies the abolition of the death penalty.³⁴ In the view of the Supreme Court, the provision that no one shall be arbitrarily deprived of one's life allows the very possibility of such deprivation as long as the sentence is imposed by a competent court and according to law.³⁵ Lower courts have also applied interna-

²⁸ Décret no 2008-730 du 22 décembre 2008 portant institution de la gratuité de la césarienne.

²⁹ See Koaci 'Le Bénin abolit la peine de mort' <http://www.koaci.com/articles-70001> and Afriqinfos 'Bénin: le Parlement autorise l'abolition de la peine de mort' <http://www.afriqinfos.com/articles/2011/8/19/benin-185066.asp> (accessed 26 September 2011).

³⁰ See ONG Dignité Féminine 'Pour l'examen au parlement des propositions de lois contre les violences faites aux femmes: Le plaidoyer des femmes aux députés, Nago rassure les manifestantes' <http://dignitefeminine.org/spip.php?article600> (accessed 26 September 2011).

³¹ See M Killander & H Adjoloahoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 3-22.

³² E.g. DCC 05-114 of 20 September 2005; DCC 06-103 of 11 August 2006 in which the complainant was detained for 6 years and three months without being presented to a magistrate; and DCC 06-151 of 19 October 2006.

³³ *Okpeitcha v Okpeitcha* (2002) AHRLR 33 (BnCC 2001) 8-11.

³⁴ *Yoavi Azonhito and Ors v Public Prosecutor*, Supreme Court of Benin, Criminal Chamber, Case number 034/CJ-P of 29 September 2000, ILDC 1028 (BJ 2000).

³⁵ As above. For a further discussion on the case and the use of international law in domestic courts in African francophone countries, see A Tanoh & H Adjoloahoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in M Killander (n 31 above) 109-120.

tional law principles without mentioning the relevant treaty. Those cases include instances where courts have declared that an estate share excluding females is 'contrary to the law in force',³⁶ with no mention to the Convention on the Elimination of Discrimination Against Women (CEDAW). Judges have also decided on numerous occasions the centrality of 'the prime interest of the child' or 'security and welfare of the child',³⁷ without any reference to the Convention on the Rights of the Child (CRC). The rights of any person facing a criminal charge, equality before the law, and other fundamental rights of the individual have also been used by administrative courts in the same manner.³⁸ There is no evidence of the use of the Women's Protocol by domestic courts.

7 Awareness and use by civil society

In Benin, human rights organisations are well aware of the African Charter and the Women's Protocol. The use of both instruments in their advocacy and promotional work is less evident at least for the African Charter which has arguably become a general instrument except when it is used by human rights specialists in academic spheres or by a handful of lawyers in constitutional litigation. There is no doubt that the Women's Protocol has received much more attention and implementation as a result of advocacy work around it.³⁹ Some

women organisations including the Benin Women Lawyers' Association have used the Women's Protocol to draft and lobby Parliament to adopt legislation on violence against women.⁴⁰

Several Beninese NGOs have observer status with the African Commission.⁴¹ An interesting example of Beninese NGOs submitting shadow reports to the African Commission is the *Association des Chrétiens pour l'Abolition de la Torture* – Christian Association Against Torture – (ACAT)'s alternative report on prison conditions and the abolition of death penalty in Benin.⁴² Main recommendations by the African Commission included a proper criminalisation of torture, ratification of the Optional Protocol to the Convention Against Torture (CAT), access to health services by inmates and building new prison facilities to address the high prison population. Follow-up efforts, together with various initiatives, have led to the recent abolition of the death penalty in Benin. The country has also launched the construction of ten new detention facilities across the country to

³⁹ See Africa for women's rights 'Ratifier et respecter' http://www.africa4womensrights.org/public/Cahier_d_exigences/BeninFR.pdf (accessed 26 September 2011).

⁴⁰ See ONG Dignité Féminine (n 30 above).

⁴¹ Among others, Association Béninoise d'Assistance; Association Développement 2000; Afrique 3e Millénaire; Centre Béninois pour le Développement des Initiatives à la Base; Centre Afrika Obota; Groupe d'Etudes et de Recherche sur la Démocratie et le Développement Economique et Social en Afrique; Que Choisir Benin.

⁴² See ACAT Bénin 'Rapport alternatif de la FIACAT et de l'OMCT, en partenariat avec la Coordination nationale de l'ACAT Bénin en réponse au rapport périodique de la République du Bénin sur la mise en œuvre de la Charte africaine des droits de l'homme et des peuples' 45th Ordinary Session of the African Commission (13 - 27 mai 2009), Banjul, The Gambia <http://www.fiacat.org/cadhp-rapport-alternatif-de-la-fiacat-de-l-om-ct-et-de-l-acat-benin> (accessed 27 September 2011).

³⁶ See e.g. the *Late Houankanrin Ahouansou* case, Decision 106/2001 of 14 December 2001 (Appeal Court of Cotonou, 1st Traditional Chamber).

³⁷ See e.g. Decisions 102 of 24 October 2001 (Appeal Court of Cotonou), 077 of 4 July 2001 (Appeal Court of Cotonou), 007 of 21 January 1998 (Appeal Court of Cotonou) and 182 of 18 November 1997 (Appeal Court of Cotonou).

³⁸ See e.g. Decision 48/CA of 17 June 1999 (Appeal Court of Cotonou).

improve conditions in its overcrowded prisons.⁴³

8 Awareness and use by practising and other lawyers

The extent to which lawyers and law societies are aware of the African Charter and the Women's Protocol will largely depend on the inclusion of such instruments in law schools or similar training centres' curricula. Lawyers and judges have a very limited awareness and knowledge of both instruments and of international human rights instruments in general.⁴⁴ They rarely make submissions in courts on the basis of the two instruments.⁴⁵ Of course, this is with the exception of submissions to the Constitutional Court in human rights proceedings where lawyers usually cite the African Charter. This is arguably because of the singular way in which the African Charter was incorporated in the 1990 Constitution. Issues pointed out in the section on 'courts judgements' apply to this section.

9 Incorporation in law school education

The curricula of neither the Law Faculty nor the *Certificat d'Aptitude à la Profession d'Avocat* (CAPA) – Bar Certificate

Course – includes specific modules or sections on the African Charter and the Women's Protocol.⁴⁶ However, the curriculum of the Law Faculty includes a general module on 'the rights of the person'⁴⁷ which includes reference to the African Charter and international human rights instruments. The module is taught in the second year of study, fairly close to completion of the *Licence*. Alternative programmes compensate for the lack of specialised human rights training at the Law Faculty. The most notable is the UNESCO Chair of the Rights of the Person and Democracy's *Diplôme d'Etudes Approfondies* (DEA) – the equivalent of the Master's degree.⁴⁸ The UNESCO Chair's 'Human rights and democracy' DEA is a specialised course on human rights which includes detailed study of international human rights law, the African Charter and the Women's Protocol. The UNESCO Chair was established in 1995 as a department of the Law Faculty.⁴⁹ The 'human rights' DEA is a 530-hour course including 15 themes grouped in four major modules: general themes,⁵⁰ specialised themes,⁵¹ seminars, case studies,⁵² and research methodology.⁵³

⁴⁶ As above.

⁴⁷ *Droits de la personne humaine*.

⁴⁸ Law studies at Francophone universities award a *Licence* upon completion of three years studies and a *Maîtrise* upon completion of the fourth year. The DEA is obtained upon one-year studies after the *Maîtrise*.

⁴⁹ Benin, Chaire UNESCO des droits de la personne humaine et de la démocratie <http://www.unesco.org/fr/unitwin/access-by-region/africa/benin/unesco-chair-in-human-rights-and-democracy-25/>.

⁵⁰ Philosophy of human rights, democratisation, political regimes, sociology of human rights, general international law and introduction to moot court.

⁵¹ Substantive human rights law, human rights systems, international humanitarian law, international criminal law.

⁵² Democratic transitions, situation of human rights in Africa, human rights and development.

⁵³ Computer training, English applied to human rights, research methodology, DEA proposal.

⁴³ Afriqinfo 'Le Président Béninois annonce la construction de dix nouvelles prisons' <http://www.afriqinfos.com/articles/2011/8/19/benin-185067.asp> (accessed 27 September 2011). During the UPR process before the UN Human Rights Council in May 2008, the Government of Benin had previously pledged that 'On the question of prisons, 10 new prisons will be built in the next two years, eight from the national budget, and two with the support of Belgium', A/HRC/WG.6/2/L.5.

⁴⁴ See Killander & Adjolohoun (n 31 above) 18-19.

⁴⁵ See interview with Advocate Ibrahim Salami, Advocate of the Court of Appeal, Head of the Public Law Department, Law Faculty, Université d'Abomey-Calavi (23 September 2011).

Since 1995, about thirty law professionals graduate from this course annually, among which are a few lawyers and highest courts' judges, but mostly academics, NGOs' members, civil servants and *Maîtrise* students. Other non-governmental high education institutions offer relevant courses on human rights and democracy. One of them is the *Institut des Droits de l'Homme* established by Benin's former member of the United Nations Human Rights Committee, Professor Maurice Ahanhanzo Glèlè.

10 National human rights institutions (NHRIs)

The Benin Human Rights Commission (the Benin Commission) has actively participated in various sessions of the African Commission. Due to the fact that the law establishing the Benin Commission was enacted in 1989 while the country was still under dictatorship, the Benin Commission could not obtain national human rights institution (NHRI) affiliate status with the African Commission as it did not meet the criteria stipulated in the Paris Principles. The Parliament is currently examining a bill to enact a new law that brings the Benin Commission in line with the Paris Principles. However, the Benin Commission has since obtained observer status before the African Commission. The Benin Commission is aware of and makes use of the African Charter and the Women's Protocol in its work. The Benin Commission is also member of National Working Groups and Committees in charge of following-up on the recommendations of the African Commission.⁵⁴ As indicated earlier, it is

not only the Benin Commission that is involved in the process of reporting to international human rights monitoring bodies including the African Commission, but also other institutions such as the Mediator (Ombudsman or Public Protector), and human rights related public bodies.⁵⁵

11 Academic writing on the African Charter and Women's Protocol

There is very limited academic literature by Benin human rights and law academics on the African Charter and the Women's Protocol. Opinions of such writers do not vary in respect of the African Charter which is perceived to be a 'compilation' of universally recognised rights.⁵⁶ Most contributions make cursory references to the African Charter while discussing provisions of the 1990 Constitution and decisions of the Constitutional Court. Probably, the most renowned Benin academic to have significantly written on human rights in Africa and the African Charter is Professor Maurice Ahanhanzo Glèlè, a former member of the United Nations Human Rights Committee who was also a member of the Constitutional Court of Benin for two terms.⁵⁷ A recent publication by a junior human rights specialist specifically covers a comprehensive

⁵⁵ Interviews with Moussouvikpo (as above), and Josiane Martins, Campaign Coordinator, Amnesty International Benin (22 September 2011) and Hacheme (n 5 above).

⁵⁶ See Salami (n 45 above).

⁵⁷ His major writings include 'La Charte Africaine des Droits de l'Homme et des Peuples' in *Mélanges C.A. Colliard* (ed) (1984); 'Théorie et Pratique des Droits de l'Homme dans l'Afrique Contemporaine' Colloque sur l'Enseignement et la Recherche en Droit International Dakar (11 December 1985); 'La Commission Africaine des Droits de l'Homme et des Peuples' Colloque organisé par la Commission Internationale de Juristes Dakar (17-18 July 1987); 'La Charte Africaine des

⁵⁴ Interview with Antonin Moussouvikpo, Secretary General of the Benin Human Rights Commission (24 September 2011).

comparison of the Constitutional Court's human rights jurisprudence and African Commission's work.⁵⁸

12 State reporting

Benin is up to date with state reporting to the African Commission. The Directorate of Human Rights in the Ministry of Justice is responsible for state reporting under the African Charter and the Women's Protocol. A consultant is commissioned to draft the initial report which is discussed in meetings of the National Council of Human Rights Organisations chaired by the Minister of Justice. Representatives of the Bar Association, the *Conseil Supérieur de la Magistrature*,⁵⁹ NGOs, the NHRI, human rights bodies, academic institutions and relevant offices in ministries concerned (family and social affairs, health, education, home affairs) sit on the Council. The report is then finalised by the Directorate of Human Rights and submitted to the African Commission.⁶⁰

Most recent cases in which the recommendations of the African Commission have diligently been followed-up by civil society organisations include the rehabilitation of Benin Commission and ratification of the Optional Protocol to CAT.⁶¹

Droits de l'Homme et des Peuples : ses virtualités et ses limites' *Revue de Droit Africain (Association des Juristes Africains)* January-March 1985 ; 'Pour une O.U.A. opérationnelle' 1985 (3-4) *Revue Juridique et Politique - Indépendance et Coopération*; 'La Charte Africaine des Droits de l'Homme et des Peuples: spécificité et universalité' Colloque: Justice et Paix, Cité du Vatican, Rome (November 1988); 'Introduction à l'Organisation de l'Unité Africaine et aux Organisations Régionales Africaines' (1986).

⁵⁸ See H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* (2011).

⁵⁹ Judicial Service Commission.

⁶⁰ See interview with Martins (n 55 above) who is currently member of the Bureau of the Council.

⁶¹ See interview with Hacheme (n 5 above).

13 Communications involving this state

In *Comité Culturel pour la Démocratie au Bénin and Others v Benin*, the African Commission decided that 'the government of Benin had settled the complainant's claim administratively'.⁶² In *Odjouriby v Benin*, the African Commission found Benin in violation of article 7(1)(d) of the African Charter thus recommending that Benin 'take appropriate measures to ensure that the complainant's appeal is determined by the Court of Appeal as quickly as possible'⁶³ and 'take the necessary steps to pay appropriate compensation for damages suffered by Mr Odjouriby Cossi Paul due to the unduly prolonged proceedings in the processing of his case'.⁶⁴ Due to the lack of accurate records at the Benin Commission, evidence could not be obtained on whether the government of Benin has complied with these recommendations.

14 Special mechanisms and promotional visits by the African Commission

The African Commission has undertaken several visits to Benin. These include a promotional mission in 2001 and visits of the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on Prisons and Conditions of Detention, and the Special Rapporteur on the Rights of Women in Africa.⁶⁵ The African Commission and its special

⁶² *Comité Culturel pour la Démocratie au Bénin and Others v Benin* (2000) AHRLR 23 (ACHPR 1995) 5.

⁶³ *Odjouriby v Benin* (2004) AHRLR 15 (ACHPR 2004) recommendations no 1.

⁶⁴ As above recommendations no 2.

⁶⁵ From 25-29 August 2008, Commissioner Yeung Kam John Yeung Sik Yuen conducted a promotional visit to Benin during which she met with government officials, NGOs, civil

mechanisms have also organised various activities in Benin on their own initiative and in collaboration with national and international organisations.⁶⁶ The African Commission also held one of its ordinary sessions in Benin.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

The African Charter may be said to have significantly impacted on the protection of human rights in Benin. The most visible indication of such impact is the good human rights record of the country, its complainants-friendly constitutional protection mechanisms and respect for the 1990 Constitution incorporating African Charter provisions. Benin's respect for the rule of law, political stability, democratic governance and regular elections provide further evidence of the impact of both the African Charter and the Women's Protocol in the country. Several visits of the African Commission and its special mechanisms to Benin have certainly encouraged the country's efforts towards a better implementation of the rights contained in these instruments. The fact that the African Commission held one of its ordinary sessions in Benin represented an important event for a country that has since 1990 been

society organisations and made recommendations included in a Report submitted to the African Commission. See *Activity Report of Commissioner Yeung Kam John Yeung Sik Yuen Inter-Session period, May 2008-November 2008*.

⁶⁶ For instance, in her capacity as Special Rapporteur on Human Rights Defenders in Africa, Commissioner Reine Alapini-Gansou organised a seminar on 'Preparation of working documents for human rights defenders in Africa' (31 August – 4 September 2008); and on 'Human rights in Benin: achievements' (23-25 October 2008) in commemoration of the 60th anniversary of the UDHR.

considered as one of the most stable democracies in Africa.⁶⁷ The country's commitments to African human rights instruments and the system as a whole have also been raised to a higher level by the election as Commissioner of one of its citizens, Advocate Reine Alapini-Gansou. She was the Chairperson of the African Commission between 2009 and 2011.⁶⁸ Her term as Commissioner has recently been renewed. The general perception is that her appointment on the African Commission is not only an achievement, but a 'benchmark' against which the country ought to measure its further involvement with human rights. The media have also contributed their part to this state of affairs through very incisive, but constructive engagement with government and civil society organisations.

Apart from corruption⁶⁹ and a resource limited judicial system, one major factor that could impede the African Charter and Women's Protocol in Benin is the ineffectiveness of its constitutional human rights litigation mechanism which lacks proper reparation. This issue has been partly addressed in

⁶⁷ See African Commission 'Final Communiqué of the 28th Ordinary Session of the African Commission on Human and Peoples' Rights' 23 October – 6 November 2000, Cotonou, Benin.

⁶⁸ Advocate Alapini-Gansou was first elected in 2005 for a six-year term. She was then elected as the Chairperson of the Commission during the 46th Session in Banjul, The Gambia, 11-25 November 2009. In June 2011, she was re-elected as commissioner for another six-year term. She is also Special Rapporteur on Human Rights Defenders in Africa.

⁶⁹ In August 2011, the Parliament of Benin adopted a law on corruption and related crimes. See Sonangnon 'Lutte contre la corruption au Bénin: l'Assemblée nationale vote une loi pour éradiquer le mal' http://www.sonangnon.org/index.php?option=com_content&view=article&id=3018:lutte-contre-la-corruption-au-benin-lassemblee-nationale-vote-une-loi-pour-eradiquer-le-mal-les-deputes-concretisent-un-reve-cher-du-president-boni-yayi-&catid=1:actualite (accessed 27 September 2011).

the current constitutional amendment process.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN BURKINA FASO

*Augustine Kounkinè Somé**



1 Introduction

In Burkina Faso, there are several institutions that deal with human rights, including in the interaction with the African Commission on Human and Peoples' Rights (African Commission). These institutions include: The Ministry in Charge of the Promotion Human Rights; the National Human Rights Commission; the inter-ministerial committee on human rights and humanitarian law; and the national commission to follow up Burkina Faso's commitments in favour of women. In researching on the impact or implementation of the African Charter, discussions were held with all these organs as well as other relevant stakeholders working in the area.

2 Ratification of the African Charter and Women's Protocol

The process of the ratification of international agreements requires Parliament to pass a law authorising government to do so. Depending on the nature of the

treaty, the relevant ministerial department initiates a draft request for ratification. The draft is discussed in a Cabinet meeting and then endorsed. It is then passed on to Parliament for adoption. Only Parliament can authorise the ratification of an international convention although both the Legislature and the Executive also play a role in the process.¹

With regards to the African Charter it was ratified solely by the Executive in September 1984. This was at a time when there was no Parliament as the country was under a revolutionary regime. However, the Women's Protocol was ratified in September 2006 in accordance with the process explained above which was as follows: the Ministry in charge of the promotion of human rights submitted a request (draft law) to Cabinet which endorsed it and tabled it before Parliament for adoption into a law. The law (*loi no 021-2005/AN du 19 mai 2005 portant autorisation de ratification du protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme en Afrique adopté par la Conférence des Chefs d'Etat et de Gouvernement de*

* LL.M HRDA 2004. Centre for Human Rights, Pretoria. Coordinator, Citizens Information and Documentation Centre (Cidoc) Ouagadougou. asomes@yahoo.fr infocidoc@yahoo.fr

¹ Art 148 of the Constitution stipulates that: 'the President of the Republic negotiates signs and ratifies treaties and international agreements'.

l'Union africaine, le 11 juillet 2003 à Maputo) authorising government to ratify the Women's Protocol was adopted on 19 May 2005 and promulgated through a Presidential Decree and published in the Official Journal. As is the practice, the ratification document was sent to the Secretariat of the African Union by the Ministry of foreign Affairs.

Presenting and defending the draft bill before Parliamentary Committee on Foreign Affairs, the Minister in charge of the promotion of women explained that 'given the issues covered by the Protocol, it is without any doubt the most suitable fundamental legal instrument to the context of African women'. She added that its ratification by Burkina Faso will present the country with a constant commitment to promoting women's rights, and will also translate the good will of national authorities to promote and protect the rights of women. She concluded that the ratification of the Protocol will fill the gaps and lacunas revealed in the application of national and international human rights instruments already ratified by the Burkina Faso.² In the submissions tabled and defended before Parliament, the Minister highlighted the value added by the Women's Protocol and stressed on its progressive nature and how it will help advance women's legal rights.³

3 Domestication or incorporation of the African Charter and Women's Protocol

Paragraph 8 of the Preamble to the Constitution of Burkina Faso reads that 'reaffirming solemnly our engagement

vis-à-vis the African Charter of Human and Peoples' Rights of 1981. With this, the African Charter is an integral part of the Constitution and this confers a constitutional legal value to its provisions which are normally directly applicable even against the government. The Women's Protocol remains a convention and therefore is considered at the level of legislation under the Constitution.

Almost all the rights provided for by the African Charter are included in the Bill of Rights, although only civil and political rights have direct application. Economic, social and cultural rights are to be promoted, in the sense of their progressive realisation. In fact the African Charter was ratified when Burkina Faso had no Constitution. The one that followed incorporated the rights enshrined in the African Charter. The African Charter has, therefore, influenced the new Constitution and the Bill of Rights thereof.

The Preamble to the Constitution refers expressly to the African Charter, and the Bill of Rights contains almost all these rights. However, there is no specific legislation with the intention to give effect to the African Charter or the Women's' Protocol. Few specific pieces of legislation refer to the African Charter. Notwithstanding this, there are other pieces of national legislation, which by their content are a translation of a combination of various international and regional human rights instruments. These include the Law on Reproductive Health, the Law on the Fight against HIV/AIDS and the Protection of the Rights of Persons Living with HIV/AIDS, and the Law Instituting Quotas for Legislative and Municipal Elections in Burkina Faso.

² 'Exposé des motifs' presented before Parliament by the Minister in charge of the promotion of women.

³ As above.

4 Legislative reform or adoption

Before the ratification of the Women's Protocol and as provided for by article 155 of the Constitution, a compatibility test was conducted. In the first instance, a legal opinion was sought from the Constitutional Council as to whether the Women's Protocol is in conformity with the Constitution. The answer of the Constitutional Council was positive.⁴ This paved the way for the ratification process to proceed. Furthermore, and more generally, a project was initiated by the Ministry in Charge of the Promotion of Human Rights to align national legislation with international norms with regard to civil and political rights. Though not explicitly stated, various pieces of legislation have been adopted which seek to further the realisation of rights contained both in the African Charter and the Women's Protocol.

5 Policy reform or formulation

Although there are no specific policies with the aim to give effect to the African Charter or Women's Protocol, there are a number of initiatives that further the realisation of rights provided for in these documents. One example of policy formulation in reaction to these instruments is 'The Action Plan of the Minister of Justice and Human Rights'. The Ministry has also developed a methodological note to guide the drafting of sectoral policies with the view to incorporating human rights aspects.

⁴ Avis juridique no 2006-001/CC du 24 février 2006 sur la conformité à la Constitution du 2 juin 1991, du Protocole à la Charte africaine des droits de l'homme et des peuples relative aux droits de la femme en Afrique, adopté par la Conférence des Chefs d'Etat et de Gouvernement de l'Union Africaine le 11 juillet 2003 à Maputo.

6 Court judgments

There is almost no court ruling making express reference to the African Charter or the Women's Protocol. Only the Constitutional Court has issued a legal opinion in 2006 (*Avis juridique no 2006-001/CC du 24/02/2006 sur la conformité à la Constitution du 02 juin 1991, du Protocole à la Charte africaine des droits de l'homme et des peuples relative aux droits de la femme en Afrique, adopté par la Conférence des Chefs d'Etat et de Gouvernement de l'Union Africaine le 11 juillet 2003 à Maputo*), in which it confirmed that the Women's Protocol was in conformity with the Constitution.

7 Awareness and use by civil society

Generally, NGOs have little awareness of the African Charter or the Women's Protocol. Only a few human rights-based groups, including the Burkinabe Human and Peoples' Rights Movement (MBDHP) have a fair knowledge of these instruments. The MBDHP uses the African Charter as a monitoring and advocacy tool while women's rights groups such as the Female Lawyers Association use the Women's Protocol in their advocacy work. During a sensitisation mission to Burkina Faso in March 2006, the African Commission delegation called on civil society and NGOs in particular to further consolidate their activities in the area of sensitisation of the population on human rights issues through the promotion of the African Charter. The MBDHP, which has observer status before the African Commission, frequently submits shadow reports to this body. This NGO also issues an annual report on the human rights situation in the country using the African Charter as the basis.

8 Awareness and use by practising and other lawyers

Lawyers in Burkina Faso have little or no awareness of the African Charter or the Women's Protocol. In conducting this research, this writer could not find an instance where lawyers have used the African Charter or the Women's Protocol in their briefings or in any other way related to their work. The interviews that were conducted revealed that lawyers argue that national legislation is comprehensive enough to provide them with arguments for their cases. Nevertheless, most respondents admitted that they have little or no knowledge of these instruments.

9 Incorporation in law school education

The African Charter and the Women's Protocol-based rights are taught at the Faculty of Law and at the National School of Administration and Magistracy (ENAM) for the Human Rights Advisers' Section. At the Faculty of Law, the curriculum focuses on the human rights systems, including the African system. At the ENAM the curriculum known as 'Category rights' is articulated around child rights, women's rights and the rights of people living with disabilities. The African Charter and the Women's Protocol are used to support the content. A course on human rights and public liberties is also taught at the law department of the University of Ouagadougou.⁵ It devotes two full chapters to the African human rights instruments and focuses on the African Charter and its protocols, including the Women's Protocol.

⁵ Outlines of some courses are available.

10 National human rights institutions (NHRIs)

The National Human Rights Commission of Burkina Faso has a draft Action Plan which outlines several projects aimed at promoting and protecting human rights. Though the draft document does not refer directly to the African Charter or the Women's Protocol, its implementation will favour the realisation of rights under these instruments. The office of the Ombudsman traditionally strives to ensure respect for the human rights of the citizenry, but does not expressly refer to the African Charter or the Women's Protocol. As a result of its affiliation to the African Commission, the National Human Rights Commission submits shadow reports to the African Commission, but is not engaged in direct follow up of the implementation of the African Commission's recommendations or decisions against Burkina Faso. Both the National Human Rights Commission and the *Médiateur du Faso* participate in the national validation workshops before state reports are submitted to human rights treaty-monitoring bodies. Besides, their opinion is not directly sought.

11 Academic writing on the African Charter and Women's Protocol

Generally, in Burkina Faso, academic writings on human rights issues are very rare and those focusing on the African Charter or the Women's Protocol are almost non-existent. Academic practitioners explained that this is due to the system put in place by the CAMES (*Conseil africain et malgache pour l'éducation supérieure*), which does not consider publications on human rights when evaluating candidates for promotion.

This state of affairs has led authors in tertiary institutions of learning to limit themselves to theoretical teaching with almost no publication on human rights as a topic. However, Yarga Larba⁶ and Professor Salif Yonaba⁷ have written on human rights, but not with specific focus on the African Charter or the Women's Protocol. Law students have equally written their dissertations on various human rights issues, including on the African human rights system. When talking about the African Charter, the view generally expressed is that it is an African instrument which is based on African values and perspectives.

12 State reporting

Until recently, the Ministry in Charge of the Promotion of Human Rights has always been tasked with leading the state reporting process, including under the African Charter and the Women's Protocol. However, with the latest cabinet reshuffle, it is now the Ministry of Justice and Human Rights that plays the lead role. In fact there are several bodies including inter-ministerial structures that intervene in the reporting process such as the Committee for the follow-up of international accords within the Ministry of Justice and Human Rights and its various focal points designated in all ministries. The inter-ministerial Committee on Human Rights and International Humanitarian Law also plays a part in the reporting process.

The state reporting process is led by the Committee for the Follow-up of International Accords within the Ministry of Justice and Human Rights. The procedure is generally that, first, the Committee sends out letters to the relevant ministerial departments (it has focal points in each ministry) and to civil society groups with a view to collecting information and generate a pre-draft of the report. A cabinet meeting is then held at the ministerial level to validate the draft. This meeting is attended by senior officials of the ministry and presided over by the Minister. The Committee will accommodate comments or inputs of this meeting and produce a draft report. Once the draft report is in place, it is discussed at a national validation workshop attended by relevant ministries, civil society groups and key state institutions such as the Constitutional Court, the Office of the Ombudsman and the Superior Council of Communication. The validated draft report is submitted to the Inter-ministerial Committee on Human Rights and International Humanitarian Law for review. On conclusion of the review, the draft report becomes the project that is presented to the Council of Ministers by the relevant minister. The Council of Ministers adopts the report and transmits it to African Commission through the Ministry of Foreign Affairs. An inter-ministerial delegation, led by the minister in charge of human rights, presents and defends the report before the African Commission at the scheduled session.

Burkina Faso presented its last report at the Commission's 49th session in Banjul, 28 April to 13 May 2011. The report covered the period of 2003-2009. Observations made to Burkina Faso were not disseminated either by the State or civil society groups. NGOs only

⁶ L. Yarga 'La réalisation des droits de l'homme de seconde génération par l'Etat et les organisations non gouvernementales au Burkina' 16 *Revue burkinabè de droit* (1989) 175-200. The author is former Minister of Justice, former Member of the Parliament and President of the *Haute Cour de Justice* of Burkina Faso.

⁷ S. Yonaba *Indépendance de la justice et droit de l'homme: le cas du Burkina-Faso* (1997).

refer to it sporadically during meetings. At the time of writing, the concluding observations arising from the last report are still to be issued by the African Commission.

13 Communications involving this state

There are two communications involving the state of Burkina Faso.⁸ In *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*,⁹ the African Commission found that Burkina Faso was in violation of articles 3, 4, 5, 6, 7(1)(d) and 12(2) of the African Charter, and recommended that Burkina Faso should draw the legal consequences of such a finding, including specific measures enumerated by the African Commission. Very little has since been done to implement the decision of the African Commission. During the four years it took to consider the communication by before the African Commission, Burkina Faso did not fully cooperate. This was indicative of its intention not to comply fully with the decision.

14 Special mechanisms and promotional visits by the African Commission

A sensitisation mission of the African Commission to Burkina Faso, led by Commissioner Rezag Bara, took place from 26 to 30 March 2007.¹⁰ Promotional visits were also conducted in 2002 and 2008. However, no special mechanisms visited the country so far.

⁸ *International Pen v Burkina Faso* (2000) AHRLR 47 (ACHPR 1994) and *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001).

⁹ (2001) AHRLR 51 (ACHPR 2001).

¹⁰ The report of the sensitisation mission is available.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

Poverty, ignorance, lack of awareness of existing human rights instruments and mechanisms, and insufficient political commitment are factors that seriously impede on the positive impact of the African Charter and the Women's Protocol in Burkina Faso. However, the increasing number of active civil society groups and women's rights-based NGOs, the creation of the human rights commission and the national commission to follow up Burkina Faso's commitments in favour of women as well as the translation of the African Charter into local languages, are factors that have and could boost the impact of the African Charter in Burkina Faso.

Burkina Faso hosted the 19th Ordinary Session of the African Commission from 26 March to 4 April 1986. This was an opportunity for local NGOs to know more about the African Commission and its work, and also the conditions for observer status with the African Commission. Also, Ms Salamata Sawadogo, former Minister of Human Rights, chaired the African Commission from 2003 to 2007. She has been a member of this Commission since 2001. During her presidency, citizens of Burkina Faso learned more about the African Commission and relevant documentation and information were provided to national NGOs. As the then Chair of the African Commission she also played a vital advocacy role in the adoption of the legislation allocating gender quotas for parliamentary and local elections. She had issued

a letter to the Speaker of the Parliament to that effect.

Finally, the media can and should play a role in informing the public on the importance and impact of the African Charter. In conducting this study, we did not come across any media report citing or referring to the African Charter or the Women's Protocol. This 30th anniversary of the African Charter should be an opportunity for the media to analyse and report widely on the Charter.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN CAMEROON

*Christèle Diwouta**



1 Introduction and background

Cameroon has acceded to the major international and regional human rights treaties. The African Charter on Human and Peoples' Rights of 1981 (African Charter) was signed on 23 July 1987 and ratified on 20 June 1989 and the Protocol thereto on the Rights of Women in Africa (Women's Protocol) was signed on 25 July 2006 and ratified on 28 May 2009.

2 Ratification of the African Charter and Women's Protocol

In Cameroon, the Constitution of Cameroon (the Constitution) determines which organ has the duty to ratify international treaties. In terms of the Constitution,¹ the executive, through the President of the Republic, has the responsibility to ratify all international treaties. Part VI of the Constitution deals with treaties and international agreements. Illustratively, article 43 provides as follows:

The President of the Republic shall negotiate and ratify treaties and international agreements. Treaties and international agreements falling within the area of competence of the Legislative Power as defined in Article 26 above shall be submitted to Parliament for authorisation to ratify.

On its part, article 44 states

Where the Constitutional Council finds a provision of a treaty or of an international agreement unconstitutional, authorisation to ratify and the ratification of the said treaty or agreement shall be deferred until the Constitution is amended.

Further, article 45 suggests that Cameroon is a monist state as it stipulates that:

Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement.

3 Domestication or incorporation of the African Charter and Women's Protocol

The organ in charge of implementation of the African Charter is the Sub-directorate of NEPAD at the Ministry of External Relations. Regarding the

* LLM HRDA 2004, Researcher, Institute for Democracy in Africa (IDASA), South Africa.

¹ Constitution of the Republic of Cameroon, Law No 96-06 of 18 January 1996 amending the Constitution of 2 June 1972.

Women's Protocol, there is no specific organ in charge of its implementation in Cameroon. However, the State has created an institutional framework that protects and promotes the rights of women and girls. In 1975, the Ministry of Social Affairs was created which later became the Ministry of Women Affairs and is known today as the Ministry of Promotion of Women and the Family. This Ministry's mandate is to put in place measures aimed at the respect of the rights of women in Cameroon, the elimination of all forms of discrimination against women and the promotion of equality in political, economic, social and cultural terms.

There is no separate section in the Constitution that could be referred to as a bill of rights. The revised Constitution of 1996 (1996 Constitution) gives full effect to the fundamental rights and freedoms as spelt out in the Universal Declaration on Human Rights (UDHR), the African Charter and every other ratified international treaty. The 1996 Constitution limits itself to enumerating relevant human rights such as the right to life, the rights to freedom and security, the right to education among others. Having mentioned this, however, article 65 of the 1996 Constitution clearly states that the Preamble shall be part and parcel of the Constitution. Therefore, fundamental rights mentioned in the preamble have equal weight as any other provision in the body of the 1996 Constitution.

As pointed out earlier, in terms of article 45 of the 1996 Constitution, upon ratification and being made public, international treaties have primacy over every domestic law. It is the duty of lawmakers to ensure that, prior to ratification, no provisions of an international convention conflict with existing nation-

al laws. The Parliament of Cameroon has made no reservations while ratifying the Women's Protocol or modified domestic laws before ratification. Any observation or reservations ought to have been raised before ratification.

4 Legislative reform or adoption

The researcher was not able to obtain any relevant information on this issue.

5 Policy reform or formulation

The researcher was not able to obtain any relevant information on this issue.

6 Court judgments

The researcher was not able to obtain any relevant information on this issue.

7 Awareness and use by civil society

Civil society in Cameroon is well aware of the African Charter and the Women's Protocol. As will be illustrated below, the African Charter has been used in NGO's work and its provisions mentioned as well. The ratification of the Women's Protocol in Cameroon has been met with alarm on the part of the Catholic Church with respect to article 14 of the Women's Protocol on health and reproductive rights. In a resolution marking the close of the 34th Assembly of the National Episcopal Conference of Cameroon, the bishops condemned the Cameroonian Government for ratifying the Women's Protocol on the grounds that it violates Cameroonian laws by permitting abortion. Following the Bish-

ops' Resolution, a protest was held in the Douala Archdiocese.²

Article 14(2)(c) of the Women's Protocol on health and reproductive rights, which is the bone of contention, calls on governments to, 'protect the reproductive rights of women by authorising medical 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'. Article 337 of the Cameroonian Penal Code which deals with abortion severely sanctions abortion. In terms of this provision, abortion can only be undertaken in the case of pregnancy resulting from rape subject to judicial approval. Abortion may also be carried out for medical reasons as stipulated in article 339 of the Penal Code. According to the relevant Minister, 'no one can hide behind the Women's Protocol to justify infanticide, or similar practices'.³

Civil society organisations in Cameroon have had occasions to submit shadow reports before treaty-monitoring bodies. For instance, the Danish International Working Group on Indigenous Affairs (IWGIA) submitted complementary information in 2006 to the African Commission in preparation of the revision of Cameroon's periodical report. The summary of the information was on

the rights of indigenous people in Cameroon.⁴

In preparation for the examination of Cameroon's periodic report by the African Commission in May 2010, the Centre for Environment and Development (CED), in collaboration with local partners, undertook consultations with communities in Eastern and Southern Cameroon. The consultations took place in March 2010. The purpose of the study was to gather information on the situation of indigenous women in Cameroon's forests in order to better inform the elaboration of a supplementary report to the African Commission and to report on the situation of indigenous women and peoples in the country. Then, later in March 2010, indigenous women in Cameroon also had the opportunity to voice their concerns at the National Forum on Forests which welcomed the participation of 11 indigenous women.

Building on their supplementary report submitted to the United Nations Committee on the Elimination of Racial Discrimination, in January 2010, CED, the *Réseau Recherches Actions Concertées Pygmées* (RACOPY), and FPP, included the issues raised by indigenous women and their communities during the consultations and at the National Forum on Forests in their supplementary report to the African Commission. These issues included the multiple forms of discrimination faced by indigenous women in society; the violation of their reproductive rights; indigenous women's increasing lack of access to health care, water, and traditional resources; and the obstacles to conducting their

² Cameroon: abortion, the Catholic hierarchy and the Women's protocol http://goliath.ecnext.com/coms2/gi_0199-12086493/Cameroon-abortion-the-Catholic-hierarchy.html (accessed 1 September 2011).

³ Grace Ongey 'Marie-Therese Obama, minister of female empowerment and family. Female Empowerment and Family Minister says Cameroon has not legalised abortion and homosexuality' <http://www.leffortcamerounais.com/2009/10/female-empowerment-and-family-minister-says-cameroon-has-not-legalised-abortion-and-homosexuality.html?cid=6a00d83451c73369e20120a8e780dd970b>.

⁴ International Working Group on Indigenous Affairs (IWGIA) 'Eléments complémentaires sur les droits des peuples autochtones au Cameroun' May 2006.

traditional and income-generating activities, which contribute to food insecurity, greater marginalisation, and extreme poverty. The report recommended that the Commission urge Cameroon to take concrete measures to protect doubly marginalised indigenous women.

The concluding observations that followed the consideration of Cameroon's state report are remarkable for the number of recommendations relating to the rights of indigenous peoples. Many of the recommendations can be said to draw on the information outlined in the supplementary report submitted to the African Commission. In addition to recommending that Cameroon 'harmonises the national legislation with the regional and international standards on the rights of indigenous populations or communities' and 'work towards the consideration of their cultural peculiarities', the African Commission also expressly urged Cameroon to 'take special measures to guarantee the protection and implementation of indigenous women's rights due to their extreme vulnerability and the discrimination to which they are subject to'. These recommendations constitute important legal standards and a significant step for indigenous peoples and women. They can now be used at the national level for the recognition and realisation of their rights.⁵

8 Awareness and use by practising and other lawyers

The researcher was not able to obtain any relevant information on this issue.

⁵ See Forest Peoples 'Advocacy efforts lead to African Commission's increased consideration of indigenous women's rights' <http://www.forestpeoples.org/topics/gender-issues/news/2011/06/advocacy-efforts-lead-african-commissions-increased-consideration> (accessed 1 September 2011).

9 Incorporation in law school education

The law faculty of the University of Dschang conducts training on human rights. Before 2009, the programme was a *Diplôme d'Etudes Supérieures Spécialisées* (DESS) in human rights and humanitarian action. Since the university reform in 2009, this programme is the equivalent of a masters' degree and has a module in African human rights law which draws content from the African Charter as well as the Women's Protocol.

At the University of Buea, there is a course on introduction to human rights, which also touches on the African human rights system. However, the course is an elective for students with specific interest in the discipline of human rights. In the same vein, the *Association pour la Défense des Droits de l'Homme en Afrique Centrale* (APDHAC), an NGO based at the Catholic University of Central Africa (UCAC), has a fully-fledged programme on human rights in Africa. This institution, through UCAC, offers masters' and doctorate degrees in human rights. The institution also offers year-long short courses on different aspects of human rights on the African human rights system and beyond.

10 National human rights institutions (NHRIs)

The researcher was not able to obtain any relevant information on this issue.

11 Academic writing on the African Charter and the Women's Protocol

The researcher was not able to obtain any relevant information on this issue.

12 State reporting

Cameroon has submitted one initial report and two periodic reports to the African Commission.⁶ Periodic reports have, as a goal, to present the progress and difficulties in implementing human rights in a country. In the case of Cameroon, periodic reports have been cited as being a means to show that international conventions constitute domestic legislation and could be invoked in a court of law in Cameroon.⁷

A state report in Cameroon is prepared by inter-ministerial collaboration between the Ministry of Foreign Affairs, and the Ministry of Justice. More specifically, the report is prepared by the Division of International Cooperation and the Division of Human Rights in the Ministry of Justice. The African Affairs Division at the Ministry of Foreign Affairs also takes part in this process.

Having said this, however, in its concluding observations, the African Commission regretted the fact that Cameroon's latest periodic report did not take into account the concluding

observations adopted at the 39th Ordinary Session following the presentation by Cameroon of its last periodic report. In addition, the African Commission noted that there is no reference in the report to the conditions under which the report was prepared and as to the involvement of civil society in the drafting process.⁸

13 Communications involving this state

To date, the African Commission has received eleven communications against Cameroon filled by civil society organisations on behalf of individuals and by individuals themselves.⁹ Of these eleven communications, six communications were declared inadmissible on grounds ranging from the fact that Cameroon was not yet a Member State at the time the communications were filed,¹⁰ or non-exhaustion of local remedies¹¹ to the decision of the African Commission not to take the matter further.¹²

Of all the communications brought before the African Commission against Cameroon, the *Open Society Justice Initiative (on behalf of Puis Njawe Noumeni) v Cameroon* has received continuous and intensive media attention for over a decade now.¹³ This case was finalised by way of an amicable settlement between the parties. The complaint

⁶ The initial report was presented in 2002 in Pretoria, South Africa. The first report was presented in Banjul, The Gambia in 2006 and the second report, which covered the period 2003-2008, was presented during the 47th session of the Commission in May 2010 in Banjul, The Gambia.

⁷ BR Guimdo Dongmo 'Le droit d'accès à la justice administrative au Cameroun: Contribution à l'étude d'un droit fondamental' *Revue de la recherche juridique-droit prospectif* (2008) 463.

⁸ Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Cameroon, Adopted at the 47th Ordinary Session of the African Commission on Human and Peoples' Rights held from 12 to 26 May 2010, Banjul, The Gambia.

⁹ See http://www.achpr.org/english/_info/index_Decision_Cameroon.html.

¹⁰ See *International PEN v Malawi, Ethiopia, Cameroon and Kenya* (unreported) Communication 19/88 7th Activity Report.

¹¹ See *Miss A v Cameroon* (2004) AHRLR 39 (ACHPR 2004).

¹² See *Amuh Joseph Vitine v Cameroon* (2000) AHRLR 55 (ACHPR 1994).

¹³ (2006) AHRLR 75 (ACHPR 2006).

lodged by an NGO maintained that following the liberalisation of airwaves in 2000, an application with the Ministry of Communications of Cameroon for a licence to operate a radio station was put forward. After the six months required period as prescribed by law, the Ministry did not respond favourably to the request arguing that the application was still being considered. The complainant started broadcasting programmes and the Ministry of Communication banned the radio station and the police and army sealed the premises of the radio station.

The complainant requested the African Commission to consider the above facts in violation of articles 1, 2, 9 and 14 of the African Charter and pleaded with the African Commission to request Cameroon to pay adequate compensation to the victim for multiple violations of their rights and freedoms. At the 36th Ordinary Session of the African Commission, the Minister of Justice at the time offered his good offices with a view to facilitating an amicable solution to the matter. At the 38th Ordinary Session, the complainant informed the African Commission that the Government of Cameroon dropped the criminal charges against the radio station director and released the equipment. The government also granted provisional authorisation to broadcast. On its part, the director of the radio station agreed to discontinue the communication before the African Commission. The African Commission took note of the above request and closed the file.

14 Special mechanisms and promotional visits by the African Commission

As to special mechanisms, in September 2002, Dr Vera Chirwa, the then Special Rapporteur for Prisons and Detention Conditions of the African Commission, visited prisons and detention centres in Cameroon. The objective of the visit was to assess and document the conditions of detention in Cameroon, make immediate recommendations where necessary and initiate co-operation with the Government of Cameroon towards the improvement of prison conditions in the country.¹⁴

In February 2011, the Chairperson of the African Commission, Reine Alapini-Gansou, headed a delegation to Cameroon with special focus on the conditions as well as the rights of women and journalists who were being held under detention. In the delegation was Justice Lucy Asuagbor, a Cameroon national by birth, who is the Special Rapporteur on Human Rights Defenders in Africa in the African Commission. The visit to Cameroon was essentially to go through the conditions of promotion and safeguarding of human rights in the country, stating that the Commission during each situation has specific concerns to address with each member state.¹⁵ Reine Alapini Gansou noted with satisfaction that Cameroon has opened its doors to the

¹⁴ Prisons in Cameroon report of the Special Rapporteur on prisons and conditions of detention in Africa – the African Commission on Human and Peoples' Rights Report to the Government of the Republic of Cameroon on the visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa from 2 to 15 September 2002.

¹⁵ Cameroon today 'Commission verifies human rights in Cameroon'<http://news.cameroon-today.com/commission-verifies-human-rights-in-cameroon/4122/#ixzz1WhTGA411>.

mission without any restraints. The mission met with ministers of external relations, justice, territorial administration and decentralisation, defence as well as the general delegation for national security, the Supreme Court representative and the Prime Minister of Cameroon.¹⁶

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

There are indeed factors that play in favour or against the implementation of the African Charter and the Women's Protocol in Cameroon. For starters, Cameroon has not yet complied with the 50:50 gender parity in parliament and other leadership positions. Women and especially indigenous women are still marginalised despite the adoption by the African Commission of a Resolution on the Protection of Rights of Indigenous Women in Africa.

Cameroon has not implemented the concluding observations and recommendations by the African Commission with necessary speed, which include the ratification of the African Charter on Democracy, Elections and Governance,¹⁷ the Protocol to the African Charter on Human and Peoples' Rights on the Establishing the African Court on Human and Peoples' Rights, and to lodge the declaration under article 34(6) of this Protocol.

Some laws or the absence thereof are in conflict with the Women's Protocol which Cameroon has ratified. For

instance, marital rape is still not punishable under Cameroonian law. Cultural and customary beliefs are at loggerheads with the Women's Protocol. Female genital mutilations still exist in some parts of the country as well as child marriage and wife inheritance.

The Women's Protocol has received extensive media attention that sent the church into frenzy because of its article 14, but other steps have not been taken to promote the protocol and its other provisions.

In spite of the above, Cameroon has been co-operative in submitting periodic reports to the African Commission and has received several delegations from the African Commission on fact-finding missions without restraints as indicated earlier in this report.

Although Cameroon has never hosted any session of the African Commission, Chief Justice Lucy Asuagbor, a native of Cameroon, has been elected as the African Commission's Special Rapporteur on Human rights Defenders in Africa in 2010 upon recommendation of the President of the Republic. Among other duties, Lucy Asuagbor was allocated Benin, Rwanda, Guinea Bissau and Togo as countries where she will have to undertake promotional missions during her tenure.

¹⁶ As above.

¹⁷ Cameroon has since ratified this treaty thereby launching it into force.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN CHAD

*Francis Nadjita Ngarhodjim**



1 Introduction and background

Chad became a party to the African Charter in 1986,¹ at a time when the country was under a repressive regime governed by the Fundamental Act promulgated by Hissène Habré's Commanding Council of the Northern Armed Forces on 29 September 1982. As to its implementation, the Ministry in Charge of Human Rights and the Promotion of Liberties is the focal point for Chad's obligations under international and regional human rights instruments. Within this Ministry, the responsibility for following-up on Chad's human rights obligations is assumed by the Director of Studies, Legislation and Litigation. The current Director, Mr Rotta Dingamadji Carlos, acknowledged that Chad has not submitted any report to the African Commission since 1996, but stated that he was planning to lead an inter-ministerial mission (with the participation from the Ministry in charge of Human Rights and the Promotion of Liberties, the Ministry of Defence, the Ministry of

National Security, the Ministry of Social Action and the Ministry of Justice) to the African Commission to discuss the best ways in which Chad could live up to its obligations under the African Charter.

2 Ratification of the African Charter and Women's Protocol

Under the current Constitution of Chad, international treaties are negotiated and ratified by the President of the Republic (1996 Constitution).² In terms of article 220 of the 1996 Constitution, the ratification of some treaties, including peace treaties, defence treaties, trade treaties, and those treaties relating to the use of the national territory or the exploitation of natural resources, agreements relating to the international organisation, treaties involving state finances, and treaties relating to the status of persons, must be authorised by the National Assembly.

In terms of article 10 of the Fundamental Act, the President of the Republic shall 'negotiate, sign and ratify' international treaties, conventions and agreements. Only treaties involving territorial integrity, national defence and

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¹ Chad signed the African Charter on 29 May 1986, ratified it on 9 October 1986 (ratification instruments deposited on 11 November 1986).

² Adopted on 31 March 1996 and promulgated on 14 April 1996.

the country's political, economic and social orientation were to be ratified after consultation with the Council of Ministers and of the National Consultative Council.³ Human rights treaties did not fall under the category of treaties subjected to a prior opinion of the National Consultative Council. The African Charter was therefore ratified by the President of the Republic without any other form of authorisation or consultation and no official reason was given for the ratification of the African Charter. In our view, however, ratifying the African Charter was just part of a trend for the ratification of African regional instruments as a sign of the country's (specially the Habré regime) commitment to African unity as promoted then by the Organisation of African Unity (OAU).

Chad signed the Women's Protocol on 6 December 2004, but it is still to ratify it. The Government introduced a bill for the ratification of the Women's Protocol, but the bill has been rejected twice by the National Assembly because of the hostility of the Muslim community and leadership as a result of presumed incompatibility with prevailing religious convictions regarding the treatment of women. It is still unclear as to when the bill could be ultimately enacted as law.

3 Domestication or incorporation of the African Charter and Women's Protocol

According to article 222 of the 1996 Constitution, international treaties shall

have precedence over national legislation. It is worth mentioning that 'national legislation' in this case seems to exclude the Constitution, considering the power confirmed on the Constitutional Council by article 162, namely, to check the conformity to the Constitution of laws, treaties and international instruments. As a result of this 'constitutionality check', no treaty shall be ratified if any of its provisions has been declared non-compliant with the Constitution. The 1996 Constitution has to be amended before such treaty is ratified or implemented.⁴

The African Charter enjoys a special status under Chad's legal framework. As a matter of fact, in addition to the provision on the precedence of international treaties over national legislation, the Preamble, which is part and parcel of the 1996 Constitution, solemnly reaffirms Chad's commitment to the principles of human rights included in international treaties, with an express reference to 'the Charter of the United Nations of 1945, the Universal Declaration of Human Rights of 1948 and the *African Charter of Human and Peoples' Rights of 1986*' (emphasis added). Furthermore, almost all the rights contained in the African Charter are included in the Bill of Rights or other constitutional provisions. One could therefore argue that the African Charter has a constitutional value in Chad by virtue of the express reaffirmation in the preamble of Chad's commitment to its principles and the fact that the rights enshrined in the African Charter are also protected under the Bill of Rights and other constitutional provisions.

³ The National Consultative Council was an advisory body of 30 National Counsellors representing the then 14 regions of the country and the Capital City N'Djamena (that is, two per constituency). National Counsellors were appointed and revoked by the President of the Republic (Arts 7 and 24 of the Fundamental Act).

⁴ Art 221 of the Constitution. See also N Ngarhodjim 'An Introduction to the Legal System and Legal Research in Chad' *Globalex* (December 2007).

It is further worth indicating that systematic explicit reference to the African Charter is made by Chad's constitutions that have been adopted since the country ratified the African Charter. Both the 1989 and the 1996 Constitutions include a preambular provision reaffirming Chad's commitment to the human rights principles enshrined in the African Charter.

4 Legislative reform or adoption

Chad's ratification of the African Charter was a unilateral decision taken by the then President of the Republic Hissène Habré without any debate or consultation. To our knowledge, no compatibility study of domestic law with the African Charter was undertaken prior to ratification. The African Charter impacted on Chad's post-ratification constitutional development in a number of ways. As indicated earlier, the 1989 and 1996 Constitutions and the 1993 Transitional Charter⁵ all make explicit reference to the African Charter and include Bills of Rights that encompass most of the rights enshrined in the African Charter. Although it did not include a Bill of Rights, the National Charter adopted following the December 1990 *coup d'état* that deposed President Hissène Habré, also reaffirmed in its preamble the attachment of the Chadian people to the principles enshrined in the African Charter.⁶ The authors of the 1990 *coup* also committed to 'guarantee individual and collective freedoms in a pluralist democracy'.

⁵ Adopted by the National Sovereign Conference on 5 April 1993.

⁶ The National Charter was promulgated by Chad's new strongman Idriss Deby in his capacity as the Chairman of the National Council for Salvation on 28 February 1991.

5 Policy reform or formulation

The promotion and protection of human rights were included in Chad's 2003 and 2008 National Poverty Reduction Strategies. Upon the recommendation of the 2003 National Conference on the Justice Sector (*états généraux de la justice*), Chad adopted the National Programme for the Reform of the Justice Sector in 2005. Two out of the four objectives of the Justice Sector Reform are 'a better protection of human rights' and 'a programme of information, education and communication to better inform citizens of their rights and duties'. However, there is no specific reference to the African Charter in these various policy documents.

6 Court judgments

Chadian judges seldom refer to international law in their decisions. Finding a reference to international human rights instruments or quoting jurisprudence of the African Commission or any decision, resolution, declaration or concluding observations adopted by the continental body in Chadian court decisions is a very difficult undertaking. In the course of our research, we did not find any court decision in Chad explicitly quoting the African Charter. That notwithstanding, nothing legally prevents courts in Chad to use international human rights instruments as the legal basis for their judgments, provided that such instruments are 'regularly ratified and published'.⁷ Thus, in *Société des femmes tchadiennes transitaires v Ministry of Finance*,⁸ the Supreme Court ruled that a decision by the Director General of Customs denying women access to the

⁷ Article 222 of the 1996 Constitution.

⁸ Supreme Court Decision No 024/05 of 13 December 2005, *RJT* No12, September 2007.

customs offices was discriminatory and in violation of article 13 of the 1996 Constitution ('Chadians of either sex have the same rights and the same duties. They are equal before the law'.)

In Chad, which is a civil law country, jurisprudence is a secondary ('indirect') source of law. The impact or influence of jurisprudence on court decisions is usually implicit, with courts referring generally to the 'trend' in the application of a certain law by courts seized of similar matters. Thus in several decisions, the Court of Appeal of N'Djamena and the Supreme Court use the expression '*il est de jurisprudence constante*' ('according to a constant jurisprudence').⁹ In *ATETIP v MA*,¹⁰ the Supreme Court even quoted the jurisprudence of the Court of Appeal of Ouagadougou and the Supreme Court of Cameroon without giving any further details as to the facts of these cases or the ruling of these foreign courts. That means that nothing in law prevents the courts in Chad from making reference to the jurisprudence of the African Commission.

7 Awareness and use by civil society

The African Charter is not well-known by civil society organisations, including human rights organisations, even though six Chadian NGOs have observer status with the African Commission and sometimes attend sessions of the Commission and the NGO Forum lead-

ing to each session.¹¹ Some of the NGOs contacted for the purpose of this research, especially the Chadian Association for the Promotion and the Defence of Human Rights (ATPDH) and the Chadian League for Human Rights (LTDH), indicated that they use the African Charter in their promotional activities (trainings, workshops, etc.). However, by and large, it should be acknowledged that the level of awareness of African human rights instruments is very low, taking into account that human rights organisations only have a 'superficial' knowledge of these instruments. Both the ATPDH and LTDH responded that they do not use the African Commission resolutions and concluding observations in their work. They claim that they are usually not served with copies of any documents adopted by the African Commission and could therefore not include them in their work. Despite it being a channel dedicated to human rights issues, the FM Liberty (a community radio established by a coalition of human rights civil society organisations) vaguely makes reference to the African Charter without any specific programme dedicated to this instrument. Unsurprisingly, Chadian NGOs with observer status have never submitted any shadow report to the African Charter.

⁹ See for instance *Société Garantie v Koulabé Doudji* (Court of Appeal of N'Djamena, decision No 54 of 10 July 2002) and *NK and 57 Others v Municipality of N'Djamena* (Supreme Court Decision No 00017/06 of 3 November 2006).

¹⁰ Supreme Court Decision No 10/CS/CJ/SS of 9 October 2001.

¹¹ The following NGOs have Observer status with the ACHPR: Association tchadienne pour la promotion et la défense des droits de l'homme (ATPDH), Association tchadienne des juristes (ATJ), Association des femmes juristes du Tchad (AFJT), Ligue tchadienne des droits de l'homme (LTDH), Droits de l'homme sans frontière (DSF), Tchad Non Violence (TNV). LTDH informed the researcher that they have not attended any session of the ACHPR for the last 10 years due to financial constraints. The same applies to most Chadian NGOs.

8 Awareness and use by practising and other lawyers

Many lawyers are members of human rights associations and do have some knowledge of the African Charter. However, they usually do not invoke the African Charter in their pleadings.

9 Incorporation in law school education

Since 2004, the African Charter is taught as part of a chapter on regional human rights mechanisms in the fourth year of study at the University of N'Djamena Law School.

10 National human rights institutions (NHRIs)

A National Human Rights Commission was established in 1994¹² and was granted affiliate status by the African Commission during the 29th Ordinary Session held in Tripoli, Libya. However, since 2006 the Commission has been dormant with its members having not held a meeting for a very long time. Its office space has ceased to exist.

The Office of the National Mediator (Ombudsman) indicated that they do not use the African Charter in their activities and do not follow-up on the implementation of concluding observations and decisions of the African Commission although the office is actively involved in the preparation of state reports.

11 Academic writing on the African Charter and Women's Protocol

The author did not come across any academic writings dedicated to or making reference to the African Charter.

12 State reporting

State reporting to international and regional human rights bodies is the responsibility of an inter-ministerial committee convened by the Ministry in charge of Human Rights and Promotion of Liberties, with participation from the Ministries of Defence, National Security, Social Action, Justice, Foreign Affairs, the National Human Rights Commission, the Office of the National Mediator and one civil society representative. So far, Chad submitted only one report to the African Commission under article 62 of the African Charter.¹³

13 Communications involving this state

There has been only one communication decided by the African Commission against Chad that went as far as the merits stage, which is *Commission nationale des droits de l'homme et des libertés v Chad*.¹⁴ However, the low level of awareness of the African human rights system in Chad and the fact that the communication was submitted by a relatively unknown French organisation resulted in the decision going unnoticed in Chad. Furthermore, the fact that the decision just found the Government of Chad in violation of African Charter

¹² Law No 031/PR/94 of 9 September 1994.

¹³ Considered by the ACHPR during the 25th Ordinary Session held in Bujumbura, Burundi, from 26 April to 5 May 1999.

¹⁴ (2000) AHRLR 66 (ACHPR 1995).

provisions without prescribing any remedy, made it very difficult, if not impossible, to assess Government efforts to remedy the violations by implementing the decision.

14 Special mechanisms and promotional visits by the African Commission

There has never been any special mechanism or promotional visit of the African Commission to Chad.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

There seems to be a willingness by Chad to promote and protect human rights in the recent years, as evidenced by the establishment of a Ministry in charge of Human Rights, the holding of the 2003 National Conference on the Justice Sector followed by the adoption in 2005 of the National Programme for the Reform of the Justice Sector, the holding from 9 to 11 March 2010 of the National Forum on Human Rights that took a stock of the situation of human rights in the country and made concrete recommendations for their improvement, and the efforts made by the country to fulfil its human rights obligations within the framework of the United Nations, among other indicators.¹⁵

However, there seems to be a problem of poor familiarity with the African human rights system known both among Chadian authorities and civil society organisations. This, in our view,

is mainly due to the fact that very little has been done by the African Commission to engage the country on its obligations under the African Charter. To date no session of the African Commission has ever been held in Chad and the African Commission and its special mechanisms never visited the country.

There is therefore a need for the African Commission to better engage the Government of Chad on its obligations under the African Charter, for instance by holding a session in Chad and undertaking missions to Chad. Such sessions and missions would contribute to popularising the African Commission and the African Charter in Chad and could provide an opportunity for training sessions and workshops for Chadian human rights organisations and lawyers on the African human rights system.

¹⁵ Chad underwent the Universal Periodic Review on 5 May 2009.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN CONGO

*Estelle Nkounkou Ngongo**



1 Introduction and background

The Republic of Congo (Congo) ratified the African Charter in 1982, but has not yet ratified the Women's Protocol. The African Charter is not well known because of lack of public awareness initiatives. Scholars focus more on international treaties, such as the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Generally, the African Charter is hardly ever used in court judgments or by the National Human Rights Institutions. Some non-governmental organisations (NGOs), which regularly work with the African Commission, use the African Charter, but they face serious lack of its enforcement. Despite the fact that Congo hosted a session and has two nationals among former commissioners of the African Commission, the effectiveness of the African Charter still needs to be adequately addressed.

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2 Ratification of the African Charter and Women's Protocol

According to article 178 of the Congolese Constitution¹ the President negotiates, signs and ratifies treaties and international agreements. Ratification occurs after parliamentary approval.

3 Domestication or incorporation of the African Charter and Women's Protocol

Congo is a monist state. This means that all ratified treaties are applicable in the domestic legal system without any specific acts of domestication. Accordingly, article 184 of the Constitution provides that:

All treaties or agreements, regularly ratified or approved, have from their publication, a higher authority than national laws, subject to their application by the other party.

4 Legislative reform or adoption

There is no available information about a compatibility study of domestic law with the African Charter that was undertaken before its ratification.

¹ Constitution of 22 January 2002.

Though a monist state, Congo does not have a real problem in matters of domestication as treaty ratification cannot occur without Parliament authorisation,² which should ensure that they will not be a conflict between a treaty and the Constitution. The compatibility test is by way of consulting the Constitutional Court which has the duty to control the constitutionality of domestic laws as well as international treaties and agreements.³

There is no particular law that was adopted to facilitate the implementation of the African Charter. However, in February 2011, Congo adopted a law on the Promotion and Protection of Indigenous Peoples' Rights in Congo.⁴ This law subscribes to the principle of non-discrimination of article 2 of the African Charter and the protection of minority group rights.

5 Policy reform or formulation

There is no government policy on HIV/AIDS strategy, although steps have been taken to prepare a Congolese legal framework concerning HIV/AIDS. For instance, in 2009, the Association MIBEKO organised a workshop on the importance of the definition of an adequate legal framework for the elaboration of specific law on HIV/AIDS⁵ and to constitute a database for the elaboration of the project law.

² Art 178 of the Constitution.

³ Art 146 of the Constitution.

⁴ Loi no 5-2011 du 25 Février 2011 portant promotion et protection des droits des populations autochtones en République du Congo.

⁵ Association MIBEKO is an organisation which works on capacity building of national Congolese in human rights, legal assistance to vulnerable people and people living with HIV/AIDS.

6 Court judgments

A lawyer, one Advocate Alide Bouanguï,⁶ said that she once used article 7 of the African Charter to recall the right of fair trial for everyone in one case to sustain her argument. The case is still pending in court. Congolese courts tend to breach the African Charter principles mainly through ignorance. For instance, the Constitutional Court⁷ infringed article 2 of the African Charter on non-discrimination by legitimatising discrimination against women in Congo regarding the treatment of adultery.⁸ When a similar case was submitted to the Benin Constitutional Court, the judge declared the provision criminalising adultery by women unconstitutional. Due to the lack of awareness, the Congolese case was not submitted before the African Commission on the basis of its violation of article 2 of the African Charter. This illustrates very well the need of capacity building for lawyers and magistrates on the use of the African Charter as an interpretative tool or source of substantive rights.

7 Awareness and use by civil society

The degree of awareness of the African Charter and the Women's Protocol is very low. Many NGOs are not familiar with the African Charter and thus do

⁶ Telephone interview, 9 September 2011.

⁷ No 1/DCC/SVE/03 of 30 June 2003. Decision of the Constitutional Court on adultery, the Constitutional Court was asked to declare arts 336 and 337 of the Penal Code unconstitutional as they treat women adultery in a discriminatory manner compared to men adultery. ddata.over-blog.com/1/.../Congo-Brazzaville/CC-Congo-2003-adultere.doc (accessed 26 August 2011).

⁸ See Dr Ibrahim Salami 'Le traitement discriminatoire des délits du mariage devant les cours constitutionnelles béninoise et congolaise' ddata.over-blog.com/.../SALAMI-traitement-discriminatoire-delits-de-

not use it in their work. One of the most prominent NGOs, namely, the *Association pour les Droits de l'Homme et l'Univers Carcéral* (ADHUC), has come up with a project designed to ensure improved awareness of the African Charter, but lacks funds to implement the project.⁹ The same organisation, ADHUC, has submitted a shadow report during the 46th session of the African Commission when Congo submitted its 2nd periodic report.¹⁰

8 Awareness and use by practising and other lawyers

The African Charter is not well known among lawyers and therefore is not really used. Many lawyers are ignorant of the existence of the African Charter hence an extended inability to use it. Lack of awareness about treaties ratified by Congo is common to lawyers and magistrates in the country. According to Advocate Alide Bouangui,¹¹ 'as part of the Constitution the African Charter can be used before the Court, but one should know about it and how to use it. The main problem is the absence of effectiveness of the African Charter and all treaties ratified by Congo'. She had used the African Charter once and the judge reacted favourably. However, she added that, she was able to use the African Charter because she studied it when she read for her post-graduate qualification in Cameroon. Advocate Bouangui regrets that there is no special programme that addresses this problem, as the few workshops organised by NGOs target only a small number of people. Lawyers and magistrates need strong capacity building on the use of

the African Charter and other treaties ratified by Congo in their respective work. This will lead to improved effectiveness of the instrument in Congo.

9 Incorporation in law school education

There is a mandatory program on 'public liberties' from the second year of study for the law license, until the final year of a post-graduate master's degree in public law. This programme teaches about different aspects of human rights. However, the programme has been criticised for not being practical and not building capacity on how to use the African Charter as well other treaties on a daily basis.¹²

10 National human rights institutions (NHRIs)

There is a National Human Rights Commission. According to Mviri Kevin, ADHUC's Program Officer, the NHRIs does not conduct awareness campaigns on the African Charter or others treaties related to human rights. It also does not issue press statements when needed and is not independent from the state. It does not involve itself in following up on concluding observations and decisions. It is understood that the NHRI is involved in the preparation of state reports, but it does not take a lead role in monitoring the implementation of concluding observations and decisions of the African Commission. The NHRI has a limited number of activities. Furthermore, it is not affiliated to the African Commission, and does not

⁹ Email from Kevin MVIRI, ADHUC Program Officer, Brazzaville, Congo.

¹⁰ Congo has submitted all its periodic reports.

¹¹ Telephone interview, 9 September 2011.

¹² Interview with Mr Marion Mouandzinba Ewango, Professor of Political Sociology, Faculty of Law, Université Marien Ngouabi, Brazzaville, 30 August 2011.

take part in African Commission activities.

11 Academic writing on the African Charter and Women's Protocol

The researcher was not able to obtain any relevant information on this issue.

12 State reporting

The Ministry of Justice is responsible for state reporting.¹³ The Ministry of Justice is identified as the technical ministry which coordinate the preparation of the state reports in collaboration with the Ministry of Foreign Affairs and other ministries that may need to be involved in the process.

13 Communications involving this state

Congo has never responded to communications submitted against it and consequently no exposure has been given to the findings at the national level. Lack of awareness remains the main problem. Only a few NGOs that work closely with the African Commission are aware of cases submitted before the African Commission and try to follow their implementation.

14 Special mechanisms and promotional visits of the African Commission

In 2008 Congo received its first promotional visit by Commissioner Soyata Maiga, who was in charge of the coun-

try and was also the Special Rapporteur on Women Rights.¹⁴ One of the main recommendations made by the Commissioner was that the state should ratify the Women's Protocol as well the Protocol on the Establishment of the African Court on Human and Peoples' Rights. Congo has not taken any steps have been taken to implement this important recommendation. Yet on the other hand, the Special Rapporteur on Human Rights Defenders in Africa is understood to have requested on several occasions, an invitation to visit the country, but is still to be invited.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

Lack of awareness impedes heavily on the effectiveness and impact of the African Charter. The low exposure on the work of the African Commission is also a problem. Moreover there is a need of the establishment of a strong and more practicable human rights programming in the university.

Congo hosted a session of the African Commission in November 2007. This gave a limited and temporary exposure to the work of the African Commission. However, ignorance about the importance of the African Commission is still very strong among stakeholders.

To date, two Congolese nationals have been members of the African Commission. These are Alexis Gabou (1987 to 1993) and Advocate Julienne Ondziel-Gnelenga (1995 to 2001). Gabou did not play a notable role within the African Commission, but Advo-

¹³ Interview with Mrs Lauria NGUELE, Administrative and Legal Counsel, Ministry of Foreign Affairs and Cooperation, 30 August 2011.

¹⁴ She is still holding the mandate.

cate Ondziel-Gnelenga played an important role on the adoption of the Women's Protocol. Indeed, in her capacity as Special Rapporteur on Women Rights she worked to get the Women's Protocol drafted and approved.

Limited exposure is given by the media to the implementation of the African Charter. Although the media cover workshops or other meetings organised by civil society and even publish their press releases, there is no deliberate engagement by the press with the issues of human rights and particularly on the promotion of the African Charter and its implementation in the country.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN CÔTE D'IVOIRE

*Armand Tanoh**



1 Introduction and background

The African Charter was adopted on 21 June 1981 in Nairobi, Kenya. All member states of the African Union have ratified this key instrument in the protection and the promotion of human rights in Africa. Côte d'Ivoire ratified the African Charter in 1992. As clearly mentioned by article 2 of the African Charter, members states should take steps to give effect to its provisions.¹ As far as Côte d'Ivoire is concerned, it could be submitted that the different measures adopted to give effect to the African Charter are still unclear due to the fact that the country has witnessed different changes of government and very serious political turmoil.

On the other hand, since ratification in 1992, Côte d'Ivoire has never submitted any periodic report on the implementation of the African Charter. Therefore, conducting a study on a country which has not fulfilled its minimum obligations and where the political

context does not provide any good chance to give effect to the provisions of the African Charter, is very challenging. Côte d'Ivoire has also signed and has only recently ratified the Women's Protocol.² It is clear that different measures and policies have been adopted at the domestic level though they might not be directed by the provisions of the Protocol. In this study, one will focus specifically on the African Charter especially the measures adopted to give effect to the African Charter and also the different policies pertaining to the Women's Protocol.

2 Ratification of the African Charter and Women's Protocol

Like most civil law countries, Côte d'Ivoire practices the monist tradition. This means ratified treaties are theoretically directly applicable provided that they have been regularly published in the *Journal Officiel*.³ In terms of the Ivorian Constitution, the President of the Republic negotiates and ratifies treaties

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¹ Art 2 of the African Charter on Human and Peoples' Rights.

² Côte d'Ivoire deposited its instrument of ratification on 9 March 2012.

³ As art 87 of the Constitution of Côte d'Ivoire of July 2000 reads, 'Les Traités ou Accords régulièrement ratifiés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque Traité ou Accord, de son application par l'autre partie'.

or any other international obligations.⁴ In concrete terms, between the signature and the ratification of the treaty, the National Assembly first needs to authorise the President to ratify the treaty and, secondly, and more importantly the Constitutional Council needs to decide whether the treaty violates any provisions of the Ivorian Constitution of 2000.⁵ It is only after the approval by the National Assembly and the decision of the Constitutional Council authorising the President of the Republic to ratify a treaty that the latter would go ahead with the ratification. This procedure was followed for the ratification of the African Charter on 6 January 1992. On its part, the Ivorian Constitution provides that a treaty, once ratified, has a higher status than the Constitution and any other law of the land.⁶

3 Domestication or incorporation of the African Charter and Women's Protocol

The Ivorian Constitution makes reference to the African Charter in its preamble and other provisions similar to the provisions of the African Charter could also be found in the 2000 Constitution.⁷ The Ivorian Constitution enshrines civil and political rights as well as socio-economic rights from article 2 to article 22. Most of the rights enshrined in this 'Bill of Rights' are civil and political

rights. Like the African Charter, the Ivorian Constitution imposed duties on the individual such as the duty to protect and defend the nation, the duty to pay taxes and the duty to protect the environment.⁸ This 2000 Constitution is clearly different to and has improved upon the Ivorian Constitution of 1960,⁹ where no rights were enshrined at all. No other law makes reference to the African Charter.

4 Legislative reform or adoption

At the time of the ratification of the African Charter, Côte d'Ivoire was still under its first Constitution¹⁰ the provisions of which were similar to the new one as far as treaty ratification is concerned. Under the first Constitution, the Supreme Court had the mandate to check the compatibility of a treaty with domestic laws, especially the Constitution. The Constitution was not amended to comply with the provisions of the African Charter as the 1960 Ivorian Constitution itself made reference to the Universal Declaration of Human Rights (UDHR). The work of the National Assembly has not really been focused on giving effect to the treaties ratified by the State. Most of the activities of the National Assembly as the Executive were mainly focused on the resolution of the conflict.¹¹ For that reason, ratifi-

⁴ Art 84 of the Constitution.

⁵ As an illustration, the President of the Republic seized the Constitutional Council to determine whether the Rome Statute is in conformity with the Constitution. In its decision No 002/CC/SG of 17 December 2003, the Constitutional Council held that the Rome Statute violates the Constitution as it undermines state sovereignty among other constitutional provisions. This decision in essence was not well legally motivated but it indicates the power of the Constitutional Council in the ratification process.

⁶ Art 87 of the Constitution.

⁷ See para 4 of the Ivorian Constitution.

⁸ Art 23 of the Constitution.

⁹ First Constitution of Côte d'Ivoire.

¹⁰ Loi No 60-356 du 3 novembre 1960 portant Constitution de la République de Côte d'Ivoire.

¹¹ This is clearly exemplified by the fact that most of the human rights treaties ratified by Côte d'Ivoire were before 1995. The only major exception is the Protocol on the African Court on Human and Peoples' Rights which was ratified in 2003.

cation of treaties goes at a very slow pace.¹²

5 Policy reform or formulation

From an institutional point of view, different measures have been adopted by the Government of Côte d'Ivoire to give effect to the provisions of the African Charter. Thus, the Government established a Ministry of Human Rights with various departments in order to formulate policies and submit laws to Parliament for a better protection of human rights in Côte d'Ivoire. The State has also established the National Commission of Human Rights (National Commission) with the mandate of protecting and promoting human rights in Côte d'Ivoire. The Government has not really adopted a consolidated plan of action to give effect to the provisions of the African Charter. However, different ministries have adopted sectoral plans for the promotion of human rights in Côte d'Ivoire in the course of discharging their duties.¹³

Côte d'Ivoire has only ratified the Women's Protocol a few days before the compilation of this report.¹⁴ It is, therefore, too early to mention plans that have been adopted to give effect to this Protocol. Nevertheless, in order to give effect to the provisions of Convention on the Elimination of Discrimination Against Women (CEDAW), and to deal

with specific issues pertaining to women, laws and policies have been adopted, which include campaigns of sensitisation of against violence against women developed by the Ministry of Family and Women in the years 2000.¹⁵ A law against female genital mutilation was also adopted in 1998¹⁶ among the adoption of various policies by the Ministry of Family and Women.

As already mentioned above, the fact that Côte d'Ivoire did not ratify the Women's Protocol has not prevented the State from adopting internal measures to deal with specific issues such as the issue of HIV/AIDS. Thus, in 2000, the President appointed a Minister of HIV/AIDS whose mandate was to deal specifically with that issue. The appointment of a minister with a real HIV/AIDS focused agenda has significantly contributed to the drop of the prevalence which decreased from 10% to 4% among sexually active population.¹⁷

6 Court judgments

Unfortunately, the African Charter was never mentioned in any judgment before domestic courts. The judges in Côte d'Ivoire like in many francophone countries still strongly rely on domestic law. There could be many reasons to this. First, most of them are not aware of the international human rights instruments ratified by Côte d'Ivoire. Second, even in cases of awareness, the judges generally do not really know how to motivate or include human rights provisions in

¹² It should however be mentioned that in the 2000s, Côte d'Ivoire ratified the Protocol on the African Court, the Constitutive Act of the African Union (AU), the Charter on the Rights and Welfare of the Child, and the Protocol on the establishment of the AU Peace and Security Council.

¹³ Interviews with officials at the Ministry of Foreign Affairs who referred the researcher to the National Report of Côte d'Ivoire for the Universal Periodic Review.

¹⁴ Côte d'Ivoire ratified the Protocol on 5 October 2011, and deposited its instrument of ratification on 9 March 2012.

¹⁵ National report of Côte d'Ivoire for the Universal Periodic Review (UPR) presented at the session of the Working Group on UPR from 30 November to 11 December 2009.

¹⁶ Loi no 81-640 du 31 juillet 1981 instituant un code pénal; loi no 98-757 du 23 décembre 1998 portant répression de certaines formes de violences à l'égard des femmes, notamment les mutilations génitales.

¹⁷ Based on figures provided by UNAIDS.

their judgments. Lawyers have also not really proven their ability of relying or making reference to human rights provisions in their written and oral submissions before national courts. This state of affairs presents a situation of general ignorance of the African Charter and human rights in general within the Ivorian legal profession.

7 Awareness of and use by civil society

Civil society and human rights organisations have become increasingly active in Côte d'Ivoire especially these recent years.¹⁸ Factors such as political instability and rampant extra judicial killings are some that have contributed to the establishment and development of many human rights organisations. The United Nations Operation in Côte d'Ivoire, through the Human Rights Division, has conducted many activities and has contributed to the strengthening of institutional capacities of civil society organisations, which participate on a regular basis in training activities. Civil society organisations are now highly organised and have been putting in place programme activities on human rights such as different campaigns with human rights agenda.

8 Awareness of and use by practising and other lawyers

One of the main challenges for the popularisation of the African Charter is that lawyers who are supposed to take human rights issues before national courts do not play their part. The fact is that, by and large, they are focused on

¹⁸ Interviews with Pierre Lobé, President of the Association of law students of Côte d'Ivoire, member of the convention of civil society organisations, 5 October 2011.

issues connected to the usual law subjects such as commercial law, civil law and penal law. Only a few lawyers who are human rights activists or involved in human rights activities are aware of the African Charter, the Women's Protocol and other instruments. All in all, lawyers are generally not familiar with international law as well as international human rights law.

9 Incorporation in law school education

Human rights as a course, is not taught in primary and secondary schools in Côte d'Ivoire. However, at university level, human rights education has really evolved these recent years with the development of various master's degrees by the National University as well as different human rights institutes.¹⁹ The African Charter as well as the Women's Protocol is part of the curricula of the university as well as the institutes referred to above.

10 National human rights institutions (NHRIs)

As part of the different peace agreements, the ruling party at that time as well as opposition parties (rebels and non-armed groups) have decided to establish the Ivorian Human Rights Commission (*Commission Ivoirienne des Droits de l'Homme*) (Commission).²⁰ The mandate of this Commission is to

¹⁹ The *Centre de Recherche et d'Action pour la Paix* (CERAP) is an Academic and human rights organisation based in Côte d'Ivoire. In 2003, the Centre established an institute of human rights (*Institut des Droits et de la Dignité Humaine*) ((INDH)). This institute offers master's programmes in the field on human rights since 2005.

²⁰ Décision no 2005-08/PR du 15 juillet 2005 portant création de la Commission nationale des droits de l'homme.

promote and protect human rights in Côte d'Ivoire. It should be mentioned that the composition of the National Human Rights Commission does not comply with the Paris Principles as mentioned in the Commission's report of 2009.²¹ This Commission is presently composed of political parties and as such its independence is seriously compromised.

Since its establishment, the Commission has conducted many activities and missions in the country as well as abroad. It has compiled, consolidated and reported on the situation of human rights in Côte d'Ivoire. In order to do this, the Commission relied on human rights instruments ratified by Côte d'Ivoire such as the African Charter.²² It could be then said that the Commission takes into account the African Charter in its work. The Commission also has competence to hear human rights complaints as has so far received more than 300 complaints. No decision or action has apparently been taken so far.

11 Academic writing on the African Charter and Women's Protocol

There is evidence of quite a significant number of Ivorian academics penning articles and other publications on the African Charter.²³ However, these discussions are mostly philosophical and too academic to have a wider impact in Côte d'Ivoire. Tanoh and Adjolohoun in their article on the prob-

lems of human rights litigation in Côte d'Ivoire and Benin pointed the lack of decisions from Ivorian courts with respect to human rights.²⁴ In addition, lecturers at the National University have written and published a few articles which have unfortunately not received a wider distribution. Therefore, there is very little literature in Côte d'Ivoire with respect to the African Charter.

12 State reporting

Article 4 of the Decision establishing the Ivorian Human Rights Commission gives the latter the mandate to assist the government in preparing reports to human rights treaty bodies. The Commission was then involved in the universal periodic review of Côte d'Ivoire in 2009 and was part of the delegation representing the country during the presentation of the report in Geneva.²⁵ With its life span commencing in 2007, there is no indication it has been involved in the preparation of other reports such as the overdue reports that need to be prepared and submitted to the African Commission in terms of article 62 of the African Charter.

13 Communications involving this state

The two communications that have been brought against Côte d'Ivoire before the African Commission went as far as the merits stage. In these two instances, the African Commission found Côte d'Ivoire in violation of its obligations under the African Charter.²⁶ The first communication dealt with access to land in Côte d'Ivoire by non-

²¹ Rapport Annuel, l'état des droits de l'homme en Côte d'Ivoire <http://cndhci.net/DOCUMENTS/RAPPORT%20ANNUEL%202009%20VERSION%20DU%2014%20JUN%202010.pdf> (accessed 7 October 2011).

²² As above 27.

²³ See R Degni Segui *Les droits de l'homme en Afrique noire francophone* (2001).

²⁴ See A Tanoh & H Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in M Killander (ed) *International and domestic human rights litigation in Africa* (2010).

²⁵ As indicated in the 2009 report.

nationals, while the second communication dealt with criteria for eligibility to stand for the post of president in general elections. The issues dealt by the communications are among the reasons Côte d'Ivoire went through such a serious military and political turmoil. The resolution of the issues remains a priority taking into account, for instance, that constitutional provisions regulating eligibility for presidential candidature have not been changed.²⁷ In the aftermath of these two communications, the African Commission has held that the country has not taken any serious steps to implement the recommendations.

14 Special mechanisms and promotional visits by the African Commission

The African Commission organised three promotional visits to Côte d'Ivoire in 2001 and 2003. These visits took place just after the election of President Laurent Gbagbo as President of Côte d'Ivoire. The 2001 visit took place in the aftermath of violent election protest that left hundreds of people dead. It took place from 4 to 8 February 2001 and the delegation of the African Commission was headed by Mrs Julienne Ondziel-Gnelenga, member of the African Commission and Special Rapporteur on the rights of Women in Africa. Giving the political context of that time, the African Commission's delegation urged the Ivorian Government to conduct investigations on allegations of rape of women in a Police College in 2001 and other human rights violations that

occurred during the election-related protest.²⁸ So far, there has been no action to the effect of prosecuting the perpetrators of these violations who are yet to be identified and apprehended.

The second visit took place from 2 to 4 April 2001. The Chairperson of the African Commission (as he then was) Professor EVO Dankwa headed the delegation. The delegation met different high profile officials, among them the President and ministers, to assess the human rights situation in Côte d'Ivoire.²⁹ Different recommendations were made to the Government of Côte d'Ivoire, among them were; to set up a commission of inquiry to investigate massive human rights violations that took place during election-related protests, the trial of the perpetrators of human rights violations and the submission of periodic reports under article 62 of the African Charter.³⁰ The African Commission itself admitted that no satisfactory measures had been taken in respect of the recommendations made. Now, about 10 years after this promotional visit, the country has not submitted any periodic report to the African Commission.

The third promotional visit took place from 24 to 29 May 2003 and recommendations were related to peace-building and conflict resolution. The recommendations were in the same line with the two earlier visits. Again, nothing has been done so far with regards to investigation and identification of the perpetrators. Following his election as

²⁶ *Mouvement Ivoirien des Droits Humain v Côte d'Ivoire* (I) 2008 AHRLR 62 (ACHPR 2008) and *Mouvement Ivoirien des Droits Humain v Côte d'Ivoire* (II) 2008 AHRLR 75 (ACHPR 2008).

²⁷ Art 35 of the Constitution which brought much debate and led to conflicts has not been amended.

²⁸ See African Commission's Report on the mission to the Republic of Côte d'Ivoire 21 (on file with author).

²⁹ Report of the promotional mission in Côte d'Ivoire from 2 to 4 April 2001 presented at the 33rd Ordinary Session of the Commission held from 15 to 29 May 2003.

³⁰ As above 14.

president, Mr Ouattara sent a letter to the International Criminal Court in the view of investigating the electoral violence that occurred after his election on 28 November 2010. There is no clear way forward about all human rights violations that took place from 1999 to 2010.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

Côte d'Ivoire has the primary responsibility to respect, protect and fulfil the rights enshrined in the African Charter and the Women's Protocol which has been recent, which has been recently ratified.

In order to respect its international human rights obligations, the Ministry of Human Rights was established since 2003 with the mandate of promoting and protecting human rights. Despite different campaigns and activities organised on the ground, the general feeling of civil society organisations is that people in general are not aware of the existence of the African Charter as well as the Women's Protocol.

Côte d'Ivoire ratified the African Charter in 1992. So far, no periodic report has been submitted to the African Commission. On the other hand, Côte d'Ivoire is constantly represented at the African Commission's sessions where they attend different activities and, therefore, is fully aware that the reports are long overdue.³¹ The state does not really seem to realise the importance of submitting these periodic reports. With

this background, one can say that Côte d'Ivoire which has freely ratified the African Charter has a responsibility in enhancing the impact of this instrument.

Côte d'Ivoire has been a very unstable country for almost a decade. The civil war as well as the economic meltdown has put the country on its knees. This instability really complicates any action to promote the African Charter. Human rights violations are more prominent and remedies or access to justice are not really available. However, as mentioned above, the Ivorian authorities are fully aware of the work of the African Commission as they attend the sessions. The challenge is to be able to convey the message or to promote the African Charter on a wider scale. Initiatives are being taken, but are not sufficient, considering the different problems vexing the country. The fact that no reports have ever been submitted to the African Commission is also an obstacle to check the progresses made by Côte d'Ivoire in the promotion and the protection of human rights. This could also be explained by the crisis as all the efforts were prioritised towards the peaceful resolution of the Ivorian crisis.

As mentioned above, the judiciary plays a very important role in the recognition and justiciability of human rights. However, so far no judgment by a national court has been rendered outlining violations of provisions of the African Charter. The judges still strongly rely on domestic law because this is the law they are familiar with. There is no serious initiative or judicial activism despite different trainings organised by international NGOs and international human rights organisations targeting judicial officers. The training of judges prior to taking office does not include human rights and international law as

³¹ See the report of Côte d'Ivoire for the Universal Periodic Review.

such. The Constitutional Council, which is the supreme institution in Côte d'Ivoire with the mandate to protect the Constitution, has not rendered any specific finding on human rights.

The rendering of judicial decisions on human rights cases also requires the involvement of lawyers when drafting or presenting their submissions before national courts. Lawyers in Côte d'Ivoire have not really been able to submit cases on human rights violations. Only a few lawyers who are members of different human rights organisations have a fair knowledge of human rights principles and treaties. In the two communications brought before the African Commission, the *Mouvement Ivoirien des Droits Humains*³² did not have the opportunity to exhaust local remedies as they were not available. If remedies were available, this could have been a very good test for the Ivorian judiciary with respect to human rights adjudication.

One of the means of popularising a human rights instrument is the media. In Côte d'Ivoire, the media has not been very active in the coverage of human rights activities. The African Charter is only discussed during commemorations and anniversaries.

In conclusion, one can say that the promotion of the African Charter as well as the Women's Protocol still has a very long way to go. Different human rights violations that occurred at a massive scale is proof that a lot of work needs to be done. The commitment of civil society organisations as well as other actors enhances good prospects for the full recognition of the rights enshrined in the African Charter as well

as the Women's Protocol on the rights of women. However, Côte d'Ivoire through its authorities, has, so far, failed to demonstrate its strong commitment to comply with the African Charter's obligation under article 62, which is the submission of periodic reports.

³² The President of the MIDH is a lawyer.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN ERITREA

*Muluberhan Hagos**



1 Introduction and background

Eritrea acceded to the African Charter on 14 January 1999. State parties to the African Charter have an obligation under article 1 to adopt appropriate legislative and other measures to give effect to the rights, duties and freedoms enshrined under this Charter. The Ministry of Foreign Affairs was the only governmental institution that has had some channel of communication with the African Commission.¹ The other persons and entities that have been responsible for the implementation of rights and freedoms enshrined in the African Charter and the Women's Protocol never had any channel of communication with the African Commission.

2 Ratification of the African Charter and Women's Protocol

Eritrea acceded to the African Charter on 14 January 1999. The legislative schemes for the ratification or accession

to international agreements are provided under Proclamation No 37/1993, (as amended) and the 1997 Constitution of Eritrea (1997 Constitution). Pursuant to Proclamation No 37/1993, (Proclamation for the Structure, Powers and Responsibilities of the Government of Eritrea), the National Assembly elects the President of the State of Eritrea. The elected President serves as the Chairperson of Cabinet of Ministries and the National Assembly.² According to article 6(4)(c) of the Proclamation No 37/1993, the President of the State is empowered to sign, ratify and enforce international agreements and conventions. The President or the delegated body by the President of the State of Eritrea would sign and ratify international agreements. The African Charter is one of the international instruments acceded to by the Minister of Foreign Affairs.³ The President being the Chairperson of the Cabinet of Ministers and the National Assembly has been ratifying international agreements.

The 1997 Constitution expressly states that 'the president shall be elected from amongst the members of the

* LLM Constitutional Practice (Pretoria, 2001). High Court Judge and Lecturer at the University of Asmara, Eritrea.

¹ Personal interview with Mr Adem Osman, Legal Advisor to the Ministry of Information, 8 August 2011, Asmara, Eritrea.

² See Proclamation No 27/1993, art 4(3).

³ Personal interview with Mr Adem Osman.

National Assembly...'.⁴ Unlike Proclamation No 37/1993, the 1997 Constitution empowers the National Assembly to elect a chair person by the absolute majority vote of its members. The selected President is empowered to negotiate and sign international agreements.⁵ The National Assembly must ratify international agreements by law.⁶ So far, national elections have not yet been held, which means that the National Assembly envisaged under the 1997 Constitution has not yet been established. The practical process of ratification of international instruments has been adhering to the powers and responsibilities enshrined under Proclamation No 37/1993.

3 Domestication or incorporation of the African Charter and Women's Protocol

The transformation of international law into domestic law ensures the compatibility of domestic laws with ratified international law treaties. It also provides for express domestic enforcement mechanisms. The adherence to the concept of transformation renders Eritrea essentially dualist. A treaty or convention is domesticated if the National Assembly ratifies and proclaims it as the law of Eritrea. However, as stated above, the National Assembly envisaged under the 1997 Constitution has not yet been established. In the meantime, the President of the State of Eritrea is empowered to sign, ratify and enforce international agreements. He has been, either person-

ally or by way of delegation, signing, ratifying or acceding to international agreements.

The ratified international agreements or conventions have either expressly or impliedly been domesticated into the Eritrean legal system. The domestication process in a country adhering to the dualist approach normally requires promulgation. Eritrea has been engaging the domestication process by either expressly legislating or impliedly domesticating international instruments. The above stated 13 proclamations clearly demonstrate express promulgation in the process of domesticating international agreements. Conversely, the African Charter and a number of other international human rights instruments have not been explicitly legislated in the process of domestication.⁷

In 1994, a Constitutional Commission was duly established to draft a new

⁴ The 1997 Constitution of Eritrea, art 41(1).

⁵ The State of Eritrea, the Constitutional Constituent of Eritrea, the Constitution of Eritrea, adopted on 23 May 1997, Asmara, Eritrea, art 42(6).

⁶ Id. See the 1997 Constitution of Eritrea, art 32(4).

⁷ The State of Eritrea, Universal Periodic Report, Submitted to the UN General Assembly, Human Rights Council, A/HRC/WG.6/6/ERI/1, 26 November 2009. The following are the International Bill of Human Rights: International Covenant on Economic, Social and Cultural Rights (accession 17 April 2001), International Covenant on Civil and Political Rights (accession, 17 April 2001), Convention on the Elimination of All Forms of Discrimination Against Women (accession, 2 September 1995), Convention on the Rights of the Child (Ratification, 21 July 1994), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (accession, 16 February 2005), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and Declaration in relation to art 3 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (accession, 16 February 2005), International Convention on the Elimination of All Forms of Racial Discrimination (accession, 31 July 2001), African Charter on Human and Peoples' Rights (accession, 14 January 1999) and African Charter on the Rights and Welfare of the Child (accession, 22 December 1999).

constitution for Eritrea.⁸ To date the Constitutional Commission has primarily conducted a review of international conventions, covenants, declarations and other instruments that Eritrea has acceded to and ratified. The main objective of the review was to ensure the harmonisation of international and domestic laws. There was overwhelming public participation during the drafting process. The Constitutional Constituency ratified the Constitution on 23 May 1997.⁹ The ratified Constitution is classified into seven chapters. The first chapter, the General Provisions, expressly states the concepts of democracy, social justice and rules of law that constitute some of the founding provisions of the international conventions including the African Charter. It also enshrines the basic ground for acquiring citizen. The most important provisions relevant to the rights and freedoms enshrined in the African Charter and the Women's Protocol are provided under Chapter Three, the Rights, Freedoms and Duties. The civil and political, socio-economic and developmental rights are explicitly stated under Chapter Three. The Constitution has recognised the family as a natural and fundamental unit of the society that is entitled to the protection and special care of the State and society. The family has constitutional obligation to bring up their children with due care and affection. Conversely, children have constitutional duty to respect their parents and sustain them during old age.

⁸ The Government of the State of Eritrea, Proclamation No 55/1994, A Proclamation to Provide for the Establishment of Constitutional Commission, Gazette of Eritrean Laws, Vol. 4/1994, No 3, 1994.

⁹ The Government of the State of Eritrea, Proclamation No 92/1996, A Proclamation to Establish The Constitutional Constituency, Gazette of Eritrean Laws, Vol. 6/1996, No 8, 1996.

The Constitutional Commission has translated the African Charter among other relevant international instruments in the constitution-making process into local languages. The translation of the African Charter into local languages has played an important role in dissemination and raising public awareness and interested individuals on the rights and freedoms enshrined in the African Charter.

Proclamation No 37/1993 and the 1997 Constitution do not enshrine express provisions on the supremacy of the international over domestic law. The issue of whether international or domestic law prevails is raised in the event of conflict between these laws. As elaborated above, Eritrea being classified as adherent to the dualist approach to international law, the interpretative principles would serve in determining the supremacy or the resolution of the conflict between the international and the domestic laws. For instance, in cases of conflict the principle of the 'new derogates the old law' and the 'special derogate the general law' would be applicable. International law enjoys the status of domestic law as of the time and day it has been duly proclaimed or domesticated.¹⁰

The promulgation of the transitional codes and several others specific laws prior and after accession to the African Charter can be considered to constitute systematic harmonisation of the African Charter with the domestic laws. The drafting of the transitional codes and the making of the new laws compelled the examination and exploration of several

¹⁰ Personal interview with Mr Daniel Semere, Department of Legal Service, Ministry of Justice, 10 August 2011, Asmara, Eritrea and with Eden Fasil, Head of Department of Legal Service, Ministry of Justice, 13 August 2011, Asmara, Eritrea.

principles, concepts, rights and freedoms enshrined under the African Charter. Moreover, the African Charter was one of the international laws that the Constitutional Commission referred to and translated it into one of the working local languages – Tigrigna.¹¹ There are certain shared principles and provisions between the African Charter and the 1997 Constitution. For instance, the African Charter under Chapter Two enshrines the duties of an individual. Pursuant to article 29, an individual has duties, such as preservation and harmonious development of family; serve the national community, preservation and strengthening national solidarity and African culture. Similarly, article 25 of the 1997 Constitution enshrines the duties of the citizen, such as owe allegiance, complete national service, advance national unity, defend and protect the Constitution and adhere to the rule of law. This example is about duties rather than individual rights. However, the principle adhered to in the African Charter and the 1997 Constitution is that rights are corollary to duties.

4 Legislative reform or adoption

The legislative measures taken prior and after acceding to the African Charter include the adoption of the transitional codes, proclaiming several new laws and culminated in drafting and ratifying the 1997 Constitution of Eritrea. Indeed some essential new laws enacted after independence of Eritrea have had impact in the implementation of the

¹¹ The Constitutional Commission of Eritrea, Translation of the African Charter on Human and Peoples' Rights into Tigrigna, Vol. 1, 1994, Asmara, Eritrea. The Constitutional Commission of Eritrea translated the African Charter and the International Bill of Rights to maximise members and public awareness on international instruments relevant to constitutional rights.

African Charter and the Women's Protocol.¹²

5 Policy reform or formulation

The State of Eritrea has also issued several policy frameworks essential in the implementation of the African Charter and the Women's Protocol. They include duly issued and drafted, and applicable policy frameworks. The duly issued policies include the Macro-Policy of 1994,¹³ the National Charter for Eritrea of 1994 and the National Policy on Gender and Action Plan: A Framework issued in 2005.¹⁴ The National Health Policy reviewed in March 2010, the National Educational Policy issued in 1993 and recently revised, Cultural Policy for Eritrea (2003) and the Disability Policy issued in 2004 are some of the policies that are drafted and applicable but yet require official adoption.

¹² Proclamation No 23/1992 as amended by Proclamations No 37/1993 and 52/1994 address the Structure, Powers and Duties of the then de facto Provisional Government of Eritrea and de jure State of Eritrea. The Land Tenure System Proclamation No 58/1994, The National Service Proclamation No 11/1991 as amended No 71/1994 and No 82/1995, The Proclamation No 86/1996, Establishment of Local Government, The Advocates Proclamation No 88/1996, The Press Proclamation No 90/1996, The Establishment of the Constitutional Constituency, Proclamation No 92/1996, The Labour Proclamation No 8/1991 as amended Proclamation 118/2001, The Proclamation on Establishment of Community Courts, Proclamation No 132/2003, The National Scheme Establishment Proclamation No 135/2003, The Public Sector Pension Scheme Proclamation No 136/2003, The Martyr's Survivors Benefit Scheme Proclamation No 137/2004, The Establishment, Powers, Responsibilities, Rights and Duties of the Local Assembly, Proclamation No 139/2004, Goods for the Disabled Government Assistance Regulation Legal Notice No 82/2004, Election of Regional Assemblies, Proclamation No 140/2004, A Proclamation to Abolish Female Circumcision, Proclamation No 158/2007.

¹³ The Government of the State of Eritrea, Macro-Policy, November 1994, Asmara, Eritrea.

6 Court judgments

As elaborated above, Eritrea adheres to the dualist approach to international law. The African Charter is legally deemed part of the domestic laws after the duly accession to it. However, the non-establishment of the Supreme Court and other institutions enshrined under the 1997 Constitution of Eritrea hardly trigger cases that necessitate the application or interpretation of the African Charter in domestic courts. Consequently, the researcher identified some cases of Habeas Corpus and others but not explicitly a case that the domestic courts persuaded or necessitated the interpretation of the African Charter.

7 Awareness and use by civil society

The researcher was not able to obtain any relevant information on this issue.

8 Awareness and use by practising and other lawyers

As elaborated above, the efforts of the Constitutional Commission in translating the African Charter into one of the local languages and attempting to engage the public on regional and international instruments have to some extent raised the awareness of the civil society and lawyers on the African Charter and other regional and international human rights instruments.

¹⁴ The State of Eritrea, National Policy on Gender and Action Plan: A Framework, January 2005, Asmara, Eritrea. Note that the publication year written in the cover states 2000 but the cited bibliography as well as contents goes up to 2004. In the framework of previous studies that he did, the researcher had already discussed and confirmed this publication error with Mr Ghebrehanese Berhe, former Project Officer of the National Union of Eritrea Women in 2009.

However, due to the 1998 border conflict with Ethiopia, and the subsequent protracted no-peace-and-no-war status, the awareness of the civil society and lawyers on African Charter remains very slim.¹⁵

9 Incorporation in law school education

The curriculum of the Law School at the University of Asmara implicitly addresses international human rights and humanitarian laws in its constitutional and public international law modules. The African Charter and Women's Protocol are among the regional human rights instruments implicitly dealt with at the Law School.

10 National human rights institutions (NHRIs)

The researcher was not able to obtain any relevant information on this issue.

11 Academic writing on the African Charter and Women's Protocol

The researcher was not able to obtain any relevant information on this issue.

12 State reporting

The Ministry of Foreign Affairs is responsible to submit periodic state reports. Three periodic reports have since been submitted to the African Commission. Subsequently, the Researcher interviewed and consulted the legal service (Legal Advisor) of the Ministry of Foreign Affairs on the reports made

¹⁵ Personal interview with Mr Getahun Yohannes, Practising Lawyer, Asmara, 25 September 2011, Asmara, Eritrea.

to the African Charter. He replied that no document was found that proves the submission of report by the State Party to the African Commission. The Researcher brought to the attention of the legal advisor of the Ministry of Foreign Affairs the three reports allegedly been submitted to the African Commission. So far, neither information nor documentation could be obtained on the alleged reports submitted to the African Commission on behalf of Eritrea.

13 Communications involving this state

The first communication was the case of *Interights (on Behalf of the Pan African Movement and the Citizens for Peace in Eritrea) v Ethiopia*.¹⁶ The complainant alleged that between June 1998 and July 1999, more than 61,000.00 (sixty one thousands) Ethiopian-Eritrean and Eritreans were expelled *en mass*. The complainant alleges that expellees were illegally arrested, detained and interned in harsh condition. They were denied the right of family visitation. Furthermore, food, cloth and toilet facilities were not provided for extended periods of time. Moreover, they were subjected to cruel, inhumane and degrading treatment. Their properties were confiscated and family separated. In its 33rd Ordinary Session held in Niamey, Niger, the African Commission decided to suspend the communication indefinitely and await the decision of the Claims Commission established pursuant to the Comprehensive Peace Agreement between the Government of the Federal Republic of Ethiopia and Eritrea.

The second communication was the case of *Interights (on Behalf of the Pan Afri-*

can Movement and Inter African Group) v Eritrea.¹⁷ The complainant alleged that thousands of Ethiopians were systematically expelled from Eritrea. The complainant alleged that expellees were illegally arrested and detained in harsh conditions. They were denied the right of family visitation, while food, clothes and toilet facilities were not provided for an extended periods of time. Moreover, there were some allegations of rape and torture of Ethiopian women. Some expellees were forced to work without salaries to ensure protection. Some were forcibly evicted from their rental homes resulting with homelessness. The African Commission joined both communications and rendered the decision stated above, namely, to suspend the case sine die until the Claims Commission renders its decision.

In Communication No 250/2002, Dr Leisbeth Zegvel an international lawyer at the Netherlands based Bohler Franken Koppe De Freiject and Mr Mussie, an Eritrean living in Sweden filed a complaint against Eritrea for alleging illegal detention of 11 senior government official in violation of the Eritrean laws and the African Charter. Briefly, the complainant alleged violation of article 2, 6, 7(1) and 9(2) of the African Charter. The African Commission received the submission from both parties and heard oral arguments. The African Commission, during the 34th Ordinary Session held from 6 to 20 November 2003 in Banjul, The Gambia, found the Eritrea in violation of articles 2, 6, 7(1) and 9(2) of the African Charter and urged Eritrea to immediately release the 11 detainees and compensate them for the illegal detention.

¹⁶ (2003) AHRLR 74 (ACHPR 2003).

¹⁷ (2003) AHRLR 74 (ACHPR 2003).

14 Special mechanisms and promotional visits by the African Commission

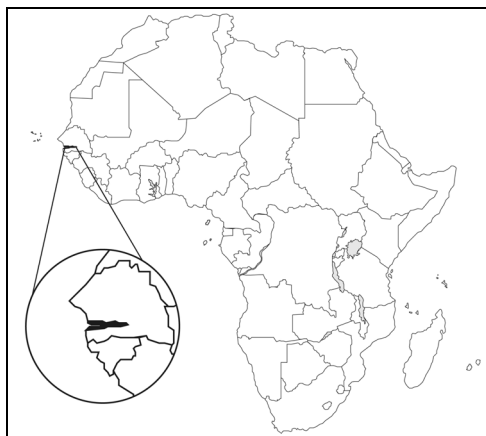
The researcher was not able to obtain any relevant information on this issue.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the work of the African Commission

The researcher was not able to obtain any relevant information on this issue.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN THE GAMBIA

*Tem Fuh Mbuh**



1 Introduction and background

The Gambia is situated on the west coast of Africa, bounded on the north, south and east by Senegal and to the west by the Atlantic Ocean. The country gained its independence from Britain in 1965 and remained under the leadership of Sir Dawda Jawara until he was overthrown in a *coup* in 1994 by Lt Yaya Jammeh, who has been in power since then. The Gambia ratified the African Charter on Human and Peoples' Rights (African Charter) on 8 June 1983 and the Protocol thereto on the Rights of Women in Africa (Women's Protocol) on 30 March 2009.

The Ministry of Justice and Chamber of the Attorney General, and more specifically, the Civil Litigation and International Law Department is responsible for the State's responsibilities under the African Charter and Women's Protocol and indeed all other international human rights instruments ratified by the Gambia.¹ Information on

the views of officials about the channel of communication with the African Commission and the institutionalisation of the state's responsibilities could not be obtained.²

2 Ratification of the African Charter and Women's Protocol

The Gambian Constitution vests in the President, the power to negotiate and conclude treaties and other international agreements. The President may exercise the power personally or through his Secretaries of State. Ratification of such treaties and international agreements is the prerogative of the National Assembly of the Gambia.³ Sir Dawda Jawara, Gambia's first President, was closely involved in the process leading to the adoption of the final draft version of the African Charter which was concluded in Banjul, the capital of the Gambia. No information could be obtained on the

* LLM HRDA 2010, Legal Officer, African Commission on Human and Peoples' Rights, Gambia.

¹ Interview with Sheik Tidjan Hydera, Legal Officer at the African Commission and former Minister of Justice and Attorney General of the Gambia see also www.moj.gov.gm (accessed 20 August 2011).

² This researcher approached officials in the Ministry of Justice specifically the Solicitor General who requested that all questions be put in writing for the Ministry's response. This was done but no response had been received from the Ministry at the time of submitting this paper.

³ Art 79(1)(c) of the 1997 Constitution of the Gambia. See also the Combined Initial, second and third Periodic Reports of the Gambia to the CEDAW Committee.

reasons for ratifying the two instruments under study.

3 Domestication or incorporation of the African Charter and Women's Protocol

The Gambia is a typical dualist jurisdiction. International law is largely viewed as foreign and is not enforceable unless it has been domesticated by an act of the National Assembly. The Gambian Constitution establishes the Constitution as the supreme law of the land and any other law found to be in conflict with it is void to the extent of the inconsistency.⁴ The Gambian Constitution identifies Acts of the National Assembly, common law and principles of equity, customary law, sharia law in certain respects and any orders, rules, regulations and subsidiary legislation made by a person or authority conferred by the Constitution, as 'other laws' applicable in the Gambia.⁵ There is no express mention of the African Charter or the Women's Protocol in the Constitution. Indeed, the status of international law in the national jurisdiction is not mentioned in the Gambian Constitution at all.

The provisions of Chapter IV of the Gambian Constitution on the protection of fundamental rights and freedoms correspond largely with the provisions of the African Charter. The Gambian Constitution protects the right to life, the right to personal liberty, freedom from slavery and forced labour, torture and inhuman treatment, the right to privacy, property, fair trial, freedom of speech, conscience, assembly, association and movement, the right to political participation, right to marry, right to

education, culture, freedom from discrimination, and lumps together rights for women, children and the disabled.⁶ However, the Gambian Constitution does not protect the right to health, the right to work, and environmental and developmental rights. In all these respects the African Charter has not been domesticated. The Women's Protocol has been explicitly incorporated in the Women's Act of 2010.

4 Legislative reform or adoption

No information could be obtained on whether a compatibility study was conducted before the African Charter and the Women's Protocol were ratified. The Women's Act of 2010 is one piece of legislation in the Gambia that expressly incorporates an international treaty. In its preamble, it is clearly stated that this law is 'an Act to implement the legal provisions of the National Policy for the Advancement of Gambian Women and Girls, and to incorporate and enforce ... the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and for other matters connected therewith'. Although the Legal Aid Act of 2008 does not expressly stipulate which treaty it incorporates, it was revealed from interviews conducted, that the Institute for Human Rights and Development in Africa, an international NGO based in the Gambia, fostered the enactment of the law in furtherance of the African Charter.⁷ Apart from these two Acts, no other legislation could be identified as having been adopted or amended implicitly or explicitly, to give

⁴ Art 4 of the Constitution.

⁵ Art 7 of the Constitution.

⁶ See arts 17 to 33 of the Constitution.

⁷ Interview with Edmund Foley and Humphrey Sipalla, respectively Legal Officer and Communication Officer of the Institute for Human Rights and Development in Africa, 25 August 2011.

effect to the African Charter or the Women's Protocol.

5 Policy reform or formulation

The researcher was not able to obtain any relevant information on this issue.

6 Court judgments

There is no system of comprehensive and updated law reporting in the Gambia. It was, therefore, extremely difficult to obtain information on court judgments. However, a study conducted by Gaye Sow⁸ reveals that a decision of the African Commission has been invoked in at least one case and the Gambia's obligations under the African Charter in another case. In *Ousman Sabally v IGP and 2 Others* (unreported), Jallow JSC referred to the decision of the African Commission in *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, in interpreting the right to freedom of expression.⁹ In *Mariam Denton v the Director General of the NIA and 5 Others*,¹⁰ Justice Monageng made reference to the obligations of the Gambia under the African Charter. The same happened in *Garrison v The Attorney General*.¹¹ Besides these, no other known cases could be identified where the two instruments under study or a decision of the African Commission have been invoked. In the same vein, there is no information of any case where the African Charter or the Women's Protocol has been used as the basis of a remedy. This is due largely to ignorance among

legal practitioners of the existence of these instruments and their non-binding nature as well as decisions of the African Commission in the country.

7 Awareness and use by civil society

The African Charter and the Women's Protocol are well known among human rights NGOs that operate in the Gambia. The two most prominent are the African Centre for Democracy and Human Rights Studies (ACDHRS) and the Institute for Human Rights and Development in Africa, which both have observer status with the African Commission. The work of these two is based principally on the instruments under study. There are numerous women associations and organisations such as the Gambian Committee on Traditional Practices (GAMCOTRAP), the Foundation for Research on Women's Health, Productivity and the Environment (BAFROW), the Female Lawyer's Association Gambia (FLAG), the Association for Promotion of Girl's and Women's Advancement in The Gambia, the Forum for African Women Educationalist (Gambia) (FAWE-GAM), the Gender Action Team and a host of others, which all base their work on the Women's Act and by extension, the Women's Protocol. The Think Young Women, a young-women-led organisation, has for example organised a Joint Stakeholders Workshop on Sharing Best Practices in the implementation of the Women's Act for security officials, the Judiciary, Ministries and university students.

The domestication of CEDAW and the Women's Protocol in the Women's Act of 2010 was largely the result of lobbying and advocacy undertaken by

⁸ Legal Officer at the Institute for Human Rights and Development in Africa and former Magistrate and Judicial Secretary of the Gambia, interviewed on 24 August 2011.

⁹ (2000) AHRLR 227 (ACHPR 1999).

¹⁰ HC/24/06 MF/087/F1.

¹¹ Initial Report of the Gambia to the UN Committee on the Rights of the Child, 1992.

these organisations, notably the ACDHRS.¹² On its part, the Legal Aid Act of 2008 was the result of sustained efforts of the Institute for Human Rights and Development in Africa.

None of the above NGOs has submitted a shadow report to the African Commission. The African Commission has not adopted any concluding observations on any of the periodic Reports that the Gambia has submitted and there is no other publicly available report adopted by the African Commission on the Gambia. The NGOs approached have not used any resolution adopted by the African Commission in their work in the Gambia.

8 Awareness and use by practising and other lawyers

The African Charter and the Women's Protocol are practically unknown to local practising lawyers except those working in human rights NGOs and international organisations dealing with human rights in the Gambia. Most lawyers are even ignorant of the existence of the African Commission and what it does in practice. It is, therefore, not surprising that local lawyers hardly invoke the African Charter or the Women's Protocol or other international human rights standards in their arguments before national courts.¹³

9 Incorporation in law school education

The University of the Gambia was only established as a fully fledged university

¹² Interview with the Administrative Officer of the ACDHRS, 21 July 2011.

¹³ Interview with Dr Abubakar Senghore, Dean of the Law Faculty, University of The Gambia, 1 August 2011. This was also confirmed by Gaye Sow and Justice Fagbelle.

recently and the Gambia's first faculty of law came into existence as recently as 2007. Human rights law was introduced into the curriculum of the law faculty at the bachelor level in 2010. Human rights law is taught in the second and third year of the LLB degree. The African human rights system is the main focus of the human rights programme, but is still relatively under developed due to lack of staff with the requisite expertise in human rights law.¹⁴

10 National human rights institutions (NHRIs)

There is no national human rights institution in the Gambia. The Ombudsman does not have a human rights promotion or protection mandate as such and is established as a general public complaints body against injustice arising out of administrative mismanagement, mal-administration or discrimination.¹⁵ There is also the National Council on Civic Education which has no explicit human rights mandate, but does promote values contained in the African Charter and the Women's Protocol. These institutions have no liaison with the African Commission.

11 Academic writing on the African Charter and Women's Protocol

Given that human rights law was just recently introduced, academic writing on the African Charter and the Women's Protocol is sparse. However, Hassan B Jallow, a Gambian academic and prosecutor of the International Criminal Tribunal for Rwanda, has published a book that reviews the Afri-

¹⁴ Interview with Dr Senghore, as above.

¹⁵ See art 163 of the Constitution.

can Charter generally and the jurisprudence of the African Commission.¹⁶

12 State reporting

The Ministry of Justice is responsible for reporting to the African Commission under the African Charter and the Women's Protocol. The Gambia has not submitted a report to the African Commission since 1994 and has not submitted a report to any other treaty body in the last five years. Most of those approached did not, therefore, know how a report is prepared. However, the Institute for Human Rights and Development in Africa and the ACDHRS confirmed that they had been associated with the submission of Gambia's initial, second and third periodic report to the CEDAW Committee in 2003.

The Gambia submitted its Initial Periodic Report to the African Commission in 1992 and the Second Periodic Report in 1994. The practice of adopting concluding observations on periodic reports was then non-existent. The African Commission only started adopting concluding observations in 2000. How the Government would deal with such concluding observations of the African Commission could therefore not be verified.

13 Communications involving this state

A total of ten communications have been submitted to the African Commission against the Gambia. Of these, seven were dismissed for non-exhaustion of local remedies, one was settled amicably and two were decided on the merits. In *Sir Dawda Jawara v The*

Gambia,¹⁷ the African Commission had found the Gambia in violation of articles 1, 2, 6, 7(1)(d) and (2), 9(1) & (2) 10(1), 11, 12(1) & (2), 13(1), 20(1) and 26 of the African Charter and recommended that the Gambia should bring its laws in conformity with the provisions of the this Charter. In *Purohit and Another v The Gambia*,¹⁸ the Gambia was found in violation of various articles of the African Charter.

The African Commission recommended that the Gambia repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in the Gambia compatible with the African Charter and international standards and norms for the protection of mentally ill or disabled person as soon as possible; create a body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release ending the first recommendation. It was also recommended that the State provide adequate medical and material care for persons suffering from mental health problems in the Gambia. As a way to follow-up on progress in implementing the decision, it was recommended that the Gambia report back to the African Commission when it submits its next periodic report, on the measures taken to comply with the recommendations of the African Commission.

These cases have not been given any exposure by the Government and are only known within NGO circles. Beginning with the last recommendation, the Gambia has not submitted any report to the African Commission since 1994. The Government, in collaboration with

¹⁶ See HB Jallow *The law of the African (Banjul) Charter on Human and Peoples' Rights* (2007).

¹⁷ (2000) AHRLR 107 (ACHPR 2000).

¹⁸ (2003) AHRLR 96 (ACHPR 2003).

the World Health Organization, is currently drafting a Mental Health Bill. The African Commission has not been associated with this process and the Bill is not in the least informed by the decision in the *Purohit* case.¹⁹ There have been many legislative reforms since these two cases were decided but there is no evidence that the decision to reform the laws was a result of the recommendations of the African Commission.

14 Special mechanisms and promotional visits by the African Commission

There has been one promotional mission of the African Commission to the Gambia undertaken by Commissioner Jainaba Johm from 22 December 2001 to 5 January 2002. The report of the mission was not adopted by the African Commission.

As to special mechanisms, Commissioner Dankwa in his capacity as Special Rapporteur on Prisons and Conditions of Detention in Africa undertook a special mechanism visit in the country from 21 to 26 June 1999. The report has not been made public in any of the Commission's activity reports.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

Ignorance of the existence of the African Charter, the Women's Protocol and the

African Commission is the leading factor that severely limits their impact. The relevant actors such as lawyers, magistrates, judges, parliamentarians, administrators and academics who are supposed to make use of these instruments and the mechanism of the African Commission, do not even know about its existence. This is influenced by the perception of treaties ratified by the Gambia as foreign unless they are domesticated. Hence, domestication and advocacy on these instruments will have a tremendous influence on their impact in the Gambia. Even though the Gambia only ratified the Women's Protocol in 2009, it is better known than the African Charter, which was ratified way back in 1983. This is attributable to the domestication of the Women's Protocol and the aggressive publicity that women's organisations and associations have undertaken to popularise its contents.

The lack of capacity in terms of human rights trained personnel has also negatively influenced the impact of the African Charter and the Women's Protocol. There is a serious shortage of personnel at the level of the Ministry of Justice, the Bar and Bench, the academia and Parliament who are human rights specialists. It is only with the introduction of human rights training at the graduate level at the Faculty of Law in the University of the Gambia that some interest has been generated in human rights law.²⁰ Building capacity in the relevant sectors on human rights in general will have the potential of improving the African Charter's impact.

The lack of political will is also another factor that has diminished the impact of the African Charter and the

¹⁹ Interview with Dr Senghore who is also a member of the Law Reform Commission of the Gambia. This was also confirmed by Gaye Sow.

²⁰ Interview with Dr Senghore, as above.

Women's Protocol. This is manifested through the fact that the African Charter has not been domesticated even though it was ratified 28 years ago and the non-adherence to the reporting obligations imposed by the two instruments. The Gambia has only submitted two reports since it ratified the African Charter and has never reported on the discharge of its obligations under the Women's Protocol. It would seem that the Government gives priority to reporting under the United Nations human rights system than the African system since it recently submitted reports to the CEDAW Committee, the Committee on the Rights of the Child (CRC) and the Committee on Racial Discrimination. There is, therefore, a clear manifestation of lack of political will in this respect. Closely linked to this is the lack of resources given that the implementation of treaty obligations such as those under the African Charter and the Women's Protocol requires substantial resources. The Gambia is one of the poorest countries on earth and this has a significant impact on its capacity to give effect to the African Charter and the Women's Protocol.

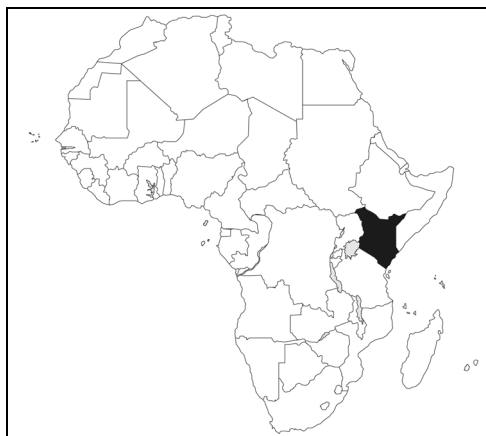
The Gambia hosts the Secretariat of the African Commission. As a result, the Gambia has hosted twenty five ordinary sessions and six extra-ordinary sessions making a total of thirty one sessions of this Commission. This has, however, had very little effect in practice. Ordinary people in the Gambia do not even know about the existence of the African Commission and what it does. The African Commission is complicit in this ignorance about its existence and activities since it does virtually nothing to market itself locally and has no local initiatives to promote the African Charter. The African Commission is very detached from the

community in which it operates, does not liaise with local organisations and institutions such as local NGOs, the Bar and Bench, Parliament, the Government, the University and the local media in order to make itself and the African Charter known, nor does it frequently react on its own initiative to human rights violations that take place within the country. The African Centre for Democracy and Human Rights Studies (ACDHRS) and the Institute for Human Rights and Development in Africa (IHRDA) are better known locally than the African Commission. It is only with the introduction of human rights law in the University of the Gambia that students have started taking interest in the African Commission and a good number of them attended the 49th Ordinary Session of the African Commission. The African Commission, therefore, needs to market itself better and get involved in local initiatives to promote the African Charter and the Women's Protocol and establish a working relationship with local state institutions and organisations in order to improve its visibility and impact.

Three Gambian nationals have been members of the African Commission. They are Commissioners Jainaba Johm, Sourahata B. Semega Janneh and Musa Ngary Bitaye. There is no known local initiative that any of them undertook to promote the African Charter or the Women's Protocol except for a promotional mission undertaken by Commissioner Jainaba Johm in 2001. However, the report of this mission was never adopted by the African Commission. Their impact of these promotional visits at best has, therefore, been negligible.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN KENYA

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1 Introduction and background

Kenya ratified the African Charter on 21 January 1992 and deposited the instrument of ratification on 10 February 1992.¹ Discussions before signature and ratification took place at cabinet meetings, records of which meetings cannot be accessed. Kenya signed the Women's Protocol in Maputo on 17 December 2003² during the summit when this Protocol was adopted. Kenya then ratified the Protocol in October 2010 becoming the 29th country to do so. The Kenya 2010 Constitution (2010 Constitution) provides that 'the general

rules of international law shall form part of the laws of Kenya'³ and further expressly states that, 'any treaty or convention ratified by Kenya shall form part of the laws of Kenya under this constitution'.⁴ Furthermore, the Kenya National Commission on Human Rights (KNCHR) is now the 'principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights'.⁵ None of these provisions existed in the immediate former Constitution.

The previous Constitution did not provide for the manner of ratification of international human rights instruments. The legislature had no express role in regard to signing and ratification of international and regional treaties. In practice, the responsibility of signing and ratifying international treaties fell into the hands of the executive⁶ with the cabinet leading the process.⁷ Generally, Kenya's treaty signing and ratification history has been 'haphazard' with no clear answers as to why some treaties were signed or ratified and others not.⁸

Furthermore, under the previous Constitution, the Office of the Attorney

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¹ African Union 'List of Countries which have signed, ratified/ acceded to the African Charter on Human and Peoples' Rights' <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> (accessed 14 August 2011).

² African Union 'List of Countries which have signed, ratified/ acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed 14 August 2011).

³ Art 2(5).

⁴ Art 2(6).

⁵ Art 59(2).

General was in charge of legal compliance with all international instruments that Kenya had signed and ratified.⁹ However, in regard to human rights treaties, the new KNCHR will be in charge of compliance under the 2010 Constitution. The process of signature and ratification is also under review and if the Ratification of Treaties Bill 2011¹⁰ is enacted, Parliament will be able to debate and approve treaties before Kenya signs or ratifies any international or regional instrument.¹¹ The 2010 Constitution clears doubts on the position of international law in Kenya and cases discussed below show a change in approach by the Kenyan courts.¹²

2 Ratification of the African Charter and Women's Protocol

Unlike the African Charter, parliamentary discussions took place on the ratification of the Women's Protocol. On 13 April 2005, the Minister in charge of Gender Affairs stated that Kenya had

delayed ratification of the Women's Protocol despite signing it in 2003 because it had some reservations regarding some of its provisions.¹³ The Minister noted that while article 10(3) of the Women's Protocol called on Kenyan Government to significantly reduce its military budget for purpose of facilitating women's development, the Government was uncomfortable with this provision and especially the exact meaning and impact of the term 'significant' as used in the Women's Protocol. Secondly, the Minister noted that article 14(1)(b) of the Women's Protocol gave women a choice to decide whether to have children or not and this had the potential of encouraging abortion. Nevertheless, the Government bowed to pressure from lobby groups and ratified the Women's Protocol in October 2010.¹⁴

3 Domestication or incorporation of the African Charter and Women's Protocol

The African Charter and Women's Protocol are now part of Kenyan law under the 2010 Constitution.¹⁵ However, the 2010 Constitution remains the supreme law.¹⁶ Secondly, this Constitution contains express economic, social and cultural rights in the Bill of Rights

⁶ Constitution of Kenya Review Commission (CKRC) 'The Final Report of the Constitution of Kenya Review Commission' (Final Draft) approved for issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 10 February 2005 (2005) 150 states that 'The conduct of international law issues is deemed and implied to fall under the powers accorded to the President under sec 23 of the Constitution. In addition, the powers and functions of the legislature do not expressly provide for domestication of international law but again it is implied as one of the legislative powers'.

⁷ Interview with Senior State Counsel, State Law Office, Kenya, 26 August 2011.

⁸ CKRC (n 6 above) 151.

⁹ The Attorney General is the legal advisor of government and thus advises the government on Kenya's compliance with treaties that it has ratified.

¹⁰ The Bill dated 16 June 2011 is sponsored by Millie Mabona Odhiambo, a Member of Parliament and parliamentary debate is yet to commence.

¹¹ Clause 7 of the Ratification of Treaties Bill, 2011.

¹² *David Njoroge Macharia v Republic* Court of Appeal at Nairobi Criminal Appeal 497 of 2007.

¹³ Parliament of the Republic of Kenya 'National Assembly Official Report' (Wednesday April 13 2005) 644-646.

¹⁴ The ratification of the women's protocol by Kenya coincided with the 'Africa Women's decade' which was organised by the African union and was hosted by Kenya in Nairobi. FIDH 'Kenya: Concrete steps required to demonstrate government's will to respect women's rights' <http://www.fidh.org/Kenya-Concrete-steps-required-to-demonstrate> (accessed 14 August 2011).

¹⁵ Art 2(6) of the Constitution of Kenya, 2010.

¹⁶ Art 2(3) provides that 'the validity or legality of this constitution is not subject to challenge by or before any court or other state organ' making it superior to international law in the domestic legal system of Kenya.

which are made justiciable¹⁷ making Kenya the only African country other than South Africa to expressly recognise socio-economic rights in its Bill of Rights.¹⁸ In the case of *Satrose Ayuma and 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Scheme and 2 Others*,¹⁹ the petitioners relied on the Bill of Rights in the 2010 Constitution, the African Charter and the *Ogoniland* case to argue against the eviction of squatters living on land belonging to the then Kenya Railways without proper guidelines and alternative areas of settlement.²⁰

The adoption of the 2010 Constitution ended more than two decades of struggle for constitutional reforms. The African Charter and other human rights instruments formed a basis for demands for political and constitutional reforms.²¹ In the process, important amendments to the previous Constitution were made some of which implemented the African Charter provisions. These include introduction of multi-party politics in 1992,²² gender considerations in nominating members of parliament²³ and addition of 'sex' as one of the grounds for prohibition of discrimination.²⁴ Subsequently, even as the country was in search of a new constitutional dispensation, many laws were enacted that directly or indirectly

recognised the rights contained in the African Charter and the Women's Protocol.²⁵

4 Legislative reform or adoption

Under the previous Constitution, the cabinet led the process of implementation of international treaties. A compatibility study was always carried out and discussed in cabinet²⁶ and the relevant ministry would initiate the relevant legislation. In the constitutional review process, the African Charter featured prominently in the discussions on the Bill of Rights, for example, article 29 of the African Charter was highlighted as an important provision in regard to the need to preserve family cultural values such as respect for parents.²⁷

Legislative reform has taken the form of either piece-meal changes to national legislation through amendments²⁸ or the adoption of new legislation. The African Charter was used as the basis of repealing the provision on corporal punishment from the Kenyan Penal Code in 2003.²⁹ Many pieces of legislation that cover a wide spectrum of rights have been adopted over the years. These include the Sexual Offences Act meant to better protect victims of sexual offences.³⁰ Among the new measures introduced was the comprehensive definition of the offence of rape and simpli-

¹⁷ Art 43(1) provides for the right to health, housing, food, social security and education.

¹⁸ Apart from South Africa, Kenya is the only other African Country to have economic, social and cultural rights recognised expressly as constitutional rights.

¹⁹ Constitutional Petition No 65 of 2010.

²⁰ The matter has not been finally determined by the Court.

²¹ See generally GK Kuria 'The rule of law in Kenya and status of human rights' (1991) 16 *Yale Journal of International Law* 217.

²² Sec 1A of the immediate former Constitution (Act 5 of 1969).

²³ Sec 33(3) of the immediate former Constitution (Act 5 of 1969).

²⁴ Sec 82(3) of the immediate former Constitution (Act 5 of 1969).

²⁵ Statutes such as the Children Act make direct reference to the UN Convention on the Rights of the Child. Sec 7(2) of the Act provides that 'Every child shall be entitled to free basic education which shall be compulsory in accordance with art 28 of the United Nations Convention on the Rights of the Child'.

²⁶ See interview with Senior State Council (n 8 above).

²⁷ CKRC (n 6 above) 91.

²⁸ For instance the Penal Code has been amended many times to delete provisions that go against international human rights standards.

²⁹ Parliament of the Republic of Kenya 'National Assembly Official Report' (1 April 2003) 709.

³⁰ Act 3 of 2006.

fication of rules of evidence to better protect victims.³¹

Kenya also established the KNCHR in 2003 via an Act of Parliament in 2003³² for more effective realisation of rights.³³ Furthermore, while Kenya only ratified the Women's Protocol in late 2010, it had already established the National Commission on Gender and Development in 2003, meant to support the mainstreaming of gender in issues of national development.³⁴ In 2006, Parliament also enacted the HIV and AIDS Prevention and Control Act³⁵ which provides for a number of safeguards and measures aimed at protecting the rights of persons living with HIV/AIDS.³⁶ With regard to the right to a clean environment, the Environmental Co-ordination and Management Act (EMCA) which was enacted in 1999³⁷ was an important step for economic, social and cultural development.³⁸ The Act allowed wide access to courts for enforcement of environmental rights which was initially restricted and narrowly construed.

5 Policy reform or formulation

As with legislative reforms, a number of policies have been adopted which impact on different rights covered by the African Charter and the Women's

Protocol. These include the 'National Policy for the Prevention and Control of HIV/AIDS and Sexually Transmitted Infections (STI)',³⁹ which seeks to implement most of the matters covered under that Act.

Further, Kenya adopted a land reform policy in 2007 which seeks to address critical issues such as communal land ownership schemes like those practised by most indigenous communities.⁴⁰ The Land Policy provides for review of land and restoration of community and trust lands that were acquired inappropriately.⁴¹ This Land Policy also recognised that the current legal framework for protection of communal and trust lands⁴² was inadequate and needs to be revised and made more effective.⁴³

In a creative move, the Ministry of Public Health and Sanitation used the report of the African Commission's Working Group on Indigenous Populations and Communities⁴⁴ to develop strategies for public health needs to marginalised and vulnerable groups in Kenya. In pursuit of this policy, the Ministry set aside funds (Health Sector Services Funds) to support community health projects in arid and semi-arid areas where some of the groups identified by the African Commission Working Group are found. The Policy also states that the Ministry is in the process of revising and updating its plan, adopted in 1994, to take care of concerns

³¹ Sec 3 of the Sexual Offences Act.

³² Act 9 of 2002.

³³ Art 59 (4) of the Constitution of Kenya transformed the KNCHR into a constitutional body with an enhanced human rights mandate. See www.knchr.org for more information on the activities of the Kenya National Commission on Human Rights.

³⁴ Sec 6(2)(j).

³⁵ Act 13 of 2006.

³⁶ TO Ojienda 'HIV/AIDS and the Labour Sector: Examining the role of law in protecting the HIV Positive Worker in Kenya' (Unpublished thesis) University of South Africa (UNISA) (2010) 128-132.

³⁷ Act 8 of 1999.

³⁸ Preamble to the EMCA.

³⁹ For more details, see <http://nascop.or.ke/is/> (accessed 14 August 2011).

⁴⁰ Ministry of Lands 'National Land Policy' (Land Policy Secretariat) (May 2007).

⁴¹ As above 13-14.

⁴² The Land (Group Representatives) Act Cap. 287 Laws of Kenya.

⁴³ Ministry of Lands (n 43 above) 13-14.

⁴⁴ African Commission 'Report of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities'.

raised by the report of the Working Group and other developments regarding marginalised and vulnerable persons.⁴⁵ The National Gender and Development Policy, adopted in November 2001, recognised the need for a national institution with a specific mandate for gender issues.⁴⁶

In October 2006, the then Ministry of Justice and Constitutional Affairs (MOJCA) and the KNCHR convened a National Stakeholders' Conference that endorsed the need for the development of a National Human Rights Policy and a National Action Plan (NAP). A draft policy has been developed and is currently awaiting formalisation by the Minister of Justice National Cohesion and Constitutional Affairs.⁴⁷ The development of a human rights policy is based on the recognition that Kenya requires a comprehensive framework to operationalise the protection and promotion of human rights for all Kenyans as guaranteed under the 2010 Constitution. Further, it is based on the understanding that human rights permeates all aspects of the lives of individuals and that every sector, public and non-public has a role and responsibility in enhancing the realisation of human rights.

This is reinforced by Vision 2030, Kenya's development blueprint, in which Kenya has restated its commitment to ensuring equitable, accountable and people-centred development in a

human rights respecting state. Vision 2030 recognises that problems of inequality and human rights violations are interlinked with economic, social and political challenges. Consequently, it aims at economic growth while ensuring that the political system is issue-based, people-centred, result-oriented and accountable.⁴⁸

6 Court judgments

Kenyan courts were initially reluctant to apply international law instruments directly to relevant domestic matters.⁴⁹ However, even under the previous constitutional regime that was strongly dualist, Kenyan courts gradually softened their approach and are increasingly making direct reference to international and regional human rights instruments to which Kenya is party.⁵⁰ For instance, in the celebrated case of *Rono v Rono*, the Court of Appeal stated that African customary succession laws that disinherited women contravened article 18 of the African Charter which Kenya voluntarily ratified without any reservation.⁵¹ The judge noted that Kenyan domestic law was insufficient in regard to this aspect of discrimination of women and thus international human rights instruments that Kenya had ratified were necessary.⁵² In a later case, *Re Andrew Manunzyu Musyoka (Deceased)*⁵³ the judge referred to the precedent that was set in *Rono v Rono* and used the African Charter and other human rights instruments to protect the rights of daughters to inherit their father's property and held that disinheriting daughters

⁴⁵ Ministry of Public Health and Sanitation 'Vulnerable/Marginalised Peoples Planning Framework' (2010) 6-9.

⁴⁶ Ministry of Gender, Sports, Culture and Social Services 'National Gender and Development Policy' (2001) 36-39.

⁴⁷ See Draft National Human Rights Policy and Action Plan, 2011 http://www.knchr.org/index.php?option=com_content&task=blogcategory&id=43&Itemid=89 (accessed 26 August 2011).

⁴⁸ For more information, see generally <http://www.vision2030.go.ke/> (accessed 12 September 2011).

⁴⁹ *Okunda v Republic* [1970] EA 453.
⁵⁰ (2005) AHRLR 107 (KcCA 2005).

⁵¹ As above.

⁵² AHRLR (n 53 above).

⁵³ eKLR (2005).

is contrary to article 18 of the African Charter and other human rights instruments that Kenya has ratified that protect and guard women's rights.⁵⁴

In another case concerning environmental issues, *Waweru v Republic*⁵⁵ the High Court invoked article 24 of the African Charter and stated that the Ministries in charge of local government and water affairs were obligated to construct a sewerage treatment plant to prevent environmental pollution.⁵⁶ In *Martha Karua v Radio Africa Ltd t/a Kiss FM Station and two others*⁵⁷ which was a case on defamation, the Court noted that articles 11 and 12(2) of the African Charter do not allow derogation from the freedom of expression while the previous Constitution allowed derogation. The Court noted that any new constitutional dispensation should take into account the non-derogable nature of this freedom.⁵⁸

The Court of Appeal has noted that while Kenya has had a strong dualist past, the position may have changed with the passing of the 2010 Constitution.⁵⁹ In the case of *David Njoroge Macharia v Republic*, the Court noted the fact that the African Charter has been ratified by 53 African states strengthens its place and legitimacy in domestic legal systems of states party to this Charter.⁶⁰ The Court also made reference to the guidelines on fair trial adopted by

the African Commission⁶¹ and indicated that they were an authoritative interpretation to Kenya's obligations under the African Charter.⁶²

There are relatively few court judgments where the Women's Protocol has featured. In one case, *Lucy Nyambura and another v Town Clerk, Municipal Council of Mombasa and 2 others*,⁶³ the petitioners applied to have sections of Kenyan legislation declared as contravening the Women's Protocol. However, during the trial, the appellant's lawyer abandoned this argument and the court refrained from making any findings. The two applicants had been arrested for 'loitering in a public place for immoral purposes contrary to section 258(m) of the Mombasa Municipal By-laws'.⁶⁴ The appellants wanted this provision to be declared as contravening the Women's Protocol. The prosecution had found the appellants with condoms and used that as the basis of prosecuting the appellants for engaging in prostitution. The appellants averred that the Women's Protocol protects their right to use contraceptives and that the by-laws were a violation of the Women's Protocol, however, as noted above, the court did not consider this submission nor make any orders.

In the case of *Richard Mwasya v AG* the petitioner relied on the non-discrimination provisions of the African Charter to fortify the argument that the constitutional provisions on non-discrimination

⁵⁴ eKLR (2005).

⁵⁵ (2007) AHRLR 149 (KeHC 2006).

⁵⁶ As above.

⁵⁷ High Court at Nairobi (Nairobi Law Courts) Civil Suit 288 of 2004 [2006] eKLR, judgment of 21 July 2006.

⁵⁸ As above.

⁵⁹ *David Njoroge Macharia v Republic* Court of Appeal at Nairobi Criminal Appeal 497 of 2007.

⁶⁰ As above.

⁶¹ African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa' http://www.achpr.org/english/declarations/Guidelines_Trial_en.html (accessed 10 October 2011).

⁶² As above.

⁶³ High Court at Mombasa Petition 286 of 2009.

⁶⁴ As above.

were also applicable to intersex persons in Kenya.⁶⁵ Therefore, by and large, the new constitutional dispensation has shown signs of embracing the application of international human rights instruments in the resolution of disputes otherwise classified as national to which domestic laws should exclusively apply.

7 Awareness and use by civil society

Most national human rights NGOs are aware of the African Charter and use it in their work alongside other international and regional human rights instruments and domestic law. Depending on their exact thematic focus, these NGOs will use the African Charter in advocacy, public education, policy reviews and litigation.⁶⁶ However, it is important to note that in most cases the first point of reference is the 2010 Constitution. Other international and regional instruments are used to augment their constitution-based arguments. It is only in instances where the Constitution is deficient that direct reference is made to the African Charter and other international instruments. However, taking cognisance of article 2(5) of the 2010 Constitution, it is clear that the African Charter now forms part of Kenyan law. It is, therefore, important to ensure that there is increased awareness of the new status of the African Charter as part of Kenyan law and the need to refer to it in the same manner as one would refer to any domestic legislation.

⁶⁵ High Court Petition No 705 of 2007. The Petitioner in this case was an intersex person claiming among other things, that the Constitution of Kenya did not recognise his unique sexuality status and that there are no legal provisions that would recognise the gender rights of intersexual persons.

⁶⁶ Interview with Davis Malombe, Deputy executive Director, Kenya Human Rights Commission (KHRC), 12 September 2011.

8 Awareness and use by practising and other lawyers

Public interest lawyers are generally aware of the African Charter provisions and use it to advance their human rights arguments. However, even lawyers who do engage in human rights legal practice rarely interact with the African Charter and would thus not use it in their legal arguments.⁶⁷

For instance as discussed above, in *Satrose Ayuma and 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Scheme and 2 Others (the Muthurwa Case)*,⁶⁸ the petitioners' advocates relied on the African Charter and the *Ogoniland Case* to argue against the eviction of squatters living in land belonging to the former Kenya Railways without proper eviction guidelines and the provision of alternative areas of settlement.

9 Incorporation in law school education

Human rights law is taught in law schools at different levels. At the undergraduate level, human rights law is taught as part of the Constitutional Law Module with a specific focus on the Bill of Rights. In the third year of study, human rights law is taught as an elective unit together with international humanitarian law. This course serves only as an introduction to the basic concepts of international human rights and humanitarian law. At this stage the main areas of focus are the UN and the African human rights systems. Other regional systems such as the Inter-American and European are not delved into. However, students at this level are well able to

⁶⁷ See interview with John Chigiti, Advocate and Public Interest Lawyer, 26 August 2011.

⁶⁸ Constitutional Petition No 65 of 2010.

appreciate the concept of human rights and the available structures and mechanisms for the protection and promotion of human rights at the domestic, regional and international levels. It is probably at the post-graduate level that human rights law is extensively taught and in more detail.⁶⁹

10 National human rights institutions (NHRIs)

The KNCHR is an independent and autonomous national human rights institution (NHRI) created under article 59 of the 2010 Constitution to promote and protect human rights in Kenya. The KNCHR takes the view that human rights are universal and indivisible and hence seeks to advocate human rights principles in line with international and regional standards in all aspects of its work on disability, public education, and advocacy on various reform issues, public interest litigation, Government advisor and economic, social and cultural rights. In this regard, the African Charter is a useful reference point in the KNCHR's work alongside other international and regional instruments.⁷⁰

11 Academic writing on the African Charter and Women's Protocol

A survey of writing by Kenyan academics leads to the conclusion that there is not much reference to the African Charter or the Women's Protocol. This may be attributed to the relatively limited academic writing compared to say a country like South Africa which has a

proliferation of well-respected legal journals. Kenya lacks long-standing legal academic journals even from the more established faculties of law such as the University of Nairobi. Nevertheless, few academics have discussed continental human rights instruments in much depth, but those have presented a positive perception of its usefulness in alleviating the human rights problems faced by Kenya in particular.

Muthoni Wanyeki writing in the East African newspaper expresses disappointment that Kenya withdrew its offer to host the 50th Ordinary Session of the African celebrating 30 years of the African Charter in October 2011.⁷¹ She describes the African Charter as 'a seminal instrument for Africa as a whole' that has dispelled the notion that human rights are culturally relative not universal, that human rights are divisible, and that human rights can only be claimed by individuals rather than collectives. She lauds the use of the African Charter by the African Commission for among other things ensuring that the AU does not block the referral of the Darfur situation by the UN Security Council to the International Criminal Court. She also considers it a positive aspect the African Commission's numerous responses to individual complaints, the fact that states have generally not implemented the recommendations notwithstanding. On the whole she expresses positive views about the African Charter and the Women's Protocol, although states compliance record with the instruments has been wanting.

⁶⁹ Interviews with Lecturers at Catholic University, Moi University and University of Nairobi.

⁷⁰ Interview with KNCHR Officers, 17 August 2011.

⁷¹ M Wanyeki 'Kenya won't host human rights summit – what a pity' *The East African* 14 August 2011 <http://www.theeastafrican.co.ke/OpEd/comment/Kenya+wont+host+human+rights+summit+what+a+pity/-/434750/1218724/-/12aw2hs/-/> (accessed 15 August 2011).

The African Charter has been invoked as a source of inspiration for African leadership as they seek to find a solution to the prevailing drought in the Horn of Africa region.⁷² In light of the post-election violence experienced in Kenya in 2007-2008, the right to participate in the government of one's country provided in the African Charter has been examined.⁷³ Mbondeniyi's analysis of this right in the African Charter highlights a gap in the scope of the provision as enshrined in this Charter in that the right is recognised in a superficial way that does not expressly guarantee the holding of periodic and genuine elections, a striking omission given the plague of poor governance that afflicts many states on the continent.⁷⁴ The survey of the African Commission's jurisprudence on the right illustrates that simply holding elections is not enough, the right to participation in governance involves the conduct of elections without exclusionary bars often intended to prevent political opponents from exercising their right to contest for office, and the safeguard other rights that support the exercise of democracy, rule of law and good governance.⁷⁵ The failure in protecting this right led to the violence experienced in Kenya in the aftermath of the 2007 elections.

12 State reporting

The proposed Ratification of Treaties Bill 2011 provides in section 13 that:

Where a treaty provides for the submission of periodic reports as part of its monitoring mechanisms the Cabinet Secretary shall, in conjunction with the relevant State Department facilitate the preparation and submission of such report within the prescribed period.

The Cabinet Secretary referred to in this provision is the one responsible for foreign affairs.⁷⁶ The relevant State Department presumably refers to the department responsible for the subject matter of the treaty.

Currently, the Ministry of Justice, National Cohesion and Constitutional Affairs is charged with the leadership role in the preparation of state reports on human rights treaties.⁷⁷ The Ministry has established an Inter-ministerial Committee Advisory Consultative Committee on International Human Rights Obligations which is meant to improve the reporting obligations of the State.⁷⁸ The Committee comprises the Ministry of Justice, National Cohesion and Constitutional Affairs, the State Law Office, Office of the President, the Ministry of Gender and Youth and specific Non-Governmental Organisations.

The process of preparing the report includes the input from government ministries as well as state bodies such as the KNCHR and civil society organisations. Nevertheless, this process has been faulted for not including the wider Kenyan public, and also for not measuring progress as against benchmarks set

⁷² A Mitaru 'East Africa's drought response – Union members must arise' *Pambazuka News* 4 August 2011 <http://www.pambazuka.org/en/category/comment/75413> (accessed 15 August 2011).

⁷³ MK Mbondeniyi 'The right to participate in the government of one's country: An analysis of art 13 of the African Charter on Human and Peoples' Rights in light of Kenya's 2007 political crisis' (2009) 9 *AHRLJ* 183-202.

⁷⁴ As above, 187.

⁷⁵ Mbondeniyi (n 76 above) 190.

⁷⁶ Ratification of Treaties Bill 2011, sec 2.

⁷⁷ Kenya third periodic report on the International Covenant on Civil and Political Rights CCPR/c/KEN/3 (13 January 2011) para 1.

⁷⁸ Kenya State report on the African Charter on Human and Peoples' Rights (2006) para 189.

or even with reference to concluding observations previously issued.⁷⁹

The 2010 Constitution provides that the President of the Republic shall report on how the government is meeting its obligations with regard to international treaties every year.⁸⁰ This provision holds the promise of accountability in terms of what the government is doing to give effect to concluding observations. Currently, there is no mechanism to ensure dissemination of either the concluding observations or progress in implementation.

13 Communications involving this state

Several communications have been lodged at the African Commission against Kenya. The latest *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* was decided in November 2009.⁸¹ Kenya was found to be in violation of the Endorois peoples' rights to freedom of religion, property, cultural life, wealth and natural resources and development. The African Commission recommended that the state should recognise rights of ownership to the Endorois and restore Endorois ancestral land; the State to ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. The African Commission further recom-

mended that Kenya pay adequate compensation to the community for all the loss suffered and pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve. Furthermore, it was recommended that the State should grant registration to the Endorois Welfare Committee and engage in dialogue with the Complainants for the effective implementation of these recommendations. Finally, as a follow-up mechanism, the African Commission recommended that Kenya should report on the implementation of these recommendations within three months from the date of notification.

On 18 January 2011, and in response to a question in Parliament on the status of implementation of the above recommendations, the Minister of Lands indicated that he had requested and was still waiting for a certified copy of the decision from Kenya's Mission to the AU in Addis Ababa.⁸² He nevertheless indicated that there were already steps that the Government had undertaken, even though not specifically in response to the communication, that would resolve some of these issues. He noted that the 2010 Constitution protected community land,⁸³ directed the state to take measures including the enactment of legislation, to revise, consolidate, rationalise existing land laws and revise sectoral land use laws in accordance with principles of equitable access to land, security of land rights among other principles.⁸⁴ In relation to the environment and natural resources, the 2010 Constitution provides that the

⁷⁹ OHCHR 'Taking these rights seriously: Civil society organisations' parallel report to the initial state report of the Republic of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights' (2008) 8 http://www2.ohchr.org/english/bodies/cescr/docs/ngos/K-HURINET_Kenya_CESCR41_report.pdf (accessed 15 August 2011).

⁸⁰ Art 132(1)(c)(iii).

⁸¹ Communication No 276/2003.

⁸² National Assembly Official Report (18 January 2011), Questions by private notice 'Property rights for pastoralists/marginalised groups' 17-22.

⁸³ Art 63.

⁸⁴ Art 68.

state shall ensure the sustainable exploitation, utilisation, management and conservation of the environment, public participation in these goals and utilisation of the environment and natural resources for the benefit of the people of Kenya, to name a few obligations.⁸⁵ Other provisions relate to the enforcement of environmental rights and the regulation of agreements relating to the exploitation of natural resources.⁸⁶

The Minister further pointed out that the Ministry of Lands had drafted a National Lands Policy and was involved in the drafting of a National Land Commission Bill and a Lands Bill. The Policy had received input from pastoral and minority groups. He said that the emphasis of the Ministry was on developing a framework on equitable access to land for use rather than ownership of land.

On its part, the KNCHR is not able to profile all communications due to limited resources and other competing needs. Consequently, it gives exposure only in specific matters that are of broad public interest, for example, the Endorois case ruling and its significance to the rights of indigenous communities in Kenya. In such cases, the KNCHR engages with relevant stakeholders to ensure that the findings are widely disseminated.

In the *Endorois* case for example, KNCHR convened CSO stakeholders to mobilise the public through television and print media and through grassroots workshops with the Endorois community on recommendations' significance to their rights as indigenous people. Steps have also been taken to engage with Parliament and with the Minister

responsible for land affairs to pursue the implementation of the decision as part of the wider realisation of the community land framework under the current Constitution. As a follow up, CSOs and KNCHR will undertake a strategic planning process to identify key resources and formulate means of mainstreaming the *Endorois* decision implementation within their core programme areas. The convening role of KNCHR remains important.⁸⁷

14 Special mechanisms and promotional visits by the African Commission

There is no evidence of any promotional visits that have been undertaken to Kenya either by the African Commission or the special mechanisms. In an East African Human Rights report on Kenya in 2003, then member of the African Commission responsible for Kenya, Commissioner Vera Chirwa, decried the apathy towards requests for promotional visits which went unanswered and unacknowledged, and the then dismal state reporting status on the African Charter.⁸⁸ While Kenya has since submitted a state report, no promotional visits have taken place.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

The 2010 Constitution has provided a much needed breath of fresh air in the

⁸⁵ Art 69.

⁸⁶ Arts 70-71.

⁸⁷ Interview with Senior KNCHR Staff in charge of Minorities in the ECOSOC Department, 17 August 2011.

⁸⁸ East African Human Rights Report – Kenya (2003) 1 *The East African Journal of Human Rights and Democracy* 1-37.

articulation and advocacy of human rights principles in Kenya. In particular, article 2(6) thereof provides that all treaties ratified by Kenya shall form part of the laws of Kenya. The import of this is that all human rights treaties that Kenya has ratified (including the African Charter), now constitute part of Kenyan law.

Moreover, the Bill of rights contains a raft of provisions that are modelled on international and regional standards for the promotion and protection of human rights. It is anticipated that this, together with a vibrant civil society, fairly independent media and effective watchdog agencies such as the KNCHR, will enhance the human rights discourse in Kenya and thus the impact of the African Charter.

In terms of government led processes, the reform process in Kenya has seen matters of human rights come to the fore and be included in every discussion on law and policy. Furthermore, adoption of the proposed National Action Plan and Policy on Human Rights and the Performance Contracting Process in Government with human rights indicators will ultimately result in the mainstreaming of human rights in all aspects of service delivery by government.

Under the previous Constitution, Kenya was a dualist state. This meant that international instruments were only persuasive in terms of human rights advocacy and litigation. Moreover, this, coupled with lack of judicial activism and a 'human rights averse' government effectively hampered the impact of the African Charter, notwithstanding that it was signed in Nairobi. Myriad governance challenges and a hostile political environment for human rights defenders suffocated the human rights discourse in general including the impact of the Afri-

can Charter. The enhanced democratic space and a more vibrant human rights discourse after 2003 has generally improved prospects for positive impact of the African Charter in Kenya.

A significant challenge is the lack of awareness and use of the African Charter by CSOs, legal practitioners and government bodies. In most cases, lawyers and activists rely on the provisions of international treaties such as the ICCPR, and other UN instruments. Recourse is only had to the African Charter for instance in cases before the East African Court of Justice whose constitutive instrument makes explicit reference to the Charter as a source of law.⁸⁹ Kenyans are quick to engage with the UN mechanisms to the detriment of the regional framework- There is thus the need for enhanced awareness on the African Charter, and its relation to our laws and its impact on human rights in Kenya.

In addition, there is the perception that UN Mechanisms are more effective, and thus enjoy more publicity than the African mechanisms. For instance the former UN Special Rapporteur on Extra-Judicial Executions, Professor Philip Alston, took government to task over alleged extra-judicial killings by the Kenyan Police and Military in 2008 whereas little was heard from the AU and (or) African Commission on this. Furthermore, the AU's political stand in matters relating to the ICC process in Kenya and other African States has served to cast all AU affiliated mechanisms including the perception of the African Charter in negative light within the domestic realm. For this reason, it is suggested that the African Commission

⁸⁹ For instance *IMLU v Attorney General of Kenya and 4 others* EACJ Ref. No 3 of 2010.

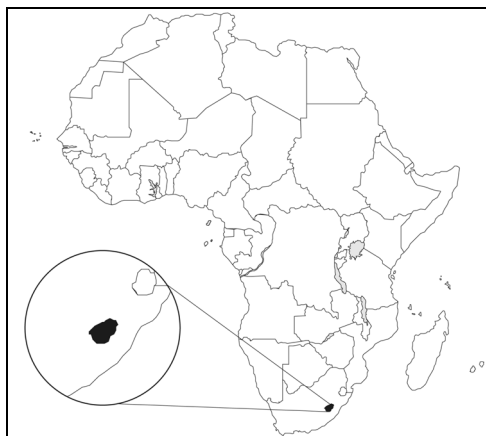
undertakes a promotional visit to Kenya to engage with CSOs and other human rights actors and the general populace in an effort to create new partnerships and strengthen existing ones.

With specific focus on the Women's Protocol, it is evident that there are still a number of negative cultural practices that continue to subjugate women and impede the full realisation of their rights. Practices such as early marriages, wife inheritance, female genital mutilation (FGM) and preference for the boy-child still need to be addressed in order to enhance the impact of the Women's Protocol.

State parties to this Protocol have also not fully embraced its spirit. There is, therefore, a dire need for more sensitisation on the gains that the Women's Protocol offers to the African people—both men and women, in terms of accelerated development due to the great untapped potential of African women in all spheres of life.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN LESOTHO

*Tebello Thabane**
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1 Introduction and background

Lesotho, like its neighbours Botswana and Swaziland, was a British Protectorate and as such it applied Roman-Dutch law through the General Law Proclamation of 1884 that made law that was applicable in the Colony of the Cape of Good Hope equally applicable in Lesotho.¹ Interestingly, the Proclamation exported Roman-Dutch law and its legal traditions to Lesotho, but did not concomitantly tamper with Lesotho's legal traditions embodied in customary law. As a result, a dual system of the 'received law' running side-by-side with the customary law was created.²

2 Ratification of the African Charter and Women's Protocol

One of the legal traditions that Lesotho imported through this dual heritage is in

the realm of international treaties. In Britain, at the time, the power to ratify international treaties resided with the executive rather than the legislature.³ According to one author, commenting on the position in Botswana, which is almost identical to the Lesotho position, the legislature plays no role in the treaty-ratifying process.⁴ It is arguable that this is also the position in Lesotho given a similar historical context. Lesotho ratified the African Charter on 10 February 1992 and the Women's Protocol on 26 October 2004.⁵ True to the tradition of executive-led ratification, the process in both instances seems to have been led by executive to the exclusion of parliament.

3 Domestication or incorporation of the African Charter and Women's Protocol

Indeed international instruments can only formally become part of Lesotho law and thus enforceable if domesticated by an Act of Parliament. This tradi-

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¹ General Law Proclamation 2B of 1884.

² The received law comprised of 'the law for the time being' in force in the Colony of the Cape of Good Hope and this was Roman-Dutch law heavily influenced by English law. See VV Palmer & SM Poulter *The legal system of Lesotho* (1972) 46-53.

³ BT Onkemetse 'Giving effect to treaties in the domestic law of Botswana' (1997) *Lesotho Law Journal* 205, 209.

⁴ As above.

⁵ See 'Chart of ratifications: AU human rights treaties' in C Heyns (ed) *Compendium of key human rights documents of the African Union* (2005) 261-264.

tion emanates from English law, which Lesotho got exposed to through the General Law Proclamation of 1884. There has been no effort to domesticate the African Charter like is the case in Nigeria. The Women's Protocol has also not been domesticated. However, as will be apparent under law reform below, great strides have been made to accommodate some of the Women's Protocol rights through the Legal Capacity of Married Persons Act.⁶ The rights enshrined in the African Charter, albeit not all, are explicitly provided for in the Bill of Rights.⁷ In particular, the following rights are provided for: the right to life,⁸ the right to personal liberty,⁹ freedom of movement,¹⁰ freedom from inhumane treatment,¹¹ freedom from slavery and forced labour,¹² freedom from arbitrary search or entry,¹³ right to respect for private and family life,¹⁴ right to a fair trial,¹⁵ freedom of conscience,¹⁶ freedom of expression,¹⁷ freedom of peaceful assembly,¹⁸ freedom of association,¹⁹ freedom from arbitrary seizure of property,²⁰ freedom from discrimination,²¹ right to equality before the law and the equal protection of the law,²² and right to participate in government.²³ Interestingly, the Lesotho Constitution has an equality provision which enjoins the state to take affirmative action measures to promote

rights of disadvantaged groups, but this is under principles of state policy and thus not justiciable.²⁴

It is worth noting that some of the rights in the African Charter have not found their way into the 1993 Constitution, at least explicitly. Granted, the 1993 Constitution proscribes undignified practices like slavery and inhumane treatment, but does not, like the African Charter, explicitly provide for the right to human dignity as an independent right.²⁵ It also lacks the right to receive information.²⁶

Socio-economic rights are provided for in a chapter of the 1993 Constitution separate from the traditional civil and political rights.²⁷ They are regarded as principles of state policy and as such are not enforceable in any court. These rights are also subject to the limits of the economic capacity and development of Lesotho. They are meant to guide the authorities and agencies in the performance of their duties with a view to progressively realise them.²⁸ They include the protection of health,²⁹ provision for education,³⁰ and opportunity to work.³¹

4 Legislative reform or adoption

Lesotho adopted the current Constitution in 1993, a year after it ratified the African Charter. No compatibility study appears to have been undertaken before the African Charter was ratified and sadly this Charter does not seem to have influenced the Bill of Rights in the 1993

⁶ Act 9 of 2006.

⁷ See Chapter 2 of the Constitution.

⁸ Sec 5 of the Constitution.

⁹ Sec 6 of the Constitution.

¹⁰ Sec 7 of the Constitution.

¹¹ Sec 8 of the Constitution.

¹² Sec 9 of the Constitution.

¹³ Sec 10 of the Constitution.

¹⁴ Sec 11 of the Constitution.

¹⁵ Sec 12 of the Constitution.

¹⁶ Sec 13 of the Constitution.

¹⁷ Sec 14 of the Constitution.

¹⁸ Sec 15 of the Constitution.

¹⁹ Sec 16 of the Constitution.

²⁰ Sec 17 of the Constitution.

²¹ Sec 18 of the Constitution.

²² Sec 19 of the Constitution.

²³ Sec 20 of the Constitution.

²⁴ Sec 26 of the Constitution.

²⁵ Art 5 of the African Charter.

²⁶ Art 9 of the African Charter.

²⁷ See Chapter 3 of the Constitution.

²⁸ See sec 25 on application of the principles of state policy.

²⁹ Sec 27 of the Constitution.

³⁰ Sec 28 of the Constitution.

³¹ Sec 29 of the Constitution.

Constitution in that the Constitution treats socio-economic rights differently from civil and political rights by making the former not justiciable. Further, as indicated above, the 1993 Constitution has left out some of the rights in the African Charter. On a positive note, the country amended the Local Government Elections Act in 2004 to essentially reserve one third of all seats in every local council for female candidates.³² This resulted in 58% of women occupying local government seats after the 2005 local government elections thus surpassing the Southern Africa Development Community (SADC) standard of 30% and AU standard of 50%. This development is a direct response to article 13(1) of the African Charter, which accords every citizen the right to participate freely in government either directly or through freely chosen representatives.³³

A local compatibility study was also not undertaken before the Women's Protocol was ratified.³⁴ In an external study that sought to establish the compatibility of domestic laws of the first 15 member states to ratify the Women's Protocol, it was found that Lesotho laws did not comply with the Women's Protocol in a number of respects.³⁵ The study established that although the 1993 Constitution prohib-

its discrimination on the bases of *inter alia* sex, it surprisingly condones it under 'personal law' and customary law.³⁶ On a positive note, the State did not register any reservation to the Women's Protocol as it did to article 2 of CEDAW to the effect that it shall not amend its customary laws that are discriminatory against women.³⁷

In line with this renewed approach to eliminate discrimination against women, Lesotho embarked on a journey of reforming laws that are discriminatory against women. To this end, it enacted the Legal Capacity of Married Persons Act which essentially eliminates *de jure* discrimination against women under personal and some customary laws. The Act repeals the marital power that a husband had over the person and property of his wife and confers equal powers on both spouses married in community of property. It also gives couples and individuals the right to freely decide the number, spacing and timing of their children thus giving effect to the Women's Protocol.³⁸ The

countries that ratified the Protocol'. Copy with author and summary available at <http://www.pambazuka.org/en/category/aumonitor/38225> (accessed 9 September 2011). The fact that domestic laws were not brought in line with the Protocol was a violation of art 18 of the Vienna Convention on the Law of Treaties (1980) which obligates 'states not to defeat the object and purpose of a treaty prior to its entry into force'. Lesotho acceded to this treaty on 3 March 1972.

³² Sec 26(1A)(a) and (b) of the Act.

³³ See T Thabane & M Buthelezi 'Bridging the gap between *de jure* and *de facto* parliamentary representation of women in Africa' (2008) 41 *Comparative and International Law Journal of Southern Africa* 175, 183, where the authors, amongst others, deal with women's right to representation in the African human rights system.

³⁴ Lesotho ratified the Women Protocol on 26 October 2004 and became one of the first 15 member states to ratify the instrument.

³⁵ See A Amollo, T Thabane & R Hanzi 'A study on the compatibility of national laws and policies with the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa for the first 15

³⁶ Sec 18 prohibits discrimination but subsection (4) provides that sec 18 shall not apply to customary law or personal law (that is law on marriage, divorce, burial, devolution of property on death, adoption and so on).

³⁷ See KA Acheampong 'The ramification of Lesotho's ratification of the Convention on the Elimination of all forms of Discrimination Against Women' (1993) 9 *Lesotho Law Journal* 79.

³⁸ See in particular art 14(1)(b) of the Women's Protocol.

Act is, however, unacceptably inapplicable to customary inheritance and succession.³⁹ The Prime Minister recently lamented that 'these laws (succession and inheritance) should be amended as has been done with other laws which no longer function in modern society'.⁴⁰

The legislature was probably loath to tamper with these areas given that the issue of succession to the throne is still a thorny one and possibly because of the mistaken belief that such amendment would require a referendum given that section 18 of the 1993 Constitution is 'doubly entrenched'.⁴¹ As correctly observed by Maope, section 18(4) is not itself doubly entrenched despite the fact that it is part of section 18 which is doubly entrenched.⁴² Although this sounds somewhat absurd, section 85(3)(b) of the Constitution provides for clauses that can be altered by a simple two-thirds majority in both houses of Parliament without the necessity of a

referendum and section 18(4) is one such provision. Maope further observes that section 18(4) allows discrimination under personal and customary laws but has a *proviso* to the effect that the state can make laws to promote a society based on the equality for all citizens and thereby removing any discriminatory laws.⁴³ It is submitted that a formal national debate ought to have been facilitated before the Legal Capacity of Married Persons Act was passed with a view of getting the nation's views on the customary rules on inheritance, succession and chieftainship rather than assume that the nation wants the customary inheritance and succession rules retained in their current form or fear a referendum that is not even required in terms of section 85(3)(b) of the Constitution. One might also hasten to add that the codified customary rules on inheritance and succession are arguably no longer reflecting the 'living' customary law and as such ought to be subjected to a national debate.⁴⁴

Subsequent to the passing of the Legal Capacity of Married Persons Act, other laws that were discriminatory against women were amended. These include the Companies Act of 1967, which was amended in 2008 to enable women to become promoters or directors of companies without having to

³⁹ This is a blatant violation of the Vienna Convention on the Law of Treaties (1969/1980), in particular art 27 that states that a state 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. It is also a violation of art 26 that requires states to observe the provisions of the treaty in accordance with the principle of *pacta sunt servanda* (good faith).

⁴⁰ B Zihlangu 'Mosisili wants inheritance, succession laws reviewed' <http://www.lestimes.com/?p=7005> (accessed 1 September 2011).

⁴¹ Although sec 18 is doubly entrenched in that it would require a majority vote in both houses of Parliament and a positive referendum, subsection (4) which condones discrimination under personal laws and customary law is not entrenched.

⁴² Maope, who was a technical advisor during the drafting of the Constitution, offers a plausible history to sec 18(4) and sec 85(3)(b). He indicates that the constitution was drafted under a difficult political atmosphere of military rule with the exigency of democratisation and return to democratic rule. There was a lot of mistrust, pressure and legitimacy issues at play so it was for the drafters to find innovative ways of delivering an acceptable constitution within a short period of time without the benefit of proper consultation and borrowing from other jurisdictions. It is therefore understandable why the thorny issues

of succession to the office of King and customary succession, chieftaincy and inheritance were left untouched (sec 18 is almost a replica of sec 17 of the 1966 independence Constitution). However, subsection (4) that protected these areas was not made subject to a referendum thus giving future democratic governments leeway to amend the discriminatory laws. See K Maope 'A note on discrimination and sec 18 of the Constitution of Lesotho' in Lesotho Justice Sector Conference Report (26-30 July 2004) 129, 132-135.

⁴³ Maope (n 42 above) 131.

⁴⁴ Customary laws were codified in the 1903 Laws of Lerotoli Part I, II, & III. These century old rules surely do not represent the living customs of the nation.

seek their husbands' permission. The Land Act of 1979 was also amended in 2008, and provides for joint title to land for spouses married in community of property.⁴⁵

5 Policy reform or formulation

Some important government policies implicitly give effect to both the African Charter and the Women's Protocol. For example, the Gender and Development Policy strives to address gender inequality and vulnerability of women to HIV/AIDS and it does this by adopting a human rights based approach like the gender mainstreaming technique.⁴⁶ This policy gave birth to the Legal Capacity of Married Persons Act of 2006, the main purpose of which was to eliminate discrimination against women in all walks of life. Other policies that have favourably considered the Charter and Women's Protocol include the Lesotho Correctional Service HIV and AIDS policy and the National HIV/AIDS strategic plan.⁴⁷

6 Court judgments

The African Charter and the Women's Protocol are seldom used in judgments. The courts began, in *Joe Molefi v Govern-*

ment of Lesotho, with a strict approach to dualism where they demanded that ratified international instruments be incorporated into the domestic law before they can regard their provisions enforceable.⁴⁸ In *Basotho National Party and Another v Government of Lesotho and Others*,⁴⁹ the applicants sought an order directing the Government of Lesotho to take the necessary steps, in accordance with its constitutional processes, to adopt such legislative and other measures necessary to give effect to the rights recognised in international conventions such as the African Charter. The Court explicitly stated that 'these Conventions cannot form part of our law until and unless they are incorporated into municipal law by legislative enactment'. The Court stressed that:

the court cannot usurp the functions assigned the executive and the legislature under the Constitution and it cannot even indirectly require the executive to indirectly introduce a particular legislation or the legislature to pass it or assume itself a supervisory function over the law-making activities of the executive and the legislature.⁵⁰

However, in interpreting the right to legal representation in *DPP v Sole and another*,⁵¹ the Court made reference to several international human rights instruments including article 7(1) of the

⁴⁵ See Lesotho National report submitted to the UN Human Rights Council in accordance with para 15(a) of the annex to Human Rights Council Resolution 5/1, A/HRC/WG.6/8/LSO/1 http://www.upr-info.org/IMG/pdf/A_HRC_WG-6_8_LSO_1.pdf (accessed 1 September 2011).

⁴⁶ It must be noted that some policies were not readily available to the researchers and as a result they had to rely on credible documents that have analysed some of these policies. In this regard, see <http://www.genderlinks.org.za/article/lesotho-gender-and-development-policy-2009-09-01> (accessed 12 September 2011).

⁴⁷ These are available on the National AIDS Commission website at <http://www.nas.org.ls/documents/default.php> (accessed 12 September 2011).

⁴⁸ *Joe Molefi v Government of Lesotho* 1967–70 LLR 237. See also a conference paper by K Mohau 'Protection and redress for victims of crime and human rights violations: adequacy and efficacy of institutions and laws' in Lesotho Justice Sector Conference Report (26-30 July 2004) 96 where the author makes reference to this decision.

⁴⁹ *Basotho National Party and Another v Government of Lesotho and Others* (Constitutional case No5/2002) [2003] LSHC 6 (1 January 2003) (unreported) and *Moosa and others v Magistrate - His Worship Mr Nilhakana and others* [2007] LSHC.

⁵⁰ The Court quoted Bhagwati J in *State of Haryana v State of Punjab* (1986) LRC 208 (Supreme Court of India).

⁵¹ [2001] LSHC 101 (unreported.)

African Charter.⁵² Later, in the celebrated case of *Molefi Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LeCA 2005) the highest court in the land confirmed the emerging paradigm shift by referring to several ratified, but undomesticated instruments including the African Charter, CEDAW, the SADC Declaration on Gender and Equality, and the International Covenant on Civil and Political Rights (ICCPR).⁵³ The appellant had challenged the constitutionality of a law that reserved one third of local government seats for women. He contended that the law was discriminatory on the basis of sex. Interestingly, he also argued that the international obligations that the respondent sought to bring to the fore were actually in conflict with the domestic laws of Lesotho. The Court dismissed his arguments and found that Lesotho was bound by its international obligations. It specifically referred to article 18(4) of the African Charter despite the fact that this Charter is not domesticated. In an unprecedented move, the Court also referred to, but did not apply the Women's Protocol, which Lesotho had already ratified at that stage, but had not yet come into force due to the fact that there were inadequate ratifications.⁵⁴

Regarding the utility of the African Charter and the Women's Protocol, four of the eleven Judges of the High Court

of Lesotho indicated, in an interview, that minimal use of these instruments is attributed to among others: lack of awareness by the courts as to the existence of the two instruments and whether Lesotho is party thereto; lack of awareness and access to the decisions of the African Commission; failure of legal practitioners to refer to the two instruments and lack of enabling legislation that domesticates the African Charter and the Women's Protocol.

Although some concerns raised by their Lordships are genuine, it is submitted that they have to take their cue from the Court of Appeal particularly because Lesotho is a common law country that observes the principle of judicial precedents. If the highest court in the land was not deterred by the fact that the African Charter and the Women's Protocol are undomesticated, the High Court should also not find this to be a hurdle. The judiciary should be proactive and expose all its judicial officers across the High Court and the magistracy to international law in general and the African human rights system in particular.

7 Awareness and use by civil society

Although there are not many human rights civil society organisations in Lesotho, those present are aware of and use the African Charter and the Women's Protocol in their human rights awareness campaigns. For instance, the Transformation Resource Centre (TRC) has a human rights unit which in many instances use the African Charter in its human rights campaigns, in its moot court competitions which it holds for the university law students and also in lobbying for domestication of the Afri-

⁵² See also *Judicial Officers Association of Lesotho v The Prime Minister* [2006] LSHC in which the Court referred to arts 7 and 26 of the African Charter and stated that Lesotho is a state party to the African Charter which imposes on it, the duty to guarantee independence of the courts.

⁵³ Lesotho ratified the ICCPR in 1992 and CEDAW in 1995.

⁵⁴ For a comprehensive discussion of the case, see F Viljoen & M Nsibirwa 'Political participation of women in Lesotho: The case of *Molefi Ts'epe v The Independent Electoral Commission and Others*, Judgement of 30 June 2005' (2006) 39 *Comparative and International Law Journal of Southern Africa* 351-360.

can Charter so as to give effect to rights provided therein, in particular the socio-economic rights which are still not justifiable in the country.

The Lesotho Federation of Women Lawyers (FIDA) has also used the African Charter and the Women's Protocol in its human rights awareness campaigns. It recently sent one of its members, a female lawyer, to a course in Kenya on how the African Charter and Women's Protocol could be utilised before national courts to advance the rights of women. FIDA is also planning to train more of its members on the use of these instruments before national courts and also to lobby the government to enact enabling legislation.

8 Awareness and use by practising and other lawyers

It is in very few cases that the lawyers in Lesotho have resorted to the African Charter in their arguments. Most lawyers are of the opinion that since the African Charter and the Women's Protocol have not been domesticated into national law, they cannot be used either for interpretation purposes or to persuade the courts.

For those who make reference to regional human rights instruments, resort is made mostly to the European Court of Human Rights judgments and the Canadian Charter on Human Rights. Exact reasons for this pattern could not be ascertained although one may conclude that the influence may be from some of the Court of Appeal Judgments in which cases from the European Court of Human Rights were quoted with approval.

9 Incorporation in law school education

Topics relating to the African Charter and the Women's Protocol are included in two courses: Human Rights and Humanitarian Law as well as Gender and the Law. Human Rights and Humanitarian Law has been offered in the faculty since its inception, and topics relating to the African Charter were offered in as far back as 1981 when this Charter entered into force. Developments in terms of resolutions by and communications to the African Commission are also included in this course. Specific topics dealing with the provisions of the African Charter and its implementation mechanisms are also part of the course. It also discusses the African Commission and the procedures for bringing communications before it, as well as establishment of the African Court of Justice. In Gender and the Law, which was recently reintroduced, students are exposed to rights of women as enunciated in the Women's Protocol and other instruments.⁵⁵

10 National human rights institutions (NHRIs)

Lesotho does not have a human rights commission yet. However, it has the office of the Ombudsman. This Office is aware of the African Charter and has used it in its reports relating to the conditions of correctional institutions. In these reports, the Government has always been urged to improve the conditions in these institutions in accordance with its international human rights obligations including those in the African Charter.

⁵⁵ The Protocol is discussed and critiqued in class and assignments.

11 Academic writing on the African Charter and Women's Protocol

The African Charter and the Women's Protocol have been referred to and at times critiqued in various articles in the *Lesotho Law Journal* which is produced and edited by the faculty of law at the National University of Lesotho. These articles focus on a range of issues from the rights of women in the African Charter,⁵⁶ human rights, democracy and development aid in Africa,⁵⁷ the right to legal representation in Africa,⁵⁸

independence of the judiciary,⁵⁹ the concept of peoples' rights,⁶⁰ freedom of expression under the African Charter,⁶¹ racial discrimination,⁶² human rights and democracy in Africa,⁶³ the content of civil and political rights in the African Charter,⁶⁴ and culture and human

⁵⁶ K Acheampong 'The African Charter and Equalisation of Human Rights' (1991) 7 *Lesotho Law Journal* 21; O Tshosa 'Judicial protection of the rights of women under the constitutions of southern African countries with particular reference to non-discrimination' (2008-2009) *Lesotho Law Journal* 99. In this article the Charter and Protocol are quoted with approval as some of the international human rights instruments that prohibit discrimination on the basis of sex; N Aniekwu 'Customary law impacts on women's rights issues: reconciling the tensions in Nigeria' (2008-2009) 18 *Lesotho Law Journal* 85 where the Charter and the Protocol are quoted as other sources or legal basis for women's rights in Nigeria. The author notes with concern that although the Charter has become part of Nigerian Law, it has however not been a basis for vindication of women's rights in Nigeria. She makes an example of *Mojekwu v Mojekwu* in which a certain Nigerian custom was declared discriminatory but without reference to the Charter or Protocol as the basis for such a holding.

⁵⁷ K Acheampong 'Human rights, democracy and development aid to Africa' (1992) 8 *Lesotho Law Journal* 17. Here the author while discussing the link between human rights, democracy and developmental aid, refers to art 22 (1) of the Charter which imposes upon state parties, the primary duty of facilitating the exercise of the right to development. He argues that though this article, unlike art 1(1) of the UN Declaration on Development does not include the word 'political', and that is no sign that the Charter has revisited the ideological battlefield of the issue of prioritisation of human rights. He bases this assertion on the fact that although the Charter has not in the past, paid particular attention to the right to development, it does make some reference to it in its preamble.

⁵⁸ J Hatchard 'The right to legal representation in Africa: the Zimbabwean experience' (1988) 4 *Lesotho Law Journal* 135.

⁵⁹ PKA Amoah 'Independence of the judiciary in Lesotho: A tribute to Justice Mofokeng' (1987) 3 *Lesotho Law Journal*. In discussing independence of the judiciary in Lesotho, the author comments that although the Charter and other instruments seem to be in agreement that judicial independence is a *sine qua non* for protection of basic human rights, they do not, however, provide comprehensive definition of the concept.

⁶⁰ M Fanana 'The peoples' rights under the African charter on human and peoples' rights' (1997) 10 *Lesotho Law Journal* 37.

⁶¹ K Acheampong 'Freedom of expression including freedom of the press under the African Charter' (1997) 10 *Lesotho Law Journal* 57. This article determines the extent and the nature of the right to freedom of expression including that of the press under the Charter. It argues that arts 27 and 28 stipulate the parameters within which the right may be interfered with or limited by governments in accordance with the words 'within the law' in art 9. The author, however, notes that such limitations must be reasonably justifiable or necessary in a democratic society in which alone this right and other rights thrive.

⁶² ZS Gondwe 'Prohibition against all forms of racial discrimination: policy, law and reality' (1996) *Lesotho Law Journal* 13. In discussing international and regional instruments that prohibit discrimination, this article refers to arts 2 and 28 of the Charter. The author criticises these provisions on the ground that the Charter is concerned more with the promotion by way of superimposition of human rights than with the identification and elimination of the root causes of racism.

⁶³ K Acheampong 'Africa and the vicissitudes of the human rights principle of the will of the people as the basis of the authority of government' (1998) 11 *Lesotho Law Journal* 87. The author refers to art 13(1) of the Charter and argues that it is a standard upon which all national constitutions should be based and which if adhered to would lead to democracy.

⁶⁴ M Mbondenyi 'Improving the substance and the content of civil and political rights under the African Human Rights System' (2007) 17 *Lesotho Law Journal* 37. This article commends the Charter for having all human rights provided in one instrument without there being generalisation of rights. It also identifies some shortcomings of the Charter that deals with civil and political rights and suggests how such may be improved.

rights.⁶⁵

It is evident from the foregoing that academics in Lesotho have engaged with the African Charter in their writing from as early as the way back as the 1980s to present. It is, however, worrying that the lawyers they train do not seem to see value in using the African Charter and other African instruments when they get to legal practise.

12 State reporting

State reporting is the domain of an Inter-sectoral Committee for Human Rights (ICHR) comprised of representatives of different government ministries and civil society. The composition of this body makes it ideal to deliver on state reporting as different government ministries and civil society are represented in it. It has been faced with a huge backlog of overdue reports to different treaty bodies. It admitted to the promotional mission of the African Commission in 2006 that it prioritised reporting to United Nations treaty bodies.⁶⁶ It also acknowledged that it has capacity challenges. The Government, therefore, ought to ensure that it is resourced and able to deliver on its mandate.

13 Communications involving this State

There is one reported communication submitted to the African Commission against Lesotho. Ironically, this was submitted before Lesotho became a party to the African Charter and as such it was declared inadmissible.⁶⁷ It emerged during the African Commission's promotional mission to Lesotho in 2006 that a prisoner tried to access the African Commission through a letter complaining about torture in Lesotho prisons, but his letter was short of a formal communication.⁶⁸ The fact that there is only one reported communication may partly be due to lack of awareness about the work of the African Commission on the part of the majority of practising lawyers. It may also be due to high costs given the geographic distance between Lesotho and the Gambia. On a positive note, a few lawyers have started attending the African Commission's sessions and acquainting themselves with the work of this Commission and establishing working relationships with other lawyers from the region who have been accessing the African Commission in the past.

⁶⁵ P Letete 'The notion of culture and equality in international law: conflict of laws in Lesotho' (1998) 11 *Lesotho Law Journal* 159. The author makes a point that art 18(3) of the Charter protects culture whilst at the same time it safeguards the equality of all human beings. The author laments that despite being a party to the Charter, Lesotho has 'ignored' to incorporate its provisions in the municipal law and thereby making protective principles enunciated in the Charter and the Protocol useless.

⁶⁶ See Report of the promotional mission to the Kingdom of Lesotho (2006) paras 129-136 www.achpr.org/english/Mission/Lesotho/Mission%20Report_Lesotho.pdf (accessed 9 September 2011).

⁶⁷ See *Simon B Nkata v Lesotho* 33/89 http://www.achpr.org/english/Decision_Communication/Lesotho/Comm.33-89.pdf (accessed 9 September 2011). Lesotho became a party to the African Charter on 10 February 1992 and this matter was declared inadmissible at the Commission's 4th Ordinary Session held from 17-26 October 1988. A prisoner also tried to access the commission recently through a letter complaining about torture in prisons but this was short of a formal communication.

⁶⁸ See Report of the promotional mission to the Kingdom of Lesotho (n 66 above) para 166.

14 Special mechanisms and promotional visits by the African Commission

The African Commission undertook a promotional mission to Lesotho from 3 – 7 April 2006. The mission was led by Commissioner Mmasenono Monageng and her terms of reference were, *inter alia*, to raise awareness of and visibility of the African Commission; to encourage Lesotho to establish a national human rights institution; and to submit its first periodic report in accordance with article 62 of the African Charter.⁶⁹ After consultations with various stakeholders, the mission made two important observations, namely that civil society was weak and law reform was very slow.⁷⁰ It also made recommendations ranging from the speedy establishment of a national human rights institution; abolition of the death penalty; to measures to ensure the integrity and preservation of judicial independence.⁷¹ Commissioner Mumba Malila addressed a symposium on strengthening the independence of the judiciary in 2010.⁷² This engagement with the country's judiciary was a step in the right direction given the recommendations made by the African Commission's promotional mandate on issues of judicial independence in the Country.

⁶⁹ As above.

⁷⁰ As above, paras 184 and 185.

⁷¹ See recommendations to various stakeholders from paras 186-217 of the Report (n 66 above).

⁷² The Commissioner delivered a paper at the symposium on Strengthening the Independence, Impartiality and Accountability of the Judiciary in the context of Lesotho organized by the International Commission of Jurists in conjunction with the Judiciary of Lesotho 4 - 5 March 2010, Maseru, Lesotho titled 'The Independence of the Judiciary through the eyes of the African Commission on Human and Peoples' Rights' <http://www.icj.org/dwn/database/Malila-SC-JudicialIndependencethroughtheeyesoftheACHPR.pdf> (accessed 12 September 2011).

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

Lesotho experienced major political upheavals that resulted in a series of human rights violations after the 1998 general elections. Surprisingly, none of the special mechanisms of the African Commission intervened to investigate the violations and engage the State. It may be argued that the African Commission's irregular promotional missions impede the impact of the African Charter because the primary institution tasked with ensuring its promotion has not been visible in the country. This may also explain why some lawyers do not see it as a viable forum in their work.

Civil society and the media are major players in exposing human rights violations and holding states and non-state actors accountable. The African Commission's promotional mission of 2006 observed that these two players are very weak in Lesotho. This may therefore explain the limited impact the African Charter has in the Country.

Most countries have established dedicated human rights institutions to promote the culture of human rights. Lesotho, despite support from donor agencies, and recommendation from the African Commission, has still not established a human rights institution. This vacuum in the promotion of human rights indirectly impedes the impact of human rights instruments in the Country.

Given the questions asked by members of the judiciary during the African Commission's promotional

mission, it is apparent that judges, let alone the magistracy, do not have a clear understanding of what this Commission does. It may be argued, therefore, that they are not exposed to the African Charter if they do not know the basic functions of the body charged with promoting this instrument. This lack of knowledge is cause for concern in that they may not be amenable to using the Charter and the Protocol as tools in dispensing justice.

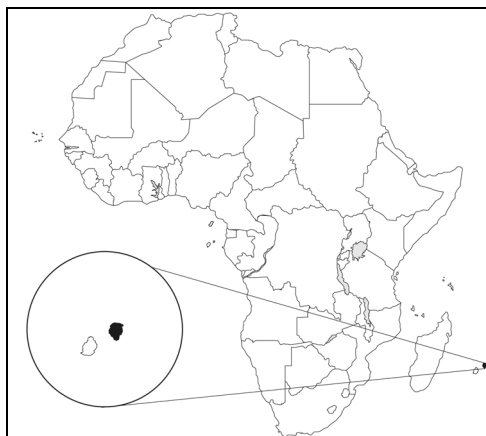
Although civil society is generally weak, women's rights groups like FIDA and the Lesotho Women and Law in Southern Africa (WILSA) have been vocal on issues of women's rights. They have participated in debates that led to the elaboration of the Women's Protocol and the SADC Gender Protocol and have used their experiences to shape the agenda of women's rights in the Country. They have also been instrumental in the law reform process thus ensuring that the African Charter and Women's Protocol, in particular, finds its way into Lesotho's domestic law. Having led the law reform process, they have also undertaken country-wide campaigns to expose women to the new laws meant to ameliorate their condition.

It is arguable that the famous *Molefi Ts'epe* case paved the way for the direct impact of the African Charter, the Women's Protocol and other international instruments in Lesotho. It is up to lawyers and judges to embrace it. Commissioner Mumba Malila's engagement with the judiciary and members of the legal profession where he, amongst others, exposed them to extensive jurisprudence of the African Commission on judicial independence and talked to the issue of the value of the African Commission's jurisprudence in the municipal jurisdiction is indeed a step in

the right direction. It is hoped that the judiciary and the legal profession will tap into the information and knowledge shared by the Commissioner.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN MAURITIUS

*Meskerem Geset Techane**



1 Introduction and background¹

Mauritius's colonial history shows a French and British control at different periods. In the period between 1767 and 1810, the Island was under French control. The British defeated the French and occupied the Island in 1810 and Mauritius remained under British rule until independence in 1968. Upon independence, the regime of the British Monarchy under the Queen of England was maintained until Mauritius became a Republic in 1992.

The written Constitution was bestowed to Mauritius by the British Government at the time of independence in 1968, and is based on the West-

minster model.² The Constitution is the Supreme law of the land³ and contains a justiciable Bill of Rights under Chapter II. It is clearly inspired by the European Convention on Human Rights. The Constitution provides for redress to be afforded by the Supreme Court to any individual whose rights under chapter II have been contravened.⁴ It is the duty of courts to interpret and enforce the provisions of the Constitution; the Supreme Court has original power to settle constitutional questions of substantial nature.⁵

In 2008 Mauritius celebrated the fortieth anniversary of its independence and Constitution at the same time.⁶ Though, the Constitution has developed through a number of amendments over the years, the fundamentals remained unchanged since independence, except for the establishment of a Republic in 1992.⁷

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¹ For a historical and political background and general information about Mauritius, see the web portal of Mauritius <http://www.gov.mu/portal/site/abtmmtius>; Mauritius Permanent Mission to the United Nations <http://www.un.int/mauritius/history.htm#development>; Wikipedia, the Free Encyclopedia, Mauritius <http://en.wikipedia.org/wiki/Mauritius#History>; US Department of State, Background Note: Mauritius <http://www.state.gov/r/pa/ei/bgn/2833.htm> (accessed 15 August 2011).

² National Human Rights Commission of Mauritius *Annual Report for the year 2008* (NHRC Report) (2009) 49, Independent Order of 4 March 1968: Attorney General's Office 1 (1981) 63-69. See also PR Domingue (2001) '*Legal Method and Mauritian Legal Systems*' (unpublished) University of Mauritius, 34.

³ See Sec 2.

⁴ Sec 17.

⁵ Sec 84.

⁶ NHRC Report (n 2 above) 1.

⁷ The 1992 constitutional amendment was fundamental which put an end to a regime of monarchy under the Queen of England.

The legal system of Mauritius is characterised as mixed taking into account that the French and British colonial periods have left their significant legacy on the legal system. 'Part of Mauritian laws is of French origin and part of British origin evolved under both colonial regimes. Civilian or Romanist foundations have been overlaid by English jurisprudence'.⁸ Having borrowings from two distinct systems, the legal system manifests substantial attributes derived from both systems. After independence, important legislative reforms were in place to maintain and consolidate the mixed character of the Mauritian legal system.⁹

2 Ratification of the African Charter and Women's Protocol

Mauritius signed the African Charter on 27 February 1992 and ratified it without delay on 19 June 1992. Mauritius has been a signatory to the Women's Protocol since 2005, albeit without ratification to date. Relevant government officials were contacted to assess the reasons for non-ratification and the possibility of ratification.

The ratification process generally involves the executive and Parliament. The process starts at the responsible line Ministry or department. The stakeholder Ministry or department of a particular treaty first makes relevant considerations and consults the Attorney General's Office which is the principal advisor of the Government on all legal matters. Compatibility reviews are done at this stage whereby the state lawyers critically

study and comment on the legal implications of a particular treaty.¹⁰ Depending on the comments, the next step will be submission of that treaty to the Cabinet. The Cabinet deliberates upon it and may decide that the treaty may be submitted to Parliament for ratification.¹¹ After it passes the Cabinet, the responsible Ministry must table the treaty before Parliament. Once Parliament has approved the ratification, the responsible department must submit instruments of ratification to the Ministry of Foreign Affairs which is responsible for depositing the instruments with the relevant treaty body.¹²

Effort was made to investigate the ratification history of the African Charter to explain the motivations and the salient considerations at the time of ratification. Given that ratification occurred about two decades ago, records of earlier events and key role players of the time were not traceable. A strong view is shared among concerned government officials is that Mauritius already having a democratic Constitution that recognises fundamental rights and freedoms, ratification of the African Charter would strengthen the State's commitment to human rights and enhance its co-opera-

⁸ Domingue (n 2 above) 4-32.

⁹ Domingue (n 2 above) 34-36.

¹⁰ Such review involves critical examination of the compatibility of a treaty with domestic laws and other international obligations. See interview with Mrs G Chitto, Principal State Counsel, Attorney General's Office, 7 September 2011.

¹¹ Normally ratification involves thorough discussion in the Cabinet on the implications at policy level after the AG's office advice on legal implications. Such discussions involve the diplomatic relations, the international image, economic and trade relations, financial implications. See interview with Mrs BR Cader, Acting Principal Assistant, Prime Minister's Office, 5 September 2011.

¹² Interviews with Mrs Cader (n 11 above); and Ms S Nurmahomed, Second Secretary, Ministry of Foreign Affairs, 5 September 2011.

tion with African countries at many other levels.¹³

Mauritius has reported that ratification of the Women's Protocol is in the pipeline,¹⁴ albeit, it was difficult to establish a notable progress at any stage. The Ministry of Gender Equality, Child Development and Family Welfare (Ministry of Gender) confirmed that there are no officially recorded impediments or resistance to ratification.¹⁵ Yet, the question of ratification has not been tabled before cabinet. It appears that the Ministry and other concerned stakeholders have not seriously looked in to it and it has also not been pushed by other stakeholders.

3 Domestication or incorporation of the African Charter and Women's Protocol

The Constitution does not provide for the status of international treaties signed and ratified by the Government. The relationship between international treaties and domestic laws is not clear. The Constitution is the declared supreme over any other law to the effect that other law inconsistent with the Constitution shall be void.¹⁶ It may follow that

the provisions of the African Charter are applicable to the extent that they are in harmony with the Constitution.

The African Charter has not been domesticated neither by explicit incorporation in the Constitution, nor by an Act of Parliament. Mauritius being a dualist state, international human rights treaties are not enforceable by national courts unless incorporated in to domestic law.¹⁷ In all this, the Constitution is also silent on whether or not national courts are enjoined to use international and regional human rights instruments as interpretive guides. Given the lack of any binding constitutional provision to that effect, the African Charter and the Women's Protocol do not have interpretative force in judicial proceedings. It would be in the discretion of the courts to resort to them.

The Constitution of Mauritius incorporated a justiciable Bill of Rights embodying civil and political rights inspired by the European Convention on Human Rights (European Convention). As a general statement, the civil and political rights in the Constitution appear corresponding to the African Charter provisions except certain omissions noted in some cases. The norms of the Women's Protocol, on the other hand, are not embedded in the Constitution. Despite, the entrenchment of the principles of equality and non-discrimination in sections 3 and 16 of the Constitution, it is a concern that grounds for discrimination are provided exhaustively. Mauritian courts have followed strict application of the provision in the past judgments.¹⁸ Further,

¹³ Interviews with Mrs Cader and Ms S Nurmahomed, as above.

¹⁴ See Mauritius Country Report on the AU Solemn Declaration on Gender Equality in Africa, Comment 9: Implementation of the Solemn Declaration on Gender Equality In Africa: First report by all AU member states, for consideration at the January 2007 summit to be held in Addis Ababa, Ethiopia, <http://www.africaunion.org/root/au/conferences/past/2006/October/WG/doc.htm> (accessed 4 September 2011). See also NHRC Report (2006) para 189.

¹⁵ Interviews with Mrs Mohini Bali, Head Gender Unit, Ministry of Gender and Dr Kaleeah Suryadeve, Head Planning and Research Unit. The same was affirmed in the above mentioned report to the AU that the Attorney General's Office advised there are no legal impediments.

¹⁶ Sec 2.

¹⁷ Justice R Lallah 'The domestic application of international human rights norms' (1988) 2 *Mauritius Law Review* 216.

¹⁸ See for example *Jeekahrajee v Registrar Cooperatives* (1978) MR 215 and *Société United Docks v Government of Mauritius* (1976) MR 81.

section 16 provides for a blanket exemption of certain laws such as laws concerning foreigners and personal status laws. Such a blanket exemption may leave the door wide open for discriminatory laws applicable on different groups and in particular may also be used as a justification for personal status laws that discriminate women and children.¹⁹

Although the rights to life and liberty are guaranteed under section 5 of the Constitution, the concepts of integrity and security of the person are missing as in independent elements warranting constitutional protection. Apart from to the omission of cruel punishment and treatment,²⁰ a critical diversion and an alarming concern is the exception provided in case of punishments authorised by law unlike the absolute protection provided under the African Charter.

Further, the Constitution lacks any corresponding provision particularly dealing with dignity as an independent right though some element of dignity is covered under the provision dealing with degrading treatment and punishment.

A very important right entrenched in the African Charter and the Women's Protocol, namely, the right to the recognition of one's legal status, is not afforded constitutional guarantee.²¹ Further

¹⁹ Under arts 6, 7 and 21 of the Protocol States are duty bound to ensure the equality and non-discrimination of women in marriage, separation, divorce and annulment of marriage and inheritance.

²⁰ Art 5 of the African Charter and art 4 of the Protocol incorporated cruel treatment and punishment as an independent concept and legally speaking it may raise arguments as to definitions and constituting elements of those concepts.

²¹ The right to the recognition of one's legal status is expressly provided under arts 5 and 3 of the African Charter and the Protocol respectively.

still to the disparity between the Constitution and the African Charter, section 10 of the Constitution recognises a wide range of procedural safeguards to ensure fair trial including a hearing by an impartial court. However, it does not expressly impose on the State the obligation to guarantee the independence of the judiciary, which is an essential part of the right to a fair trial under the African Charter.²²

With regard to freedom of association and assembly, section 13 of the Constitution misses the peculiar element of the African Charter that 'the obligation of solidarity' may constitute a justifiable limitation on the freedom. For Mauritius, a country 'where there is a co-existence of several communities and religions, these have their due importance in order to promote national solidarity for the benefit of the nation'.²³

Finally on civil and political rights, the right to participate in public and political life, the Bill of Rights has no corresponding provisions. The sections of the Constitution dealing with elections of members of the National Assembly provide for the rights to be elected and the right to vote.²⁴ It is to be noted that here participation in government is only in terms of elections to the National Assembly and does not extend to other forms of political and public participations. There is also no constitutionally established right of equal access to public service and public property as enshrined in the African Charter.

On their part, the socio-economic rights guaranteed in the African Charter

²² As above.

²³ RK Hardowar 'Between promise and compromise: Mauritius and the African Charter on Human and Peoples' Rights', LLB dissertation, University of Mauritius (2007) 85.

²⁴ See secs 33 and 44.

are not enshrined under the Constitution of Mauritius. The right to work, the right to health, right to culture, right to family, special protection of women, and the right to education do not enjoy any constitutional protection. This exclusion from the Bill of Rights is explained by the history of the constitution making. The Bill of Rights is borrowed from the European Convention which does not have provisions dealing with socio economic rights. Nonetheless, as a party to the African Charter, Mauritius should have drawn inspiration to incorporate justiciable socio-economic right along the years.

It must be mentioned that there is relevant legislation wherein such rights are afforded protection by law.²⁵ Mauritius being a welfare state and the existence of such laws generally fashioned a shared sentiment among many stakeholders that the laws are adequate whether or not the rights are enshrined in the Constitution.²⁶ It must be emphasised that, in spite of such a legislative framework, socio-economic rights need to enjoy constitutional guarantee as fundamental rights rather than legislative prerogatives.

It should be mentioned that the Constitution does not recognise the concept of 'peoples' rights'. All the essential aspects of peoples' rights

enshrined under the African Charter are not entrenched the Mauritian Bill of Rights.²⁷ In a multi-cultural society like Mauritius, the importance of such rights is not to be undermined. The principle 'all people shall be equal' is of great importance to the culturally diverse people of the Country. Needless to stress on the significance of the right to satisfactory environment; and the right to economic, social and cultural development to Mauritian context.

4 Legislative reform or adoption

In the event of a proposal for new laws or amendment, the Attorney General's office is approached to give advice on the matter. Compatibility review will be conducted to scrutinise the proposed Bill with the Constitution, international obligation and domestic laws. In such a process, the African Charter is said to be one of the important instruments that would be part of the review. It is affirmed that concluding observations of all treaty bodies are duly taken in to consideration. To this effect, the concluding observations of the African Commission are used. However, there is no practice of considering the resolutions, declarations and decisions of the African Commission.

So far, as much as recorded or known to relevant officers, it appears that no bill was amended or no proposed bill was rejected for the reason of incompatibility with the African Charter and no new bill was adopted particularly to give effect to the same.²⁸

²⁵ For example the Sex Discrimination Act of 2001, the Occupational Health and Safety Act of 2005, the Employment Rights Act of 2007, the Equal Opportunities Act of 2008, the Public Health Act of 1925, the Public Health Amendment Bill of 2006, the HIV and AIDS Act of 2006 and the Education Act of 1957.

²⁶ See NHRC Report (2007) 9-18. However, initiatives are witnessed that the Law Reform Commission (LRC) and National Human Rights Commission (NHRC) have made effort in raising the issue of incorporation of socio economic rights in the Bill of Rights. See LRC Issue Paper, Constitutional Protection of Human Rights (2010) 4 and NHRC Report (2007) 13-15.

²⁷ Arts 19-24 cover a range of peoples' rights including the right to development, the right to existence, to self-determination, to freely dispose of their wealth and natural resources, the right to national and international peace and security, and the to a general and satisfactory environment.

²⁸ As above.

On the contrary, the interaction with the Law Reform Commission (LRC) is very different. Apart from the general familiarity with the African Charter there is no meaningful link with the LRC's work.²⁹ The provisions of the African Charter, the African Commission's decisions, resolutions or concluding observations are not integrated in any of the law reform researches conducted by the LRC. In the past years the LRC has issued several research papers on possible areas of law reform. Such researches make greater use of international human rights instruments as well as the European Convention and the European Court of Human Rights (European Court) cases law, foreign cases, but never reflect any inspiration from the African Charter, the Women's Protocol or the jurisprudence of the African Commission. The African Charter is not considered to add much value to what is already enshrined under the major international human rights instruments.³⁰

Much legislation has been adopted as well as revised including several constitutional amendments. Very few examples such as the Sex Discrimination Act, the Domestic Violence Act (amendments), Equal Opportunities Act, Revision of the Civil Code, and the Sexual Offences Act, manifest no influence of the African Charter or the Women's Protocol in the adoption or revision process. Recently, constitutional amendment had been recommended both by the LRC and the National Human Rights Commission (NHRC) for the incorporation of socio economic rights in the Bill of Rights. Despite the

²⁹ Interview with Mr Sabir Kadel, Legal Research Officer, Law Reform Commission, 8 September 2011. Activity reports recorded (1997-2011) and Issue Papers and Newsletters (2007-20011) are also reviewed.

³⁰ Interview with Mr Sabir Kadel (n 29 above).

fact that the proposed rights are more or less corresponding to those under the African Charter, no inspiration is derived from the same nor is motivated by compatibility with the state's commitment under the African Charter.³¹ Other law reform initiatives were forwarded on a range of issues.

Currently the major law reform project coordinated by the LRC is the revision of the Criminal law for which a background paper is in the process of finalisation.³² In the same fashion, the African Charter or the African Commission's work has neither been consulted nor incorporated. At this point, it can be asserted that Government has not taken due consideration to the African Commission's Resolution³³ that urges States to take steps for the integration of the provisions of the African Charter in their national laws.

5 Policy reform or formulation

Akin to legislative reform or adoption discussed above, there is no evidence to show that the African Charter and the Women's Protocol have influenced the formulation or reform of policies. It is noted that the National Gender Policy Framework (NGPF 2008), refers to the Women's Protocol as one of the guiding principles of the NGPF while it refers to the CEDAW as the main instrument of

³¹ In the LRC proposal the major reform inspiration is from the Constitution of South Africa, the Draft 2006 Constitution of Trinidad and Tobago (see LRC *Issue Paper* (2010) 4-5) and the NHRC recommendation Indian Constitution NHRC Report (2007) 13-15.

³² Interview with Mr Kadel (n 29 above).

³³ African Commission Resolution on the Integration of the Provisions of the African Charter on Human and Peoples' Rights into National laws (1989).

the policy.³⁴ The National Human Rights Action Plan (NHRAP 2008) makes no reference to the African Charter and the Women's Protocol. The programmes included therein do not embody components that will enhance the promotion and implementation of the African Charter or the Women's Protocol.

6 Court judgments

Judicial application may occur through direct enforcement or reliance on international law for interpretive guidance.³⁵ A systematic review of cases decided since 1992 (since Mauritius has ratified the African Charter) at all levels of courts was conducted with the view to examine the application of the African Charter or the Women's Protocol in national court decisions. National court decisions normally make reference to domestic laws. In the majority of the cases interpretive guidance is taken from French legal doctrines and French and English case law. Cases involving constitutional interpretation may make reference to international human rights instruments. In the Mauritian judiciary, the most frequently used human rights treaty is the European Convention and as far as case law is concerned, the decisions of the European Court. As can easily be picked from such judgments, the common trend for the frequent interaction with the European system has occurred because of the similarity between the European Convention and the Constitution.

³⁴ It is not that the Protocol is having any significant role to play except being listed down among other instruments on Women such as the Beijing Platform, SADC Declaration on Gender, AU Declaration on Gender Equality, Commonwealth Plan of Action on Gender Equality, 2005-2015.

³⁵ F Viljoen *International human rights law in Africa* (2007) 540.

The reference to the Privy Council's decisions is highly influenced by the European Court's jurisprudence.³⁶ Some decisions have also made reference to the ICCPR.³⁷ However, in this review, no case law was found making reference to the African Charter. Judges have also confirmed that they have never used the African Charter or the jurisprudence of the African Commission in their judgments and never came across any domestic decisions that do so.³⁸

Many of the decisions of the European Court are already incorporated in the domestic jurisprudence through long standing reliance on them. Therefore, judges naturally incline to refer to them instead of going out of the way for 'alien' jurisprudence. 'You use what you know and what is readily available'.³⁹ On the contrary, none of the decisions of the African Commission are disseminated into the legal system and are not known among members of the judiciary.⁴⁰ It is stressed that litigants have not also placed reliance on the African Charter. It takes extra effort for them to get well acquainted with the African Charter and the jurisprudence.

³⁶ For example see cases *Parayag RK v The independent Commission against Corruption* (2011) SCJ 309; *Moodoosoodun v State* (2009) SCJ 413; *Dookhits S v The District Magistrate of Pamplemousses*; *Bundhun VP v State* (2010) SCJ 206; *Oozeer SA.S & Others v The State* (2007) SCJ 307 and *State v Assame HD & Another* (2001) SCJ 177.

³⁷ For example in the interlocutory judgment in the case of *Devendranath Hurnam, Toolskykamal v HH The District Magistrate of Pamplemousses* (2007) SCJ 289; *Fakeemeeah Mohamed v Commissioner of Police and Others* (2001) SCJ 252 and *Bajan M v the State* (2010) SCJ 348.

³⁸ Interviews with Honorable Justice N Matadeen, Supreme Court Judge, Honorable Justice SB Domha, Supreme Court Judge and Mrs Rookmeenee Narayen, Vice Chairperson of the Sex Discrimination Unit, National Human Rights Commission, 8 September 2011. She is also a former Supreme Court Judge.

³⁹ Interview with Justice Domha (n 38 above).

⁴⁰ Interviews (n 38 above).

The fact that the African Charter has not been domesticated has also contributed to the neglect by the judiciary. As pointed out by judges, it would have been different if the African Charter was an integral part of domestic law. Litigants would rely on it for their arguments and judges would also be bound to apply it.

7 Awareness and use by civil society

Awareness of the African Charter and the Women's Protocol is very low among NGOs. At this juncture, it must be stressed that Mauritius has few NGOs actively and directly involved in human rights work. Many NGOs work on social services than human rights advocacy. Amnesty international is the prominent human rights NGO in Mauritius. The key staff is well versed with international human rights instruments and mechanisms. On the other hand, their familiarity with the African Charter and the system is minimal. Key officers are not much aware of the African Commission's work, its decisions, resolutions or concluding observations.⁴¹ This can be ascribed to the lack of exposure and working relation with the system.⁴²

Trainings and advocacy activities are influenced strongly by the United Nations human rights treaties whereas the African Charter is not of any meaningful value. Respondents admit that the African system has not been used properly in the work of their organisation.⁴³ A review of the publications by

Amnesty International⁴⁴ and training, campaign or awareness raising materials do not make reference of the African Charter or the Women's Protocol. It is encouraging that the Human Rights Resource Centre has made a reasonable number of copies of the African Charter available to users. Much is expected from Amnesty International to enhance the influence of African Charter in the country given that it has observer status with the African Commission and having been long engaged with its work.

8 Awareness and use by practising and other lawyers

In general, the large majority amongst those in the legal community have studied in Europe. Consequently, they are primarily exposed to the European human rights system and the international system. Distinction must be made between State lawyers and private lawyers. The African Charter (and the Women's Protocol) is hardly popular among lawyers in the private practice and awareness in respect of the Women's Protocol is almost none existent among such groups.⁴⁵

State lawyers work as government advisors or prosecutors on litigation involving the Government. In most part of their work, apart from the Constitution and other relevant domestic laws, they also rely on the European Convention and the decisions of the European Court. As explained in defense, it is because of the particular relevance of the European Convention as the Bill of

⁴¹ Interview with Lindley Couronne, Director, Amnesty International Mauritius, 9 September 2010.

⁴² As above.

⁴³ Interview with Mr Couronne (n 41 above),

⁴⁴ Mainly DIME, a monthly newsletter published by Amnesty International to promotion of human rights issues.

⁴⁵ Interview with Mrs Pramila Patten, Barister-at-Law and CEDAW Committee member, 5 September 2011.

Rights is modelled by the same.⁴⁶ It is also attributed to the fact that opposing litigants neither invoke the African Charter nor the decisions of the African Commission.⁴⁷ Few state lawyers who are involved in the state reporting process can claim better awareness of and exposure to these African instruments.

The majority of lawyers in the private practice use the European Convention and the jurisprudence of the European Court, and if further need arise they make use of the ICCPR. There is relatively better importance attached to the international treaties and international human rights bodies which is claimed to be due to the fact that the United Nations human rights system is more visible and considered persuasive.⁴⁸ Discussions with lawyers confirmed that there is no culture of citing the decisions of the African Commission or using arguments inspired by the same in their submissions.⁴⁹ This is highly ascribed to the fact that practicing lawyers are unfamiliar with the discourse on the African Charter and the jurisprudence of the African Commission's.⁵⁰

9 Incorporation in law school education

Human rights course is thought as part of the undergraduate law curriculum at

the University of Mauritius.⁵¹ In spite of the fact that the course syllabus mentions the African Charter, the main focus of the human rights course is the Constitution and international human rights instruments. Occasionally, the African human rights system is discussed in a cursory fashion depending on the lecturer.⁵² Some lecturers affirmed that they brush up on the African Charter to inform students on the existence of the regional system. On the other hand, majority of students are not familiar with the African Charter as well as any of the prominent case laws of the African Commission.⁵³ It must be mentioned that the African Human Rights Moot Court Competition offered few students the exposure to the African Charter and the African Commission's jurisprudence. When preparing for the competition, students have to equip themselves by relying almost exclusively on African human rights instruments.⁵⁴ The Main Library collection has very negligible number of reference materials linked to the entire topic of African Human Rights. The Faculty of Law and Management Resource Centre has promising collections relevant to the topic of African Human Rights

⁴⁶ Interviews with M Armoogum, State Counsel, Attorney General's Office and Mrs Mootoo Leckinig, Assistant Director, Office of the Director of Public Prosecutions (DPP), 9 September 2011.

⁴⁷ As above.

⁴⁸ Interview with Mrs Pramila (n 45 above).

⁴⁹ Interviews with Mrs Pramila (n 45 above), Mrs Narghis Bundhun, Barrister-at-Law and Mr Vijay Chooshna, Barrister-at-Law, 5 September 2011.

⁵⁰ Interviews as above.

⁵¹ There are only two universities in Mauritius that offer law degree courses. The Department of Law at the University of Mauritius is the one and the only with one with compulsory human rights course.

⁵² Interviews with lecturers of the Law Department Mrs Odile Lim Tung and Mr Pramod Bussissie (10 September 2011), Mr Armoogum (n 46 above) and Honorable Justice Domah (n 38 above).

⁵³ Discussions with students and former students (Between 10 and 13 September). Discussions with Dr Rajendra Gunputh Head of the Law Department confirmed that the Human Rights Course do not focus on African System.

⁵⁴ Group discussion with participants for the 2011 Moot Court Completion who indicated that they only came in contact with the system for the purpose of the Moot and that it was not covered in their human rights module.

System.⁵⁵ This will enhance the new-born visibility of the African Charter amongst the Law School community.

10 National human rights institutions (NHRIs)

The African Charter and the Women's Protocol as well are not dominant in promotional and protection activities of the NHRC and the Ombudsman's office. These are the NHRIs established by law in Mauritius. Though not legally set up as a human rights body, the Human Rights Unit of the Prime Minister's Office is mandated by the Cabinet to coordinate all human rights activities in the country.⁵⁶

The NHRC has affiliate status with the African Commission. Review of the NHRC's reports testifies that neither the African Charter nor the Women's Protocol and the African human rights system in general are not given primacy.⁵⁷ The two instruments are not used for training or human rights literacy programmes by the NHRC. No activities or plans focused on or inspired by the African Charter or the Women's Protocol are reported. The human rights education campaigns and workshops focus on general human rights issues in the Constitution, and may fairly cover international instruments.⁵⁸

In advanced trainings for public servants, the African Charter may occasionally be covered, albeit, not in a manner that imparts any tangible

knowledge or meaningful exposure.⁵⁹ In the Sex Discrimination Unit of the NHRC, and in workshops, the African Charter is referred to in passing.⁶⁰ Admittedly, the African Charter is not used as a significant advocacy document as the CEDAW is much referred and popularised as far as women's rights are concerned. It is also noted that the NHRC has not also been actively involved in the reporting under the African Charter. On its part, the Human Rights Unit has relatively better interaction due to the fact that the reporting process is coordinated by the Unit. Beyond reporting, the African Charter is of no particular focus in the works of this Unit. As to the other NHRI, the Office of the Ombudsman, it does not in any way use the African Charter or the Women's Protocol in its work. This is explained mainly by the procedural nature of the work of the office.⁶¹

All in all, a general view exists that all the rights are adequately embodied in the Constitution and in the other international instruments. Another view is considering the UN treaties as the main and more authoritative ones and the African Charter and the Protocol as 'derivative' which may not add much.

11 Academic writing on the African Charter and Women's Protocol

A systematic review of the academic journals, publications and researches by academics shows that the African

⁵⁵ This is said to have resulted from the partnership with the Centre for Human Rights University of Pretoria.

⁵⁶ A Cabinet decision to that effect was passed in 2008, interview with Mrs Cader (n 11 above).

⁵⁷ The NHRC reports that are on the record reports for the years 2004 -2008 are reviewed.

⁵⁸ Informal discussions with NHRC staff Mr Toolsy Garburrin and Pervina Gokhool, 5 September 2011.

⁵⁹ Same as above.

⁶⁰ Interview with Mrs Narayan (n 38 above). Workshop and training notes make reference to the African Charter (not the Protocol) among the list of human rights instruments relevant to Mauritius.

⁶¹ Interview with Mr Mohammed Zeadally, Senior Investigations Officer, Ombudsman's Office, discussion with the Honourable Ombudsman Mr Soleman M. Hattea.

human rights system is far from the agenda of academic writings. Academics admit law students are not inspired to write their graduate dissertations on the topic. This, as explained by the students as well as the lectures, is due to the lack fair coverage of the African system in their human rights course.⁶² One salient factor is lack of exposure to the African system in the academic community is the dominance of European education among the academics. It is admitted that only recently with the interaction with the Centre for Human Rights University of Pretoria that the African human rights system is increasingly becoming visible.

12 State reporting

Mauritius has submitted two reports so far, the first in 1996 and the last in 2008. The Human Rights Unit under the Prime Minister's Office is the responsible body for state reporting. Previously the Minister of Justice and Human Rights (the current Attorney General's Office) was responsible for state reporting, previous reports were as prepared by the office.

The reporting process involves line ministries that are responsible for the implementation of different rights which contribute their inputs in respect of their work. The Prime Minister's Office in consultation with the Attorney General's office will organise the report and submit it to the Ministry of Foreign Affairs (MOFA). MOFA is the responsible body to liaise with the African Commission as far as submission and presentation of the reports is concerned.

It is noted that in the past late reporting occurred. A review of the periodic reports shows a big gap between periods of submission. A combined report of the 2nd, 3rd, 4th and 5th periodic reports submitted in 2008 after the initial report submitted in 1996. It is explained that such delays do not happen particularly in case of the African Charter. Sometimes reporting is delayed because the information gathering and preparation may not be finalised on due time. It is reported that the next report due in 2012 is already under preparation and will be submitted on time.⁶³

It is also noted that the reporting process does not involve NGOs⁶⁴ and has not been used to familiarise government stakeholders about the African Charter and the system. Many stakeholders still remained unaware of the reporting process and the previous reports submitted to the African Commission are not published or disseminated to the public.

Concluding observations are distributed to the relevant government bodies and follow up is also made on the recommendations.⁶⁵ The Principal Attorney General's Office as the principal advisory body to the Government receives the concluding observations and advises the Government on what steps should be taken. In fact, an analysis of the concluding observations for the last report was prepared and distributed to relevant government departments to take measures in their jurisdictions and report back.⁶⁶ There is, however, no tradition of disseminating concluding observations to NGOs or the public.

⁶² To one's surprise, a systematic review of all the LLB dissertations witnessed that not more than five dissertations are recorded in the Law Department's entire collection that directly or indirectly focus on the African Charter.

⁶³ As above

⁶⁴ Interview with Mr Couronne (n 41 above).

⁶⁵ Interview with Mrs Cader (n 11 above).

⁶⁶ Document was reviewed.

13 Communications involving this State

No communication against or by Mauritius has been made to the African Commission. NGOs' and individuals' level of ignorance regarding the communications mechanism is one of the reasons.

14 Special mechanisms and promotional visits by the African Commission

The African Commission has sent a promotional mission to Mauritius once in August 2006. The mission was chaired by Ms Sanji Masenono Monageng, the responsible Commissioner for promotional activities in Mauritius.⁶⁷ Several recommendations were made in the mission report, but any follow up measures could not be traced. Many relevant actors and officers are uninformed of the visit and the report. The key officials contacted during the visit are replaced and the interaction was interrupted. No special mechanism or fact finding mission has ever visited the Country.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

A number of issues need to be highlighted on the prospects of the impact of the two instruments under study in Mauritius. The Prime Minister's office currently co-ordinating all activities

related to human rights is can be considered an advantage for organising all efforts related to the state's duty under the African Charter. The fact that reporting and concluding observations of the African Commission are being taken seriously is a fertile ground to enhance the impact of the African Charter. Government should take the reporting process as an opportunity to enhance the impact of the African Charter by meaningfully and proactively engaging all stakeholders. Concluding observations need to be disseminated at a wider range. Media coverage of the reporting and concluding observations should be motivated. Publishing reports and concluding observations must be given due consideration.

The non-ratification of the Women's Protocol has highly contributed to the lack of awareness and the much less weight given to the instrument. Government must seriously consider ratification of this Protocol. In particular, the Ministry of Gender Equality must take the lead in making the significance of the Women's Protocol known and pushing for ratification.

Domestication is another critical factor that impedes the impact of the African Charter. Despite Mauritius being a party for almost 20 years, one of the major reasons that no visible influence of the African Charter could be traced is attributable to the fact that it has not become an integral part of domestic law. Mauritius being a dualist state, incorporation in to the domestic law will have much influence when it comes to litigation and judicial enforcement. Given the strong influence of the European Convention, domestication will be impetus for the visibility of the African Charter and catch the attention of litigants as well as judges.

⁶⁷ See African Commission 'Mission report of the promotional visit to Mauritius' (August 2006) http://www.achpr.org/english/Mission_reports/Mauritius/Mission%20Report_Mauritius.pdf (accessed 4 June 2011).

The lack of a clear political commitment to give emphasis and to popularise the African Charter and Women's Protocol in the National Human Rights Action Plan (NHRAP) or any other relevant policy is a big gap. Government must adopt clear commitments to promote ant African Charter and give effect to the relevant resolutions of the African Commission on the integration of the provisions of the African Charter. In this regard the National Human Rights Action Plan must be designed to play key role providing tangible steps towards the integration of the African Charter and the African Commissions jurisprudence in domestic laws, human rights activities, judicial decisions, education and other spheres.

It is a great opportunity that the discourse on the Constitutional amendment is focusing on the Bill of Rights and incorporation of socio economic rights. This can be taken the advantage to take lessons from the Charter and the Protocol and integrate underlying norms therein. This opportunity must also be used to address the gaps indicated above in this report. Constitutional imperative obliging courts to take the African Charter in to account in interpreting the constitution will help until domestication takes effect. Therefore, constitutional must take due note on this issue.

An institution focusing on law reforms; the LRC can be taken as an advantage to play significant role in informing all stakeholders through its research papers. LRC should commission a compatibility study of domestic laws to inform and shape harmonisation with the African Charter and the Protocol.

The NHRC having affiliate status with the African Commission can also

be used as an opportunity to enhance the visibility of the works of the Commission in the Mauritian human rights system. NHRC therefore should make it an agenda to integrate the African Charter, the Commissions resolutions in its works and should initiate awareness raising workshops, trainings, publications, media campaigns. NHRC must initiate the celebration of the African Human Rights Day and take advantage of the event to advocate coordinate and network with law society, academicians, government stakeholders and NGOs.

The judiciary's as well as lawyers' commendable tradition of reference to international and regional human rights instruments and jurisprudence is a fertile ground. The impediment thrives on the fact that the African Charter has not received judicial attention and the decisions of the African Commission are not popular among the judiciary and practicing lawyers as well. Insensitivity to the importance of African human rights system and lack of practical trainings continues to limit the influence of the African Charter in litigations and court decisions. This should be redeemed by aggressive sensitisation seminars and judicial training programmes at all levels of the judiciary.

The Human Rights Training Centre run by Amnesty International can be used as a forum for trainings focusing on African Charter and the Women's Protocol. Amnesty International Mauritius being reputable and influential human rights NGO in the Country has greater reach to the public, government stakeholders as well as civil societies. This can be taken advantage of to enhance awareness among different groups and also create a network to

promote and integrate the African Charter.

As far as law school education is concerned, the new partnership with the Centre for Human Rights and the participation in African Human Rights Moot Court Competition served to break the ice. This can be furthered to enhance the impact of the African Charter in the law school education by encouraging co-curricular activities that offer opportunities to introduce the good practices and the jurisprudence of the African Commission. Most importantly, it should be backed by proper coverage of the African Charter and the Women's Protocol in human rights module and developing the library collection. The fact that no academic staff has proper exposure to or training on African human rights system may limit expected impact. The Law Department should be considering inviting guest lecturers on the subject. It should also encourage and if possible sponsor the staff to further study on the field.

The general sentiment that these African instruments are for 'Africa' and that they are not relevant to the Mauritian context is deep rooted among many key actors. This compounded with the view that UN human rights system is considered higher, more effective, persuasive and more relevant, highly impedes the impact of the African Charter or the Women's Protocol at manly levels. Lack of media coverage on the work of the African Commission or the country's role in the system contributed to the negligible level of sensitivity among public at large. The public is more informed of the human rights abuses and governance problems in

Africa as presented by the media.⁶⁸ Not many have yet internalised that Mauritius is a party to the African Charter and is fully bound by it. The geographical location of Mauritius, being physically detached from Africa, the majority of the population having Asian origin with dominant Asian culture, contributed to a lack of African sentiment among the Mauritian society. The role of the media should be enhanced to disseminate the good practices of the African human rights system and to create public 'ownership' of the African Charter and the Women's Protocol.

⁶⁸ Focus group discussions with different groups of the public and public servants revealed that an African mechanism of human rights protection is not conceived in the minds of the common people.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN MOZAMBIQUE

*Aquinaldo Célio Mandlate**
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1 Introduction and background

Like other African countries, Mozambique has ratified and is bound by the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the ACHPR on the Rights of Women in Africa (Women's Protocol).¹ The Constitution regulates the process of ratification and incorporation of international law instruments. Traditionally, adherence to international law instruments generates obligations which participating states must live up to. One of the obligations arising from the ratification of the African Charter and the Women's Protocol is the duty to enact domestic laws to give effect to the rights protected in these instruments.

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¹ It ratified the African Charter on Human and Peoples' Rights (African Charter) in 1989 and the Protocol thereto on the Rights of Women in Africa (Women's Protocol) in 2005.

Although efforts are being made, a lot more needs to be done to ensure the realisation of the rights contained in these instruments.

2 Ratification of the African Charter and Women's Protocol

In the Mozambican context treaty ratification follows strict procedures established in the Constitution. The Government through the Ministry of Foreign Affairs and Co-operation or any other interested department submits a proposal to the Council of Ministers. Together with the proposal, the text of the treaty and a motivation and a proposed resolution adopting the treaty is submitted for appreciation and approval of the Ministerial Council. Depending on the nature of the subject of the treaty, whether they are executive governmental matters of legislative matters, the Council of Ministers may ratify the treaty or forward it for the appreciation and ratification by the Assembly of the Republic (Parliament).²

The African Charter was ratified in 1989, and the Women's Protocol in 2005. The latter was incorporated in the

² See arts 179(2)(t) and 204(1)(g) of the Constitution of Mozambique.

same year through the Assembly of the Republic's Resolution No 28/2005, dated 13 December 2005. The incorporation of the Women's Protocol gave effect to article 37 of the Constitution which sets out the principle of equality before the law for men and women in all domains of social, cultural, political and economic lives. It should also be pointed out that Mozambique has ratified and is, therefore, bound to the Optional Protocol on the Convention on Elimination of All Forms of Discrimination Against Women.³ It is expected that the obligations under the Optional Protocol should complement the duties radiating from the African Charter and from the Women's Protocol.

The adoption and subsequent signature of the Women's Protocol in Maputo was among the reasons that motivated the country to ratify this instrument.⁴ Further, the country's support for a regional instrument applicable for the promotion and protection of the rights of women in Africa had also favoured ratification of the Women's Protocol.

3 Domestication or incorporation of the African Charter and Women's Protocol

Mozambique follows a monist system in respect of the relationship between international law instruments and domestic legal norms. Article 18(1) of the Constitution provides that ratified international law instruments form part of domestic

norms. Consequently, to the extent that the African Charter and the Women's Protocol have been ratified, they form part of the Mozambican domestic legal order. Under article 18(20) of the Constitution, ratified international law norms have the same legal effect as domestic infra-constitutional laws. This constitutional precept is interpreted to mean that within the Mozambican legal order, ratified international law norms are positioned directly under the Constitution, but they have the same legal force as the Constitution.⁵ The main criticism that remains is that in the event of conflict, the Constitution does not provide guidance on whether international law instruments take precedence over domestic norms. Notably also in article 2, which provides that the Constitution prevails over all legal instruments.

It is evident that many constitutional rights find a corresponding provision entrenched in the African Charter and or the Women's Protocol. Beginning with the rights incorporated in both the African Charter and the Women's Protocol, the Constitution entrenches, among others, the right to life,⁶ access to justice and equality before the law,⁷ education,⁸ health,⁹ shelter,¹⁰ and respect for dignity.¹¹ The right to access to information¹² and the freedom of association¹³ protected in the African Charter are also covered in the Constitution. Many other standards specifically protected in the Women's Protocol are entrenched in the Constitution as well.

³ The Optional Protocol to the on the Convention on Elimination of All Forms of Discrimination Against Women was given effect to through Resolution No 3/2008 of May 2008.

⁴ Interview with Cláudio Dinis Mate, Head of the department of human rights and humanitarian law, Department of Foreign Affairs and International Cooperation.

⁵ See art 18 of the Constitution.

⁶ See art 40 of the Constitution.

⁷ See arts 36, 62, 70, and 120 of the Constitution.

⁸ See arts 35, 88 and 120 of the Constitution.

⁹ See art 89 of the Constitution.

¹⁰ See art 91 of the Constitution.

¹¹ See arts 19, 48(6), 119(3), and 120 of the Constitution.

¹² See arts 48 and 253 of the Constitution.

¹³ See art 52 of the Constitution.

In addition, constitutional recognition of treaties such as the African Charter and the Women's Protocol as norms which form part of domestic legal order means that no derogation is allowed after ratification of these instruments. The only exception is with regards to provisions that are subject to reservations. Thus, once ratified and incorporated, the standards of these instruments are afforded with the nature of constitutional precepts. Although the Constitution affords them the same legal force as infra-constitutional norms, the validity and nature of such standards can hardly be affected by constitutional amendments.¹⁴

Presently, domestic legislation has incorporated and given effect to certain standards found in the African Charter and the Women's Protocol. For instance, drawing from the standards contained in the Women's Protocol, the minimum age for marriage has been established at eighteen years.¹⁵ Similarly, the Domestic Violence Act¹⁶ incorporated standards for the prevention, combatting and eradication of domestic violence committed against women. Among others, the Act gives effect to article 4(2) of the Women's Protocol.

4 Legislative reform or adoption

A Technical Unit for Legal Reform, *Unidade Técnica de Reforma Legal (UTREL)* is in place to initiate legal reform processes. UTREL reforms have ensured that all legislation enacted after the ratification of the African Charter and the Women's Protocol is in line with both instruments. Studies are

underway to introduce reforms for the remaining legislation which was enacted before the ratification of the Women's Protocol, including the Penal Code which has a provision criminalising abortion. With regards to reforms to the Penal Code, for example, considerations are being made to allow women to abort in cases of unwanted pregnancy resulting from rape and incestuous relations.¹⁷

In addition to the aforementioned instruments, other legislation has been enacted to give effect to the African Charter and the Women's Protocol. An example includes the Children's Act¹⁸ with substantive provisions governing fundamental rights for children. As is the case with the African Charter, the Children's Act defines a child as every person below the age of eighteen years and it prohibits the discrimination of children (a category which includes the girl child) on the grounds of colour, race, sex, religion, and ethnicity, place of birth, social status and disability.¹⁹ Many rights, basic guarantees and certain safeguards, such as the right to life, protection for the pregnant women and prohibition of the trafficking and sale of children, were incorporated in substantive provisions of the Children's Act.²⁰ However, some grey areas still remain. For instance, polygamy is not legally recognised as a form of marriage. The practice of polygamy is common in certain areas of the country and that raises questions of inheritance rights for women when their husbands die.

¹⁴ Art 18(2) of the Constitution.

¹⁵ Art 30 of Act 10/2004 (Mozambique Family Code).

¹⁶ Act 29/2009 of 29 September 2009 (Domestic Violence).

¹⁷ Interview with Cláudio Dinis Mate (n 4 above).

¹⁸ Act 7/2008 of 9 July (Children's Act).

¹⁹ See arts 3(1) of the Children's Act.

²⁰ See arts 11, 14 and 62 of the Children's Act.

5 Policy reform or policy formulation

There is no clear evidence that the two instruments under study have influenced policy reform and formulation although comprehensive policies and strategic plans have been adopted at various levels to address pressing socio-economic, cultural and political issues affecting the citizenry. Among others, examples include the *Política Nacional das Prisões* – National Prison Policy (NPP),²¹ the *Política Nacional de Água* – National Water Policy, the *Plano de Acção para Redução da Pobreza Absoluta (PARPA)* – Plan of Action for the Reduction of Poverty, and the *Plano Económico e Social* Economic and Social Plan. Gender equality, increasing enrolment in schools and improving the quality of education, as well as the eradication of poverty are some of the main commitments endorsed in PARPA. By pursuing these and other targets the Government seeks to improve the quality of life of women and children and deliver on its international commitments as well.

6 Court judgments

It is seldom the case that domestic courts in Mozambique have used international instruments to uphold fundamental rights.²² Often, preference is given to domestic norms in adjudicating human rights matters. Despite having been incorporated, neither the African Charter nor the Women's Protocol has been used as interpretative tools or as instruments from where rights can be

drawn. However, there is general acceptance by judges that these instruments can be used to advance human rights. In fact, there is explicit acknowledgement of the fact that the Constitution accorded these instruments the same legal force as domestic legislation.²³

In a system where constitutional precepts are hardly used as basis for court decisions and where constitutional litigation is not a common practice, it is hard to find judgments citing international law instruments needed to uphold human rights. The approach to using statutory norms in deciding cases indicates that constitutional legal precepts, including constitutional provisions stating that ratified treaties form part of the domestic legal order, are not taken seriously.

Another important aspect is that the current rules governing the procedures for instituting cases before courts must be reformed to include the possibility of instituting human rights cases directly before the courts. Furthermore, the rules governing the jurisdiction of courts must indicate clearly which courts have jurisdiction over human rights matters. The two items must be dealt with immediately if significant advancements are to be made and the goals of the African Charter and the Women's Protocol and other international human rights instruments are to be achieved and to be afforded with adequate protection through the court system.

²¹ *Política Nacional das Prisões*, National Prison Policy, adopted under Resolution No 65/2002 of 27 August 2002.

²² See A Mandlate 'Challenges in the protection and enforcement of socio-economic rights in Angola, Cape Verde and Mozambique' (2010) 11 *ESR Review* 23.

²³ Interview with Hon. Luís Filipe Sacramento, Judge of the Supreme Court of Mozambique.

7 Awareness and use by civil society

Increasingly, the African Charter and the Women's Protocol are being used to support the daily activities of many civil society organisations focussing on human rights in general and in women's rights in particular. The African Charter, the Women's Protocol and other international human rights instruments have been used by civil society organisations to take stock of government activities. A respondent intimated that the African Charter and the Women's Protocol are mostly used as instruments which inform advocacy strategies of many organisations working in the human rights area. However, it is a concern that employees of organisations working at community levels are not well informed about the importance of these instruments.²⁴ Considering that the majority of people affected are in the local areas, it is important to address this gap to ensure that staff is informed about the rights protected under the African Charter and Women's Protocol thereto.²⁵

Despite awareness of the African Charter and the Women's Protocol, civil society organisations have not explored sufficiently the opportunities provided in both instruments to advance human rights in Mozambique. Activity reports and research papers as well as studies commissioned by civil society organisations have placed emphasis on promoting and protecting civil and political rights. Advocacy strategies, litigation and other related activities carried out by civil society organisations have mostly focussed on questions of depriva-

tion of liberty, access to justice and other civil and political rights. However, protection and promotion of socio-economic and cultural rights has not been adequately addressed.²⁶ Civil society needs to adopt measures to address this gap using the avenues provided for in the African Charter and the Women's Protocol.

Over the past years, few NGOs had understanding of the procedures of human right bodies. National human rights organisations lacked personnel with skills required to intervene and assist in the area. Markedly, however, some improvements have been recorded with the involvement of some organisations, including the *Liga dos Direitos Humanos (LDH)*, Human Rights League, in the work of the African Commission. Besides, having enjoyed observer status before the African Commission, the LDH has in many occasions submitted shadow reports detailing the human rights situation in the country. The work of the LDH and few other national NGOs, which have made similar efforts and participated in drafting shadow reports, is appreciated.

8 Awareness and use by practising and other lawyers

The number of lawyers currently registered at the Mozambican Bar Association stands below one thousand and many of these are not practicing.²⁷ A large number of lawyers are civil servants and many others contracted by

²⁴ Interview with Graça Fumo, Coordinator, FORUM MULHER.

²⁵ Interview with Teresinha da Silva, Coordinator, WILSA Mozambique.

²⁶ This view is also shared by Aquinaldo Mandlate who discussed the protection and enforcement of socio-economic rights in Lusophone countries in Africa. See Mandlate (n 22 above) 22-24.

²⁷ See Luís Timbane 'Novos rumos do processo civil em Moçambique', Ceremonia de lançamento do Código do Processo Civil Anotado' *UTREL*.

private companies work under contracts with exclusive regime clauses, which do not permit them to undertake other activities outside the company.²⁸ Out of the few who are left in practice, many work in law firms focussing on corporate business transactions and investment, and only a handful have human rights training. The situation is desperate and needs intervention.

It is seldom the case that lawyers with a human rights background or others involved in human rights litigation have used the African Charter and the Women's Protocol to advance their arguments before national courts.²⁹ Often, lawyers are discouraged by judges who have shown poor understanding of human rights and due to the lack of clarity on jurisdictional matters, a problem needing the urgent attention of the legislator.

9 Incorporation in law school education

Over the years, human rights education has not been given sufficient attention in the academic curricula of educational institutions. However, recent efforts are helping to improve the situation. The Law Faculty of Eduardo Mondlane University, *Universidade Eduardo Mondlane* (UEM), has established a Centre for Human Rights (Centre) entrusted with mandate to further human rights education. Whilst the Centre focuses on research and advocacy strategies, a Legal Aid Clinic was also established to link students to practical aspects of human rights. Since 2010, the Law Faculty has also been running African Charter oriented human rights educa-

tion.³⁰ In addition partnership strategies and assistance has seen Mozambican nationals attending human rights education in South Africa at the Centre for Human Rights, University of Pretoria and elsewhere. Few academic institutions, including UEM, *Universidade A Politécnica*, *Universidade Católica de Moçambique* (UCM), have introduced human rights education at undergraduate level. However, finding trained personnel for the teaching role is a huge challenge and there is no guarantee that course materials fully cover the African human rights system.

10 National human rights institutions (NHRIs)

Recently, in 2009, a National Human Rights Commission (NHRC) was established with the mandate to uphold human rights in Mozambique. Whilst the NHRC has not become operational, it is expected when it commences activities, to fast-track Government's response to concluding observations and decisions made by the African Commission. However, it is expected that the NHRC will learn from the experiences of other similar bodies in the region, including the work of the South African Human Rights Commission (SAHRC) as well.

11 Academic writing on the African Charter and Women's Protocol

Mozambican scholars have hardly written about matters involving human rights. Perhaps it is a fact that the lack of understanding of key issues and poor preparation at higher education level

²⁸ See Timbane as above.

²⁹ A position expressed by Aquinaldo Mandlate, a practicing lawyer registered with the Mozambican Bar Association since 2006.

³⁰ Interview with Gilles Cistac, Professor of Law, Faculty of Law, Eduardo Mondlane University.

impact negatively on the amount and quality of writings.³¹ The few that have engaged in matters affecting women include academic writings focussing on the problem of early marriage, access to land and inheritance rights, and violence against women. Access to justice and HIV/AIDS has also drawn significant attention from the academia as well. Often, these writings have portrayed the vulnerability of women and claimed for State action for protection of women. The large volume of work, however, includes research reports and other literature discussing human rights in general. Consequently, the rights protected in the African Charter and the Women's Protocol is attributed to the involvement of civil society organisations such as the *Liga dos Direitos Humanos*, United Nations Children's Fund (UNICEF) and Save the Children.

12 State reporting

The Department of Justice is entrusted with the mandate of overseeing the preparation of state reports together with other government departments concerned. Concerted efforts between the Ministry of Foreign Affairs (MOFA) and other government departments assist to gather the necessary information. While all relevant government departments are involved in the drafting of reports to be submitted under the African Charter, the Department of Women and Coordination of Social Action bears the greatest responsibility in drafting reports under the Women's Protocol.

The state and civil society organisations hardly disseminate information on the findings and concluding observations of the African Commission. Such

absence of information bars citizens from inclusive participation in the process.³² It also marginalises them with regards to the importance of the reporting procedure and its outcomes.

13 Communications involving this State

It is lamented that despite various human rights problems facing the country, since the African Commission commenced executing its mandate, not more than three communications were brought against the State.³³ The lack of skilled lawyers involved in human rights litigation may be among the reasons behind the problem. However, even where communications have been decided, little has been done to inform the public about the outcomes.

Given the scanty information and lack of transparency in matters concerning communications submitted against the state, it is difficult to track down the measures which the Government has taken to give effect to the findings of the African Commission. The Government must be encouraged to disseminate information on findings of the African Commission and the measures taken to address the alleged violations of the rights protected in the African Charter and the Women's Protocol.

³¹ See Mandate (n 22 above) 22-24.

³² Research work and investigations showed that there is nothing in the ground showing that the government disseminates this kind of information.

³³ Detailed information about the communications and respective references can be obtained on the African Commission's website at <http://www.achpr.org/>.

14 Special mechanisms and promotional visits by the African Commission

In 2000, a promotional mission aimed at monitoring the implementation of the African Charter was organised by the African Commission.³⁴ During the visit, African Commission delegates inquired from the Government on the question of establishment of a national human rights institution and the problems of overcrowding in prisons and centres of detention.³⁵ Some of the recommendations of the promotional mission have been implemented by the Government. The main highlight was the establishment, in 2009, of the National Human Rights Commission (NHRC). However, the major criticism remains that the NHRC has not become operational and there are questions around political influence in the appointment of its members.

As to special mechanisms, the then Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP), Dr Victor Dankwa, visited Mozambique in 1997 to assess the conditions of detention and the treatment given to persons deprived of liberty. Following his visit, the SRP recommended that the Government took measures to address the problem of overcrowding, lack of separation of children from adult prisoners and poor health conditions in all places of detention.³⁶ Four years later, SRP Vera

Chirwa visited Mozambique and found many of the problems which were detected during the visit by Commissioner Dankwa still in place. Although some improvements had been made in certain areas, including efforts to reduce overcrowding and training staff, a lot more needed to be done.

In line with her findings, SRP Chirwa recommended that Government take appropriate measures to address the remaining problems. The overall impression is that the Government takes these recommendations seriously and it makes efforts to improve the system. However, the main worry is the slow pace at which implementation takes place. This could possibly be explained by resource constraints and lack of enlightenment of politicians and persons involved in public decision making processes.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

Challenging factors include the lack of strong women rights education at tertiary education institutions, and generally the prevalent poor human rights culture in the country. Priorities should include awareness campaigns and engaging the judiciary in the promotion and protection of women's rights in Africa, in particular in Mozambique. A study pointed out that although the African Charter and the Women's Protocol have been ratified, and despite the domestication of these instruments, the majority of women living in the rural areas do not enjoy their rights under these instruments.³⁷ Customary practices and traditional values continue to dominate the

³⁴ See Special Rapporteur on Prison and Conditions of Detention in Africa, 1997 Report of visit to Mozambique.

³⁵ See African Commission on Human and People's Rights 'Report of the promotional mission to the Republic of Mozambique' (7-9 August 2000). See also A Mandate Prison reform in Mozambique: Early achievements and challenges ahead' April 2010 *CSPRI Newsletter*.

³⁶ See Special Rapporteur Report (n 34 above).

lives of many women who continue to fall through the gaps.³⁸ Consequently, if progress is to be achieved, it becomes crucial to raise the awareness of the populace and to address inconsistent customary law norms. Also, judges, practitioners and the staff of both the Justice Department and the Police must be given the necessary training.

Also notably, the African Commission has not held any of its sessions in Mozambique, but the African Union has done so. However, having a session in Mozambique would help to promote the work of the African Commission in the country and it would raise public awareness of the existence of this body. In the future, this could help engaging lawyers and practitioners and other scholars in the work of the African Commission.

In addition, Commissioner Angela Melo is one of the few examples if not the only Mozambican national who has worked in the African Commission. Her involvement in the work of the African Commission has helped to pressure Government to live up to its commitments with regards to the obligations arising from the African Charter and other relevant human rights instruments of the African Union. However, participation of nationals from Portuguese speaking countries in Africa as members of the African Commission has not been taken seriously. Out of a total of 54 African countries only five countries, representing about a fifth of the whole continent, are Portuguese speaking. Besides the language barrier which makes these countries a minority in the continent, there is a general feeling that

their nationals have not been given equal opportunity to participate in the structure of important decision making institutions in Africa. Perhaps the civil law architecture and the language barriers have influenced the level of participation of nationals of these countries in the African Union bodies.

Consequently, there is immediate need for greater involvement of countries within the continent to help Portuguese speaking countries in Africa and their nationals to fully integrate into the structures and system of the African Union. Integration should include equal opportunities for participation. Whenever possible and appropriate, permanent membership representation for the minorities should be considered. Participating individuals should be given adequate training and the support required for the materialisation of their duties.

On its part, the media is a powerful tool that could be used to advance the rights of women in Mozambique. However, as it stands the media has not played a significant role in covering details of the persistent problems affecting the promotion and protection of human rights in general and women's rights in particular. Undoubtedly, lack of training and knowledge of key issues pertinent to women, contributes largely to widening the current gaps of media houses and other related institutions. For instance, it was only recently that the country established a NHRI entrusted with the mandate to oversee the promotion and protection of fundamental rights accorded to the citizens. However, identifying qualified personnel to undertake the work of these institutions remains a problem.

³⁷ See Relatório do Estado da União Africana – Moçambique Relatório, copy in file with the authors.

³⁸ As above.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN NIGER

*Hadiza Mahaman**



1 Introduction and background

Niger ratified the African Charter on Human and Peoples' Rights (African Charter) on 15 July 1986. Niger has not yet ratified the Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa (Women's Protocol). Therefore, the following information will only focus on the African charter.

2 Ratification of the African Charter and Women's Protocol

The process of ratification was not followed by any parliamentary debates because at the time of ratification, Niger was under the military regime of Seyni Kountché. The process was basically conducted by the executive.

3 Domestication or incorporation of the African Charter and Women's Protocol

The Niger legal order is based on the supremacy of the constitution which

means that the constitution has superiority over international treaties regularly ratified by Niger as well as ordinary laws. In Niger, the Constitution prevails over the African Charter. However, the African Charter has superiority over ordinary laws.¹

One year after the ratification of the African Charter, the National Charter of Niger (National Charter)² was adopted in 1987 under the Supreme Military Council regime. (The African Charter was not adopted at the beginning as a Constitution, but has later been adopted as such). The National Charter refers to human rights principles in section II of chapter I entitled 'public freedoms'. According to the National Charter, public, individual and collective freedoms are fundamental rights of each citizen and in all circumstances respect for human being must be guaranteed.

Since the event of multi-party system, all Niger constitutions have stated their attachment to the rule of law and human rights. The Constitution of

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¹ Art 171 of the 2010 Niger's Constitution 'Les traités ou accords régulièrement ratifiés ont, dès leur publication, une autorité supérieure à celle des lois... '.

² Ordonnance no 87-29 du 14 septembre 1987 portant publication de la Charte Nationale.

the 7th Republic refers to the African Charter in its preamble states as follows:

We the people of Niger (...) proclaim our attachment to human rights as defined by the international declaration of human rights 1948, the international covenant on civil and political rights 1966, the international covenant on economic social and cultural rights 1966 and the African Charter 1981.

The 2010 Constitution contains in its chapter II the Bill of Rights (*droits et devoirs de la personne humaine*). Under this chapter the 2010 Constitution refers to fundamental rights of which many are similar to those contained in the African Charter.

4 Legislative reform or adoption

Given that Niger did not have a constitution at the time of the ratification of the African Charter, no source indicates whether a compatibility study of domestic law and the African Charter was undertaken before ratification. However, in order to give effect to the African Charter, a law authorising the ratification of the African Charter has been adopted by the Government of Niger.³

5 Policy reform or formulation

There is no information in proof or rebuttal of the fact that any policy in Niger was formulated or reformed in reaction to the ratification of the African Charter.

6 Court judgments

In general, lower courts in Niger do not refer to the African Charter in their

judgements. The Constitutional Court of Niger is the one which has, in a number of its judgments, referred to the African Charter in combination with the Constitution of Niger, as a basis of remedy.⁴ The binding nature of the African Charter's provisions is, however, generally acknowledged. To date, no case law or resolutions adopted by the African Commission have been referred to as an interpretive source in any judgment by any of the domestic courts. Nigerien judges almost prefer applying domestic law that gives them direct solution to a case.⁵

7 Awareness and use by civil society

Most of Nigerien NGOs focused their work on the promotion, protection and monitoring of human rights through advocacy, policy review law reform and other activities. The African Charter is one of their main tools of work. Many of these NGOs have observer status before the African Commission, but the Nigerien Movement for Human and Peoples' Rights Promotion and Protection is the only one that has submitted shadow reports to the African Commission in 2002 and 2003.⁶

Nigerien NGOs do not generally use concluding observations issued after state reports or other reports or resolutions of the African Commission in their work. Most of them ignore the content of the African Commission's reports or

³ Ordinance No 86-23 of 16 May 1986 cited in the Gazette of the Republic of Niger, 1 June 1986, 561.

⁴ Decision No 2003-005/CC/ of 17 February 2003; Decision No 2002-010/CC 18 January 2002; and Decision No 2003-09/CC of 10 July 2003.

⁵ Interview with Nouhou Hamani Mounkaila, Judge at the *Cour des comptes du Niger* and Coordinator of judges training section.

⁶ Interview with Sidi Abdou, Nigerien movement for the promotion and protection of human and peoples' rights.

resolutions.⁷ However, the Niger Association for the Defence of Human Rights called upon the Government of Niger to submit its initial and periodic report under the African Charter in its Annual Report on the Situation of Human Rights in Niger of December 2002.

8 Awareness and use by practising and other lawyers

Most of the lawyers are aware of the African Charter and they often use it in their arguments before national courts. In a number of decisions lawyers used arguments based on the African Charter.⁸

9 Incorporation in law school education

The faculty of law curriculum does not specifically include the African Charter, but it includes the public freedoms under which the African Charter is studied briefly as an instrument of protection of fundamental freedoms in Africa. The African Charter is also studied under the international humanitarian law course to explain the differences and similarities between human rights and international humanitarian law. This last module was introduced in 2008.⁹

⁷ Interview with Ali Idrissa, Coordinator of CROISADE; Yazi Salifou, CODDHD and Sidi Abdou, MNDHP.

⁸ Decision no 6 du 1992-09-24; Decision no 07-34 du 2007-12-26 (administrative matter); Decision no 08-005 du 2008-02-13 (administrative matter); Decision no 05-161 du 2005-06-23 (civil matter); and Decision no 08-039/P du 2008-01-24 (criminal matter).

⁹ Interview with Dr Narey Oumarou, Lecturer at the Faculty of Law, Université Abdou Moumouni of Niamey, Niger.

10 National human rights institutions (NHRIs)

In its work, the Commission on Human Rights and Fundamental Freedoms of Niger (CHRFFN), refers to the African Charter particularly when dealing with human rights violation cases. However, the legislation creating the institution does not explicitly refer to the African Charter.

The institution has, under its mandate, competence to follow up in general, but the text creating it does not refer to follow up on the implementation of concluding observations or decisions of the African Commission. The CHRFFN has not to date followed up on any observation or decision of the African Commission.¹⁰ Even when the drafting of Niger's initial and periodic report (submitted to the commission in 2004) was being done, the CHRFFN was not initially involved. After the first draft, the CHRFFN commented on the report under the request of the Ministry of Foreign Affairs.¹¹

11 Academic writing on the African Charter and Women's Protocol

Generally, Niger academics refer to the African Charter in their writing just as a source of human rights law. They have not yet focused on the African Charter in any other way. In an unpublished study, three lecturers of the faculty of law dealt with people in rural areas testing their knowledge and perception of human rights in general (rights

¹⁰ Interview with Saidou Waliyakoye, Secretary General of the Commission.

¹¹ As above.

contained in the African Charter are included).¹²

Only one Nigerien law journal (No 3 December 2000) contains articles dealing with human rights in general with no specific reference to the African Charter. The two articles were written by Togolese lecturers.

12 State reporting

The Department of Human Rights and Social Actions of the Ministry of Justice is responsible for state reporting under the African Charter. For the first and periodic report (1988-2002) submitted by Niger in 2003,¹³ a cross-department committee was put in place to conduct the drafting process.

At the time of writing, the current members of the Department of Human Rights of the Ministry of Justice do not know what the content of the concluding observations is. Consequently, these concluding observations have not been disseminated by the State or by the civil society. No action has been taken to give effect to the African Commission's concluding observations.

13 Communications involving this State

A communication was submitted to the African Commission by the Union of Niger students (43/90),¹⁴ but the African Commission decided that the communication was inconsistent with article 56 of the African Charter and 114

of the African Commission's Rules of Procedure.

14 Special mechanisms and promotional visits of the African Commission

Under article 45 of the African Charter, a promotional visit took place in Niger from 18 to 27 July 2011. The mission has not yet submitted its report to the Government of Niger. Earlier on, from 14 to 24 February 2006, the African Commission's Working Group on Indigenous Populations/Communities in Africa sent a mission to the Republic of Niger. However, it is difficult to say if the Government of Niger gave any effect to the recommendations made by the Working Group.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

Many factors may enhance the 'impact' of the African Charter in Niger. If civil society organisations focus their work towards the implementation of promotional and special mechanisms' recommendations, and if the Niger government makes the declaration under article 36(4) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, and ratifies the women's protocol, there will be a hope for a better implementation of the African Charter in Niger.

The recent visit of the African Commissioner to Niger makes the new authorities be aware of the African Charter's existence and Niger's obliga-

¹² Interview with Dr Narey Oumarou (n 9 above).

¹³ Décret no 2003-050/PRN/MJ du 5 mai 2003 portant adoption du rapport initial et périodique 1988-2002 de la République du Niger relatif à l'application de la Charte africaine des droits de l'homme et des peuples.

¹⁴ See *Union des Scolaires Nigériens and Another v Niger* (2000) AHRLR 176 (ACHPR 1994).

tions under international law to respect, promote, and fulfil rights contained in the African Charter. Given those high ranking authorities and other actors met by the Commissioner, there is a room of hope that those actors will take steps to give effect to the special mechanism and promotional visit recommendations. That would consequently lead to a better implementation of the African Charter in Niger.

The United Nations Development Programme (UNDP) provided the Department of Human Rights in the Ministry of Justice with two volunteers to help the staff in producing periodic reports under different treaties. With this technical assistance, Niger may be able to produce regularly its periodic reports under the African Charter.

The Government is currently working toward putting in place a NHRI as provided by the 2010 Constitution under article 44. If the new NHRI responds to Paris principles, and if it is led by very engaging persons, it could help to enhance the African Charter's impact.

Some factors may impede the impact of the African Charter in Niger. Indeed there is ongoing bad economic governance in Niger which began under the 5th Republic regime. Embezzlement of public funds is becoming more and more generalised in Niger. This situation is a serious burden toward the realisation of rights contained in the African Charter particularly economic and social ones. Furthermore, political instability in Niger with recurrent unconstitutional changes of government is a factor that impedes the impact of the African Charter in Niger.

The 33rd Ordinary Session of the African Commission took place in Niamey in 2003 from 15 to 29 May. However, no Nigerien national has been a member of the African Commission. In its recent promotional visit to Niger, advocate Soyata Maiga discussed this matter with the President of Niger and other high-ranking officials underlining the importance of having a Nigerien citizen at the African Commission or at the African Court on Human and Peoples' Rights. She requested the President and other authorities to encourage the participation of Nigerien citizens in the African Union institutions.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN NIGERIA

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1 Introduction and background

Nigeria gained its independence on October 1960. Its first Constitution upon attaining independence was the 1960 Independence Constitution.¹ The Constitution contained Nigeria's first constitutional guarantees of human rights. After a series of constitutional dispensations in Nigeria, the country is currently operating under its 1999 Constitution. Human rights provisions are contained in its Chapter IV; and Fundamental Objectives in Chapter II. Because this 1999 Constitution was decreed into law by the last military regime in 1999, efforts has been made since then to replace the 1999 Constitution with a more autochthonous, human rights centred and people-driven constitution. Nigeria ratified the African Charter on 22 June 1983 and the Women's Protocol on 16 December 2004.

The Federal Ministry of Justice is the 'focal point' responsible for co-ordinating Nigeria's response and responsibilities on the African Charter.² The actual department within the Ministry in charge of the ministry's activities in respect of the African Charter is the Department of Comparative and International Law (DCIL).³ The national focal point for the implementation of the Women's Protocol is the Federal Ministry of Women Affairs.⁴ Based specifically on the African Commission's recommendation, a National Working Group on Human Rights Treaty Reporting was established.⁵ The working group is mandated among other things to ensure effective co-ordination and regular consultations among stakeholders in line ministries, departments and agencies, and also to ensure follow up activities on concluding observations and recommendations of the African Commission and other treaty monitoring bodies.

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¹ However the first Nigerian Constitution was the Clifford Constitution of 1922 followed by the Richards Constitution of 1946; then the McPherson Constitution of 1951; and then the Littleton Constitution of 1954. The Littleton Constitution was the last constitution before independence.

² See Nigeria's Fourth Periodic Report (2011) 5 and Nigeria's Third Periodic Report (2008) 15.

³ The DCIL is located within the Federal Ministry of Justice Complex, Maitama District, Abuja, Nigeria.

⁴ See Nigeria's Initial Country Report on Implementation of the AU Solemn Declaration on Gender Equality in Africa 2004-2006.

⁵ Nigeria's Fourth Periodic Report to the African Commission (2011) 18.

2 Ratification of the African Charter and Women's Protocol

The President is vested with power to conduct all external relations, including negotiation and ratification of international treaties, on behalf of Nigeria.⁶ This power may be exercised by the President personally or through the Vice-President, Minister or any duly designated officer.⁷ The National Assembly is empowered to implement or in technical terms 'domesticate' international treaties duly entered into by the President.⁸ As the law currently stands, the National Assembly has no competence to ratify treaties between Nigeria and other countries.⁹ Although the President may notify the National Assembly of his or her intention to ratify a treaty, there is no obligation to do so neither can such a notification be regarded as a request for the National Assembly to 'ratify' the treaty.¹⁰

The process of domestication depends largely on the subject matter of the treaty being implemented. Where the subject of the treaty relates to any of the items under the Exclusive Legislative List,¹¹ the treaty would be deemed to have been duly domesticated upon a law passed to that effect by the National Assembly.¹² However, where the subject matter of the treaty falls outside the Exclusive Legislative List, a law to domesticate such a treaty must be duly

passed by the two chambers of the National Assembly and further ratified by a majority of the 36 state houses of assembly.¹³ In practice, the National Assembly usually makes law that would have effect only in the Federal Capital Territory, leaving the state assemblies to adopt their respective state laws implementing the treaty.¹⁴

3 Domestication or incorporation of the African Charter and Women's Protocol

Domestication of treaties may take place at two levels: directly through incorporation or, indirectly through transformation.¹⁵ Viljoen describes incorporation as the wholesale enactment of the provisions of a treaty, usually with specific reference to the treaty being incorporated.¹⁶ On the other hand, transformation takes place where domestic legislation is enacted or amended to conform with a treaty usually without any explicit reference to the treaty.¹⁷

Nigeria ratified the African Charter on 22 June 1983. However, prior to ratifying the African Charter, the Nigerian National Assembly on 17 March 1983 passed legislation titled 'African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act',¹⁸ 'to enable effect to be given to the African

¹³ Sec 12(1)-(3), 1999 Nigerian Constitution.

¹⁴ This alternative approach is often resorted to because of the practical difficulty of securing ratification of the implementing legislation by a majority of the state legislative assemblies. The approach was used to domesticate the Child's Rights Convention and the African Charter on the Rights and Welfare of the Child.

¹⁵ J James-Eluyode 'Enforcement of international humanitarian law in Nigeria' (2003) 3 *African Human Rights Law Journal* 266.

¹⁶ F Viljoen *International human rights law in Africa* (2007) 536.

¹⁷ As above.

¹⁸ Throughout this study, this Act is referred to as the African Charter Act.

⁶ See Items 26 and 31 of Part I of the Second Schedule to the Constitution. See also E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African Law* 250.

⁷ See sec 5(a) of the 1999 Nigerian Constitution.

⁸ Sec 12, 1999 Nigerian Constitution.

⁹ AA Akinbuwa 'The concept of women's rights in Nigeria' (2009) 15 *East African Journal of Peace and Human Rights* 474.

¹⁰ As above.

¹¹ A discussion of these Lists has been made under background information about Nigeria.

¹² Sec 12(1) and (2), 1999 Nigerian Constitution.

Charter'.¹⁹ Up to the time of this study, Nigeria is the only Anglophone country in Africa to have directly domesticated the African Charter.²⁰ No official reasons could be found for this prompt domestication of the African Charter. The only hint is a portion of the implementing legislation which states '... Nigeria is desirous of adhering to the said Charter.'²¹ Since in 1983 Nigeria was not a model in terms of adherence to human rights, the reason for domestication of the African Charter must be located outside the above preambular statement.²²

By ratifying the Women's Protocol on 16 December 2004, Nigeria became the sixth state party to this Protocol.²³ While some progress has been made towards domesticating and implementing CEDAW, Nigeria has not made any deliberate attempts at domesticating the Women's Protocol.²⁴ Does that mean that the Women's Protocol is not part of the domestic law in Nigeria? Two interesting arguments have been made in this regard. One is that specific provisions of the Women's Protocol, for instance, on female genital mutilation, domestic violence, gender equality and affirmative action, women's land right, widowhood practices, and other key provisions

of the Protocol have been absorbed into various laws of the state legislative assemblies.²⁵ The other argument is that article 18(3) of the African Charter incorporates into that Charter by express reference; internationally recognised women's rights instruments by obligating states to ensure the protection of the rights of women and the child as 'stipulated in international declarations and conventions'.²⁶ Viljoen and some human rights experts are of the view that article 18(3) makes CEDAW for instance applicable to all state parties to the African Charter irrespective of their ratification status under CEDAW.²⁷ It is further submitted that even the Women's Protocol could be considered part of the African Charter under this provision.²⁸ The implication of such indirect incorporation for a dualist state like Nigeria is to empower domestic courts to invoke the provisions of the Women's Protocol through article 18(3) of the 'African Charter Act' even though the Women's Protocol has not been specifically domesticated.

¹⁹ Preamble, African Charter Act CAP A9 Laws of the Federation of Nigeria 2004 of the Federation 1990.

²⁰ Viljoen (n 16 above).

²¹ Preamble, African Charter Act.

²² The domestication seems more of an act of example to other African states of the need to embrace the Charter rather than a genuine commitment to honour the obligations in the Charter.

²³ See table of ratification of the Women's Protocol http://achpr.org/english/ratifications/ratification_women%20prot9ocol.pdf (accessed 4 September 2011).

²⁴ Report of the 2nd Stakeholders Meeting on Domestication and Implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa held in Nairobi, Kenya (from 5-7 April 2011) 19.

²⁵ For instance, laws have been adopted in a number of Nigerian states prohibiting female genital mutilation (FGM), child marriages, harmful widowhood practices among others. Some states have also adopted Gender and Equal Opportunities Laws.

²⁶ Viljoen (n 16 above) 270.

²⁷ Viljoen (n 16 above); Women in Law and Development in Africa (WiLDAF) NIGERIA 'Advocacy for better implementation of women's rights in Nigeria' (2002) 5 at www.wildaf-ao.org (accessed 4 September 2004).

²⁸ See similar argument in F Viljoen 'The African Commission on Human and Peoples' Rights: Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 497-498.

Nigeria has adopted the dualist approach.²⁹ Section 12 of the Nigerian 1999 Constitution provides:³⁰

No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.³¹

The status of the African Charter, domesticated as the African Charter Act, in relation to other national legislations received significant attention in the case of *Abacha v Fawehinmi*.³² In that case, Fawehinmi was arrested without a warrant and detained by members of the State Security Service (SSS). Fawehinmi alleged that his arrest and detention violated the 1979 Nigeria Constitution and provisions of the African Charter Act. During the hearing of the case, counsel for Abacha raised a preliminary objection contending that the Court was competent to hear the case since its jurisdiction has been ousted by various decrees.

After the matter went through subordinate courts, the Supreme Court unanimously found that the African Charter Act was superior to all domestic legislation in Nigeria except the Constitution.³³ The Judges further stated that in the case of conflict between the African Charter Act and other existing or

subsequent municipal legislation, the African Charter Act shall prevail and the conflict domestic legislation shall to the extent of its inconsistency be void. Although the courts did not address the status of the African Charter vis-à-vis a law of a state assembly, it is only logical to conclude that any state law in conflict with the African Charter Act will also be void to the extent of its inconsistency.³⁴

No evidence was found in Nigeria of a compatibility study undertaken prior to the ratification of the African Charter or the Women's Protocol. Thus, real conflict still exists between the African Charter and the human rights provisions in Nigeria's Constitution.³⁵ Under the African Charter, both civil and political rights and socio-economic rights are justiciable, and the fundamental rights provisions of the Nigerian Constitution are limited to only civil and political rights.³⁶ Socio-economic rights are non-justiciable.³⁷ The Nigerian Constitution also does not recognise the rights of peoples to existence, free disposal of their wealth and natural resources, development, peace and security as well as generally satisfactory environment.³⁸ Notwithstanding the provision of section 42 of the Nigerian Constitution which generally prohibits discrimination on a number of grounds including sex, several national laws (federal and state) still conflict with the Women's Protocol. Section 26(2) of the Nigerian Constitution for instance limits women's rights

²⁹ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228 SC; *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Part 498) 124 at 150 and *African Reinsurance Corporation v Abata Fantaye* [1986] 3 NWLR (part 32) 811.

³⁰ See also sec 12(1) of the 1979 Nigerian Constitution, sec 13 of the 1989 Nigerian Constitution, sec 74 of the 1963 Nigerian Constitution and sec 69 of the 1960 Nigerian Constitution.

³¹ The status of international treaties in Nigeria thus depends on whether or not the treaty has been domesticated.

³² [2000] 6 NWLR (Part 660) 228. For a more detailed analysis of the case, see Egede (n 7 above) 249-284.

³³ *Abacha v Fawehinmi* (n 29 above) 289-343.

³⁴ See sec 4(5), 1999 Nigerian Constitution.

³⁵ Egede (n 6 above) 255.

³⁶ Chapter IV, 1999 Nigerian Constitution.

³⁷ Sec 6(6)(c), 1999 Nigerian Constitution. See *Archbishop Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337 at 350.

³⁸ Although some provisions in the Directive Principles in Chapter two of Nigerian Constitution speak to peoples' rights, these Directive Principles are not enforceable in court. See secs 14-17 as well as sec 6(6)(c), Nigerian Constitution.

to transmit their nationality to their foreign spouses. Sections 228-230 of the Criminal Code still criminalise medical abortion. Section 357 of the Criminal Code justifies marital rape. Wife 'beating' is permitted in Northern Nigeria under section 55 of the Penal Code. A number of government policies also conflict with the Women's Protocol. A table of compatibility analysis could not however be attached to this Report.

4 Legislative reform or adoption

The African Charter influenced legislative outcomes in Nigeria in at least two ways. There are cases of direct causality and also instances of correspondence in norms. In 1987, the then military government of Nigeria promulgated a decree – the Civil Disturbances (Special Tribunal) Decree. This Decree set up a special tribunal to try persons accused of causing civil disturbances. Membership of the tribunal as stipulated by the Decree included a superior court judge and four other members, one of which must be a serving member of the Armed Forces. Right of appeal was not allowed against the decisions of the tribunal. The jurisdiction of ordinary courts was also ousted. This Decree was challenged in a number of communications submitted to the African Commission wherein this Commission found the Decree to be a violation of the African Charter. The African Commission's decisions were used widely by activist organisations to mount pressure on the government. On 5 June 1996, the Decree was amended.³⁹

³⁹ The amendment specifically granted a right of appeal and removed the Armed Forces member of the tribunal. For a more detailed account of the process leading up to the repeal of the Decree, see OC Okafor *The Africa human rights system: Activist forces and international institutions* (2007) 128-130.

On another occasion, activist organisations within Nigeria used the African Commission's decisions to press for the repeal of the State Security (Detention of Persons) (Amendment) Decree 2 of 1994. This Decree which was promulgated by the then military government of Nigeria empowered the government to detain persons for acts prejudicial to state security for up to six months. Section 2A of the Decree prohibited the courts from issuing writ of *habeas corpus* for the release or production in court of the detainees. In a number of communications as in the earlier case, the African Commission condemned this Decree as a flagrant violation of the right to liberty and fair trial under the Charter. As a result of massive condemnations by NGOs and civil society organisations; using the African Commission's decisions as a reference point; the Decree was repealed in June 1996.⁴⁰

Upon transition to democracy, the following decrees which were subject of litigation in various communications before the African Commission were also repealed:⁴¹ Constitution (Suspension and Modification) Decree 1984, State Security (Detention of Persons) Decree 1984, Military Courts (Special Powers) Decree 1984, Treason and Other Offences (Special Military Tribunals) Decree 1986, Civil Disturbances (Special Tribunals) Decree 1987, Academic Staff Union of Universities (Proscription and Prohibition from

⁴⁰ See State Security (Detention of Persons) (Amendment) (Repeal) Decree 18 of 1996. Other military decrees such as the Political Parties Dissolution Decree 114 of 1999 and the Newspapers Registration Decree 43 of 1993 were reportedly repealed following intense criticism from international and domestic activist group, usually relying on the decisions of the Commission. See Okafor (n 39 above) 132-134.

⁴¹ See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999.

Participation in Trade Union) Decree 1992, Treason and Treasonable Offences Decree 1993, Political Parties (Registration and Activities) Decree 1998. Although it is difficult to establish conclusively all the factors that inspired these wide-ranging legislative reforms, what is certain however is that the African Charter norms and the African Commission's repeated condemnations were among the foremost considerations.

Since transition to civil rule, most national legislations implementing African Charter or the Women's Protocol's norms do not directly refer to the African Charter or the Women's Protocol. This comes close to what Viljoen referred to as 'transformation.'⁴² In this study, 'transformation' is referred to as correspondence, and is considered as a form of impact which the African Charter and the Women's Protocol have on domestic legislations.

The African Charter played no significant role during the drafting process of the 1999 Nigerian Constitution.⁴³ This is because the 1999 Constitution is a near-verbatim adaptation of Nigeria's 1979 Constitution which predated the African Charter.⁴⁴ The bills of rights in the two constitutions are not only similar, but identical except for the slight variations in numbering. As a result, there is no explicit reference to the African Charter in the entire 318-sections of the 1999 Nigerian Constitution. Although it cannot be said that the African Charter formed the basis of the 1999

Nigerian Constitution, most of the human rights provisions in the Constitution coincide with the African Charter provisions. An analysis of the impact of the Women's Protocol on the Constitution is unnecessary because the Constitution was adopted long before the Women's Protocol came into force.

5 Policy reform or formulation

The African Charter and the Women's Protocol have inspired the development of a number of national policies in Nigeria. These policies seek to protect human rights in general or the rights of particular group of people. The National Action Plan was developed in response to the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna Austria in 1993.⁴⁵ Although the NAP document claims that the rights contained in the document are drawn from domestic, regional and international human rights instruments, a closer look at the NAP shows significant influence of the African Charter.⁴⁶

The National Gender Policy was adopted in 2007. It replaced the erstwhile National Policy on Women of 2000. The Gender Policy is aligned with the provisions of major international instruments on women's rights, including the Women's Protocol. Although the Women's Protocol was not, and in fact ought not to be, the only inspiration for the new Gender Policy, the fact that the existing National Policy on Women

⁴² F Viljoen (n 16 above) 536.

⁴³ See Speech Delivered by the Chairman of the Constitution Debate Coordinating Committee (CDCC), Justice Niki Tobi, while presenting the Committee's report to the Head of State, General Abdulsalami Abubakar (on file with the author).

⁴⁴ As above.

⁴⁵ The conference requested each state to consider the desirability of drawing up a national action plan identifying steps whereby the state would improve the protection and promotion of human rights.

⁴⁶ See for instance aspects dealing with rights to development, peace and protected environment. These rights are not explicitly protected in the major international instruments.

was amended within a year after the Women's Protocol came into force and within months after Nigeria submitted its Initial Country report on the AU Solemn Declaration. This sequence of events raises a strong inference in favour of the catalytic role of the Protocol.

6 Court judgments

The African Charter, and to some extent the Women's Protocol, have influenced judicial decisions in at least four important ways. These include the development of the African Charter supremacy jurisprudence, and the use of the African Charter as basis of remedy, interpretative guidance and source of legitimacy.

In a long line of cases, the Nigerian courts have held that the African Charter was superior to all other domestic laws including military decrees and the Constitution. In every case where the African Charter was sought to be enforced, this supremacy argument was the implicit reason which empowered the local judge to assume jurisdiction. As early as 1990, a Nigerian Court of Appeal in the case of *Oshevire v British Caledonian Airways Ltd*⁴⁷ had laid down the principle that a treaty which has been ratified and domesticated by Nigeria, (being an agreement of an international character which no state party can unilaterally modify) is superior to other domestic laws. This decision was followed in these subsequent cases.⁴⁸

The main contribution of the African Charter supremacy argument is that

it empowered the courts to entertain human rights cases even in situations where its jurisdiction has been ousted explicitly by a domestic law. By advancing these supremacy arguments, the Nigerian courts were in fact reinforcing the African Commission's jurisprudence earlier communications and resolutions.⁴⁹

In a number of cases, the African Charter or even the recommendations of the African Commission were used as basis for seeking remedies before domestic courts in Nigeria. Only a few examples are referred to in this report. In *Comptroller Nigerian Prisons v Dr Femi Adekanye and Others*,⁵⁰ twenty-seven persons were arrested and detained for close to 30 months under the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Decree 18 of 1994. Meanwhile, the decree under which they were detained and tried ousted the court's jurisdiction. The trial court dismissed the suspension of its jurisdiction. On appeal, the Court of Appeal stated that the offending decree 'totally destroys the presumption of innocence in favour of the accused under article 7 of the African Charter'.⁵¹

In *Garuba and Nine Others v Attorney General of Lagos State*,⁵² 10 applicants mostly juveniles were tried, convicted and sentenced to death. They appealed against the sentence. While their appeal was pending, the Government made moves to execute them. An application

⁴⁷ (1990) 7 NWLR 507.

⁴⁸ *UAC of Nigeria v Global Transporte Oceanic SA; Constitutional Rights Project v Babangida and Others; Comptroller of Nigerian Prisons v Dr Femi Adekanye and Twenty-Six Others; Fawehinmi v Abacha; Chima Ubani v Director of State Security Service; and Abacha v Fawehinmi.*

⁴⁹ See *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999). See also the three country specific resolution adopted by the Commission against Nigeria. See also Account of the Internal Legislation of Nigeria and the Disposition of the African Commission on Human and Peoples' Rights, Doc II/ES/ACHPR/4, 3.

⁵⁰ (1999) 10 NWLR 400.

⁵¹ As above, 423.

⁵² Suit ID/599M/91 (31 October 1991).

was filed to enforce their right under the Constitution and the African Charter. Even though the fundamental rights provisions of the Nigeria Constitution as well as the African Charter Act was at this time suspended, the Court held that the international aspects of these instruments cannot be unilaterally be abrogated.

The Nigerian judiciary further demonstrated its creativity in deploying the African Charter in the case of *Akinola v Babangida*.⁵³ In this case, the Court was invited to invalidate the Newspaper Decree 43 of 1993. Even though this decree expressly ousted the jurisdiction of courts, the Court held:

Since the courts have held that the African Charter (Act) is like an enactment of the Federal Government like a decree, it follows that if there is a conflict between an enactment ousting the jurisdiction of the Court and another which does not, the Court should lean more on the one (referring to the African Charter) that preserves its jurisdiction.

In almost all cases reviewed during this study, the Nigerian courts have generally referred to the African Charter Act in addition to the Constitution. However, in *Agbakoba v Director of State Security Service*,⁵⁴ provisions of article 12(2) of the African Charter were clearly resorted to as interpretive guide. In that case, the applicant had been invited to a human rights conference in The Netherlands. On the day he was scheduled to depart, he was intercepted by officers of the State Security Service. His passport was impounded, without any explanation offered to him. In short, he missed the conference. The Supreme Court sought guidance from freedom of move-

ment provision under article 12(2) of the African Charter which explicitly provides that 'every individual shall have the right to leave any country including his own.' Applicant was successful.

In some domestic decisions in Nigeria, the local courts have deployed the African Charter to legitimise claims of rights that were considered very sensitive. In invalidating a customary law which prevented female children of a deceased man from inheriting his property, the Nigerian Court of Appeal in *Moujekwu v Ejikeme* stated as follows:⁵⁵

... And what is more, such a custom has clearly discriminated against Virginia, the daughter of Reuben and therefore unconstitutional in the light of the provisions of section 42 of the Constitution of the Federal Republic of Nigeria, 1999 ... Article 18 of the African Charter on Human and Peoples' Rights specifically provides for the elimination of discrimination against women.

Even though socio-economic rights are not justiciable under the Nigerian Constitution, the Nigerian Court in *Odafe v Attorney General of the Federation*⁵⁶ has justified the socio-economic rights of prisoners to medical care on the basis of the African Charter. The court has also relaxed the rules of locus standi on the basis of article 13(2) of the African Charter.⁵⁷

Another aspect where the African Charter has significantly influenced the judiciary is in the deployment of the Fundamental Rights Enforcement Procedure (FREP) Rules. As a result of the delay and prohibitive cost usually

⁵³ Reprinted in (1994) *Journal of Human Rights Law and Practice* 250.

⁵⁴ (1994) 6 NWLR 475.

⁵⁵ (2000) 5 NWLR (part 567) 402, 409.

⁵⁶ (2004) AHRLR 205, 211.

⁵⁷ See *Nwankwo v Onomeze-Madu* (2009) 1 NWLR (part 1123) 671, 715-716.

associated with court process in Nigeria, the FREP Rules was designed in 1979 to provide a special fast-track and cost-effective procedure for the enforcement of fundamental rights in Nigeria.⁵⁸ Because the Rules predated the adoption of the African Charter, no reference was made to the African Charter in the Rules; and no Rules were made subsequently for the enforcement of the rights in the African Charter.

Confronted with this tricky situation, the Supreme Court of Nigeria in what appeared to be a very liberal construction of the applicable laws held in *Ogugu v The State*⁵⁹ that although the 1979 FREP Rules did prescribe rules for the enforcement of rights in the Charter, the provisions of the Charter are nonetheless enforceable under the FREP Rules. This reasoning was adopted in subsequent cases such as *Nemi v The State*,⁶⁰ *Bamidele v Alele Williams*,⁶¹ and *Ohakosin v Commissioner of Police, Imo State*.⁶²

In 2009, the 1979 FREP Rules was abrogated and replaced with the 2009 FREP Rules. Under the new Rules, the African Charter is referred to in a number of occasions. The Rules provide for the following overriding objectives.⁶³

The Constitution especially Chapter IV as well as the African Charter shall be *expansively and purposively interpreted and applied*, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.

Referring specifically to the African Charter and the Universal Declaration

of Human Rights, the 2009 Rules mandates courts to respect municipal, regional and international bills of rights cited to it, brought to its attention or which the court is has knowledge of. The Rules also contains a number of progressive provisions but these are not within the purview of this study.

7 Awareness and use by civil society

There is a huge NGO presence in Nigeria and their level of awareness in respect of the two instruments is generally high. In a list submitted to the African Commission as part of the 4th periodic report of Nigeria, over 300 civil society organisations were listed. Due to this huge number coupled with the relative shortness of the study period, a systematic assessment of all NGOs and civil society organisations (CSOs) in Nigeria was not undertaken. However, most of the organisations talked to in the course of this study are aware of both the African Charter and the Women's Protocol.

The African Charter and to some extent the Women's Protocol have made substantial impact on the activities of these CSOs. They attend sessions of the African Commission regularly and participate actively in the activities of this Commission. Nigerian CSOs have been more engaged with the African Commission's individual complaints procedure than their counterparts in other parts of Africa. Out of the 31 communications submitted to the African Commission in respect of Nigeria, at least 25 were filed by CSOs. As stated by Okafor, the African Charter and the jurisprudence of the African Commission have served as key resource in the hands of Nigerian NGO activists, activist lawyers, minority rights advocates,

⁵⁸ See sec 42, 1979 Nigerian Constitution and sec 46, 1999 Nigerian Constitution.

⁵⁹ (1994) 9 NWLR 1, 26-27.

⁶⁰ (1994) 1 LRC 376.

⁶¹ Suit B/6M89 Benin High Court.

⁶² (2009) 15 NWLR (part 1164) 229.

⁶³ Preamble, 2009 FREP Rules (emphasis mine).

activist politicians and activist journalists.

More importantly, the 11 CSOs working in the field of socio-economic rights in Nigeria have chiefly relied on the African Charter as there are no justiciable socio-economic provisions in the Nigerian Constitution.⁶⁴ The same is true of the 53 CSOs working on the rights of women. They have also included the Women's Protocol in their programmes. The African Charter also features prominently in the promotional activities of other CSOs. For instance, a textbook for 'Human Rights Teaching in Schools' produced by Constitutional Rights Project, drew mainly from the text of the African Charter.⁶⁵ Another learning material, Manual on Gender Rights Litigation and Protection Strategies, produced by Shelter Rights Initiatives in 1998, draws chiefly from the Charter.

8 Awareness and use by practising and other lawyers⁶⁶

The African Charter is generally more popular among lawyers than the Women's Protocol. One of the interviewees, a staff in the Ministry of Justice stated that the African Charter provisions are less frequently used by Government lawyers. According to him, the African Charter is more often used by lawyers to the complainants or the applicants.

Almost all human rights cases reviewed during this study showed reference to the African Charter Act. The

most commonly used sources of remedies by lawyers are the Constitution and the African Charter Act. In recent times, less reference has been made directly to the African Charter as a treaty because the African Charter Act is more often invoked. Some lawyers believe it is the Act and not the African Charter itself that is part of Nigerian law. The present researcher really does not see the difference between the two.

It would be recalled that one of the most visible marks of military dictatorship in Nigeria was the repression of the media, arbitrary closure of media houses, arrest and detention of journalist among others. Some of these cases were challenged before the Commission and the Commission's decisions in most of these communications were widely publicised in the media. See for instance communication 102/93; communication 152/96; communication 128/94; and communication 224/98.

9 Incorporation in law school education

In 56 out of the 104 faculties of law in Nigeria, the African human rights system and especially the African Charter is being taught at the undergraduate level.⁶⁷ In some cases, it is taught as a compulsory or optional stand-alone course. In others, it is taught as part of international human rights or public international law. Most first and second generations universities encourage research and thesis writing on the African human rights system at both undergraduate and postgraduate levels. Human rights law is also part of the curriculum of the Nigerian Law School, although emphasis on the African Char-

⁶⁴ See list of CSOs in the Nigeria's Fourth Periodic Report to the African Commission (2011).

⁶⁵ As above.

⁶⁶ References cannot be provided to all these because the data is currently being processed.

⁶⁷ See Nigeria's Fourth Periodic Report to the African Commission (2011) 6.

ter and the Women's Protocol is minimal.

What can be inferred from responses received from specific Nigerians interviewed is that emphasis on the African human rights system is minimal or non-existent in primary and secondary schools as well as vocational institutions. Nevertheless, a number of lecture series at all levels help to promote the African Charter and in some cases the Women's Protocol among academics, lawyers, judges and public officers.⁶⁸

10 National human rights institutions (NHRIs)

The Nigerian National Human Rights Commission (NHRC) was established in 1995. It is specifically mandated to deal with all matters relating to the protection of human rights as guaranteed by the Nigerian Constitution, the African Charter and other international human rights treaties. The Governing Council of the NHRC comprises 16 members including three NGO representatives, three media representatives and three representatives of varied interest. No specific gender representation formula is stipulated and it is unclear whether 'varied interest' includes women. From evidence gathered during this study, the African Charter and the

Women's Protocol has influenced the NHRC's activities in the following ways.⁶⁹

11 Academic writing on the African Charter and Women's Protocol

The African Charter and to some extent the Women's Protocol is widely referred to in academic publications such as books and legal journals. During the course of this study, a significant number of academic publications were found written by Nigerians on the African Charter. Much less were found about the Women's Protocol. Conclusive figures are, however, unavailable because country-wide searches were not carried out. From the limited searches carried out, two points were obvious. First, more articles which were written on the African Charter by Nigerians are published mostly in foreign journals; and second, there seems to be very limited number of consistent authors on the African Charter except for very few prolific writers.

12 State reporting

The reporting process is co-ordinated by the Federal Ministry of Justice. From a

⁶⁸ Nigerian Institute of Advanced Legal Studies, Lagos 2005-2010 annual Human Rights training workshop sessions; National Judicial Institute Abuja, human rights workshop sessions for judges of Federal and State High Courts, Sharia Courts and lower court judges nationwide (2002 to date); Nigerian Bar Association (NBA) Human Rights and Environment Committee Annual Continuing Legal Education Training Programmes for legal practitioners at all levels nationwide; National Human Rights Commission, Abuja (NHRC), Civil Society Organisations training workshop and seminar series on Human Rights. Papers presented during these series of lectures are usually published. See also Nigeria's Fourth Periodic Report 6-7.

⁶⁹ The NHRC regularly attends the sessions of the African Commission and participates actively in the Commission's activities; NHRC also raises awareness in Nigeria about the Charter and the activities of the Commission; Since 1998, the NHRC in conjunction with relevant partners has been organising training workshop and publishing public lecture series on the African Charter on Human and Peoples' Rights; One of the thematic focuses of the NHRC is gender. To this end, the NHRC has an advocacy group on Violence against women; NHRC coordinates the preparation of Nigerian periodic report in conjunction with the ministry of Justice; NHRC coordinated the development of the National Action Plan on the Promotion and Protection of Human Rights in Nigeria which is substantially modelled on the African Charter.

review of the second, third and fourth periodic reports of Nigeria, the process a consultant is appointed for the reporting process. Then there is a Core Drafting Team comprising members drawn from the Federal Ministry of Justice and the National Human Rights Commission, which meets with the Consultant to develop a framework and a work plan for the report writing; place call for inputs in newspaper adverts in at least two national dailies; collate and analyse the inputs supplied as a result of the newspaper adverts; and produced the first drafts for peer review. Once this is done a two-day peer review workshop is usually called where all stakeholders from the relevant ministries, agencies, human rights NGOs, legislators and the general public meet to review the first draft and produce the second draft'

The second draft will then be validated by a one-day stakeholders' forum to be attended by the core drafting team, the peer reviewers, the media and the public. Inputs from the one-day stakeholders' forum are incorporated to produce the final draft. Once the second draft is adopted, the final draft is then submitted to the Federal Executive Council through the Minister of Justice and Attorney General of the Federation. After approval by the Federal Executive Council, the final report is then sent to the Secretariat of the African Commission.

There is no evidence of any occasion where concluding observations were disseminated to the public at large by the state. The observations are also not translated into the three major languages. Civil society groups however use concluding observations in their advocacy activities. On its part Nigeria has thus far complied with its reporting obligation under the African Charter,

having submitted up to date four periodic reports to the African Commission.⁷⁰ The first report was submitted in 1990; second in 2003; third in 2008; and fourth in 2011. However, the Commission's practice in respect of concluding observations was not fully developed until 2001, thereby limiting our study to the second, third and fourth reports.⁷¹

13 Communications involving this State

Between 1987 and 2010, a total of 31 communications were submitted against Nigeria.⁷² Out of these communications, eight were declared inadmissible; three were withdrawn; one was resolved via friendly settlement; 19 were declared admissible.⁷³ Violations were found in all the 19 cases that were found to be admissible. Out of the 19 cases in which the African Commission found violations against Nigeria, full compliance was recorded only in two; partial compliance in 14⁷⁴ and total non-compliance in three.⁷⁵

At least in two cases, the Nigerian government fully complied with the recommendations of the African Commission. In *Constitutional Rights*

⁷⁰ One of the reasons that prompted Nigeria to submit its fourth periodic report on time was the need to respond to the concerns raised by the Commission in the concluding observations issued after examination of the third periodic report. See Nigeria's Fourth Periodic Report to the African Commission (2011) 1.

⁷¹ See F Viljoen (n 16 above) 387. See also 14th Activity Report of the Commission.

⁷² This information is based on facts available on the Commission's website.

⁷³ These figures are based on the author's analysis of all the 31 communications submitted to the Commission in respect of Nigeria.

⁷⁴ See L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' Unpublished LLD thesis, University of Pretoria (2005) 56. This rate of compliance also reverses if the 10 cases of situational compliance are treated as non-compliance.

⁷⁵ See Louw as above.

Project v Nigeria,⁷⁶ five Nigerians were arrested and detained by the Nigerian military government without trial for about two years. On behalf of the detainees, Constitutional Rights Project submitted a communication to the African Commission. In its findings, the Commission found Nigeria in violation of articles 6 and 7 of the African Charter and urged Nigeria to charge or release the complainants. Soon after the African Commission's decision, the Nigerian government complied by charging the detainees.⁷⁷ In another case, *Centre for Free Speech v Nigeria*,⁷⁸ four Nigerian journalists were tried and convicted secretly by a military tribunal. During the trial, they were not allowed access to counsel of their choice. The military decree setting up the tribunal also ousted the court's jurisdiction. The complainants thus were without a right of appeal. In a communication submitted on their behalf by the Centre for Free Press, the African Commission found Nigeria in violation of articles 6, 7 and 26 of the African Charter. The African Commission urged the Nigerian government to release the journalists. They were eventually released.⁷⁹

Partial compliance was recorded in four cases.⁸⁰ In *Constitutional Rights Project (in respect of Akamu, Adegan and Others) v Nigeria*,⁸¹ CRP filed a communication before the African Commission on behalf of Akamu, Adegan and others who were convicted and sentenced to

death by a military tribunal. After consideration of the communication, the African Commission recommended that the complainants should be released. Although the complainants were not released, the death sentence imposed upon them was commuted to terms of imprisonment.⁸² In a similar case, *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria*,⁸³ the African Commission recommended the release of the complainants who had been sentenced to death by a special military tribunal. Following the African Commission's recommendation, the complainants' death sentence was commuted to five year imprisonment; they were later released.⁸⁴ Following the African Commission's recommendation in *Constitutional Right Project v Nigeria*,⁸⁵ 11 soldiers who had been detained unjustly for a long period were released. They were however not paid any compensation as recommended by the African Commission. Following the African Commission's recommendations in *SERAC v Nigeria*, the recommendations were widely disseminated by SERAC.⁸⁶ The Nigerian government subsequently established the Ministry of Niger Delta with special mandate on the development of the Niger Delta area. This was followed by a Development Master Plan specifically designed for the Niger Delta. The Niger Delta Development Commission (NDDC) has also taken some measures to address health and development concerns of the Ogoni people.⁸⁷ However, critical issues such

⁷⁶ *Constitutional Rights Project v Nigeria* (2000) AHRLR 248 (ACHPR 1999) [Nigerian Detention case].

⁷⁷ See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 10.

⁷⁸ *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999) [Nigerian Journalists case].

⁷⁹ Viljoen & Louw (n 77 above) 10.

⁸⁰ Louw (n 74 above).

⁸¹ (2000) AHRLR 180 (ACHPR 1995).

⁸² Louw (n 74 above) 26.

⁸³ (2000) AHRLR 183 (ACHPR 1995).

⁸⁴ See also Louw (n 74 above) 27.

⁸⁵ (2000) AHRLR 241 (ACHPR 1999).

⁸⁶ M van der Linde & L Louw 'Considering the interpretation and implementation of art 24 of the African Charter on Human and Peoples' Rights in light of SERAC communication' (2003) 3 *AHRLJ* 184.

⁸⁷ Van der Linde & Louw as above 184.

as impact assessment, prosecution of erring officials, and comprehensive clean-up of the Ogoniland are yet to be addressed.⁸⁸

Out of the 13 cases in which the then military government of Nigeria clearly failed to comply with the recommendations of the African Commission in at least 10 cases were to some extent implemented upon transition to democracy.⁸⁹ A number of military decrees earlier declared by the African Commission to violate the African Charter were repealed or amended. Some of the detainees that have been vindicated by the African Commission were also released.

14 Special mechanisms and promotional visits by the African Commission

The first mission of the African Commission to Nigeria was undertaken from 7 to 14 March 1997. The mission was approved by the African Commission at its 2nd Extraordinary Session in Kampala, Uganda, in 1995. The aims of the mission included gathering information about a number a communications which were pending before the African Commission, visiting Ogoniland and strengthening co-operation with NGOs. The mission consisted of Commissioner Dankwa and Amega. Even though the mission accomplished its aims, it was severely criticised on a number of grounds. NGOs felt the neutrality of the mission was compromised; and up to now, the report of the mission has not been published.

Also between 23 August and 2 September 2011, Commissioner Atoki

as the Special Rapporteur for Prisons and Conditions of Detention in Africa undertook a prisons promotional mission to Nigeria. The report of this mission also is yet to be made public. In the absence of this and the mission report of 1995, it is difficult to state conclusively the impact of missions on human rights in Nigeria. What is however clear is that missions gave more visibility to the work of the Commission. They also increase public awareness about the Charter. From a general survey, the disposition of the Nigerian government towards recommendations of the Commission became relatively more favourable sequel to the 1997 mission.

As to holding of African Commission sessions in member states, two sessions of the African Commission were held in Nigeria, namely, the 9th Ordinary Session, 18-25 March 1991, and the 44th Ordinary Session, 10-24 November 2008. This greatly impacted on the level of awareness about the African Charter. It also increased the visibility of the African Commission in Nigeria.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

The factors which are found in this study to have enhanced the impact of the African Charter and the Women's Protocol include the following:

- Strong civil society: This includes NGO activists, activist lawyers, minority rights advocates, activist politicians and activist journalists). The NGOs especially Constitutional Rights Project, Civil Liberties

⁸⁸ Louw (n 74 above) 48.

⁸⁹ Louw (n 74 above) 56.

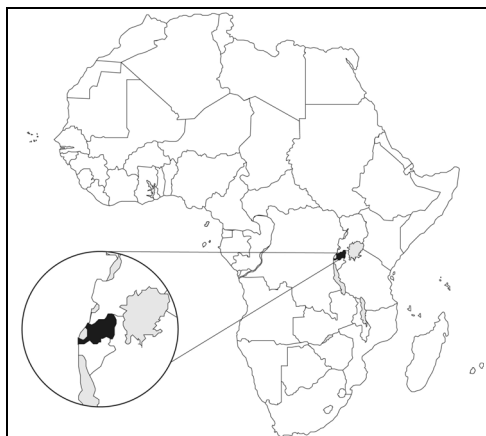
Organisations and Media Rights Agenda are well established and well resourced. The civil society was incredibly creative in deploying the African Charter.

- Domestication: Perhaps the most important enhancing factor is the domestication of the African Charter in 1983. The fact that the African Charter was already part of Nigerian law greatly eased the work of CSOs in convincing local judges to apply the African Charter. This also helped the judges to develop the far reaching superiority propositions.
- Number of communications against Nigeria: The impact of the African Charter in Nigeria has been enhanced by the number of citable jurisprudence set out by the Commission in communications submitted against Nigeria.
- Judicial activism: In partnership with activist CSOs, progressive judges have demonstrated exceptional courage and creativity in giving effect to the African Charter.
- Academic writings: Academic writings of commentators like Odinkalu, Udombana, Umozurike, Osita Eze among others have greatly enhanced the level of awareness about the Charter in Nigeria.
- Support by the Commission: Another factor that has enhanced the impact of the African Charter and the Women's Protocol in Nigeria is the direct support and encouragement given to CSOs in Nigeria by the African Commission.
- The overall international context: One factor that is often excluded from consideration is the overall international context which was favourable or even supportive of the activities of the CSOs and that of the African Commission. Such contexts include the suspension of Nigeria from the Commonwealth of Nations and the general relegation of Nigeria to the status of a pariah nation by foreign nations and donors.

Up to the time of compiling this report of Nigeria, two Nigerians have served in the African Commission. These include Professor Oji Umozurike (1989 – 1997) and Ms Catherine Modupe Atoki (2007 – 2013). Most importantly, their appointments have contributed to the development of the NNHRC. After his retirement from the African Commission, Professor Umozurike was appointed on the Board of the NNHRC in 2000. Ms Atoki was until her appointment, a Special Rapporteur of the NNHRC on Women and Gender related matters. Ms Atoki was also a member of the Governing Council of the NNHRC until 2007 when she was appointed to the African Commission.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN RWANDA

*Christian Nsabimana Garuka**



1 Introduction and background

Rwanda is a landlocked country in Central Africa with the size of 26,340 km² and 11 million inhabitants. According to the National Institute of Statistics of Rwanda, the Rwandan population was estimated to be 10,412,820 in 2010 and is expected to be 10,718,379 in the year 2011. 42.3% of the general population is below the age of 15 years.¹The 1994 genocide will always be brought up in discussions about human rights. There is no doubt that the 1994 genocide will go down in history as one of the most serious violations of human rights in Rwanda.

Unlike the Holocaust in which six million Jews were killed by the Nazis and their collaborators, the Rwandan genocide was carried out by Government apparatus and the population of different walks of life. It should be emphasised that the 1994 Rwandan Genocide was committed despite the fact that Rwanda was a party to several

international and regional human rights instruments.²

In light of the above, one could conclude that Rwanda has broken the sad record in terms of the violation of human rights at both the regional level and global level. This study focuses only on the implementation of the African Charter on Human and Peoples' Rights (African Charter) and the Women's Protocol in the aftermath of the Genocide.

2 Ratification of the African Charter and Women's Protocol

Though, the Ministry of Foreign Affairs and Cooperation has a mandate in the negotiation and signing of treaties and conventions, it should be noted that other ministries play a role in submitting a proposal to cabinet for discussion and approval. It monitors their implementation by responsible ministries.

As far as ratification is concerned, the President of Republic is vested with the powers to negotiate and ratify

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¹ National Institute of Statistics of Rwanda Population Statistics http://statistics.gov.rw/index.php?option=com_content&task=view&id=152&Itemid=318 (accessed 15 August 2011).

² For further reading, Human Rights Watch 'Leave None to tell the story' <http://www.hrw.org/legacy/reports/1999/rwanda/> (accessed 20 August 2011).

conventions and treaties.³ However, when peace treaties and agreements which are likely to modify provisions already adopted by Parliament or the agreements or treaties will have some budget implications, the ratification requires a prior authorisation by Parliament. Such authorisation is known as a 'law of ratification authorisation'.⁴

The only reason for the ratification of the African Charter is the fact it was adopted by the Heads of State and Government of the Organization of the African Unity (now the African Union). With regard to the ratification of the Women's Protocol, the study identified different reasons according to various interviewees. Indeed, some of the interviewees were of the view that Rwanda ratified the Women's Protocol because of political will of the Government leadership in terms of gender whereas others were of the view that Rwanda ratified it because the State was under obligation of the Solemn Declaration on Gender in Africa which requires African States to ratify the Women's Protocol and moreover the Beijing Conference on Women. There were no parliamentary debates prior to the ratification.

3 Domestication or incorporation of the African Charter and Women's Protocol

In terms of article 190 of the 2003 Constitution (as amended), any convention which has been ratified and published in the Official Gazette is part of the domestic law and moreover is superior to other Acts of Parliament in terms of hierarchy. Thus, the African Charter and the Women's Protocol are an integral part of the Rwandan domes-

tic law since they have been ratified. Indeed the African Charter was ratified by the Presidential Decree No 10/1983 and the Women's Protocol, ratified by Presidential Order no 11 of 24 June 2004.

The 2003 Constitution does not contain a specific Bill of Rights as such, but it contains a chapter on human rights. The African Charter and the Women's Protocol are justiciable since they have been incorporated. Some national laws make reference to the African Charter in their preambles. These include, on Prevention and Punishment of Gender Based Violence,⁵ and the law determining the use and management of land in Rwanda.⁶

4 Legislative reform or adoption

As previously noted, there was no compatibility study of domestic law with the African Charter and Women's Protocol undertaken before their respective ratification. Rwanda has experienced legal reforms after the 1994 genocide, but none of the reforms has specifically referred to the African Charter or the Women's Protocol as being the influencing factor. Nevertheless, these amended legislative provisions give effect to the African Charter and the Women's Protocol.

The study recorded different answers related to the rationale for the ratification of the Women's Protocol. Some of the respondents were of the view that the Women's protocol was ratified as a follow up of the Beijing Conference. Other interviewees were of the view that the Women's Protocol ratification was influenced by the

³ Art 189 of the Constitution.

⁴ Art 189 of the Constitution.

⁵ Law No 59/2008 of 10 September 2008.

⁶ Organic Law No 08/2005 of 14 July 2005.

Solemn Declaration on Gender in Africa of July 2003. This Solemn Declaration urges African States to ratify the Women's Protocol. The last but not the least, the Women's Protocol ratification was influenced by the political will of the Government of Rwanda related to Gender as enshrined in the Constitution of Rwanda of 2003.

5 Policy reform or formulation

The Government of Rwanda has adopted several policies which either implicitly or explicitly give effect to the African Charter and the Women's Protocol. It should be noted that these policies do not clearly refer to the African Charter or the Women's Protocol. With regard to the right to education (article 17 of the African Charter), The Nine Year Basic Education Policy (developed by the Ministry of Education in 2008) aims at ensuring that all children enrol for primary education and half of secondary education in order to enable everyone to with life with minimum skills. This policy gives effect to article 17 of the African Charter (right to education) whereas the Special Needs Education Policy (adopted by the Ministry of Education in 2007) relates to learners who are considered to have special educational needs such as those living with disabilities or with other educational needs.

With regard to the right to work (article 15 of the African Charter), the National Employment Policy (developed by the Ministry of Labour and Public Service in 2007) is of relevance. With regard to the right to health (article 16 of the African Charter), the National Nutrition Policy (developed by the Ministry of Health in 2005) aims at providing a conducive environment for the effective implementation of nutrition interventions that guarantee the nutri-

tional well-being of the entire population for the sustainable development of Rwanda, the National Health Insurance Policy, the National AIDS Policy.

There are other documents which give effect to the African Charter. These are the National Social Protection Strategy (Developed by the Ministry of Local Government in 2011): which provides for a policy framework for 'reducing vulnerability in general and the vulnerability of the poor and marginalised people in particular, and to promote a sustainable economic and social development centered on good social risk management and good coordination of savings actions and protection of vulnerable groups. There is also The Rwanda National Strategic Plan for HIV and AIDS 2009-2012 (developed by the National AIDS Control Commission).

With regard to the Women's Protocol, The National Gender Policy clearly spells out the process of gender mainstreaming in all Government and private sector policies, programmes and activities and the Girl's Education Policy (2008).

6 Court judgments

Despite the fact that the African Charter and the Women's Protocol are part of the domestic law, it should be deplored that these two instruments as well as other human rights are rarely invoked if at all in court judgments. Indeed, judges mostly refer to the 2003 Constitution and acts of parliament.

7 Awareness and use by civil society

There is a general lack of awareness of the African Charter and the Women's

Protocol among civil society organisations. However, few of them have presented shadow reports such as COPORWA, formerly CAURWA in 2007, to the African Commission.⁷ Local human rights NGOs tend to make use of international human rights treaties as well as national legislation.

8 Awareness and use by practising and other lawyers

The researcher was not able to obtain any relevant information on this issue.

9 Incorporation in law school education

Although human rights law is taught in some law schools, it should be noted that the African human rights system is only taught by a selected number of law schools. As a result, very few law school graduates are aware of the African human rights system.

10 National human rights institutions (NHRIs)

According to article 4 of the Law Determining the Organization and Functioning of the National Commission for Human Rights (NHRC) (Official Gazette no 14 of 15 July 2007), among its mandate,⁸ the NHRC sensitises relevant Government institutions as regards ratification of international conventions relating to human rights and integrating them into domestic law. The NHRC makes reference to the African Charter in its training related activities. Howev-

er, this reference to the African Charter is not always consistent.

With regard to the implementation of concluding observations or decisions, it should be noted that the NHRC has not been very active. Nevertheless, this Commission annually attends the sessions of the African Commission.

11 Academic writing on the African Charter and Women's Protocol

The African Charter as well as the Women's Protocol have not been given emphasis in the academic writing circles. It should be deplored that few Rwandan academics who have written in the field of human rights have mostly focused on international human rights law.

12 State reporting

With regard to state reporting, it is worth mentioning that both the Ministry of Justice and the Ministry of Foreign Affairs play a crucial role. Indeed, the Ministry of Justice plays the technical part (attendance at the African Commission session to present the report) whereas the Ministry of Foreign Affairs which deals with the communication (submission to the African Commission).

There is an informal Task Force Team that was established in 2007. The Task Force Team is made of the Ministry of Justice, the Ministry of Internal Affairs, the Ministry of Health, the Ministry of Local Government, the Ministry of Education, the Ministry of Gender and Family Promotion, the Ministry of Labour and Public Service and the NHRC. The Task Force Bureau

⁷ http://iwgia.synkron.com/graphics/SynkronLibrary/Documents/InternationalProcesses/ACHR/Shadow%20reports/08-01-07ACHPRShadowReportRwanda%20CAURWA_Nov2007_FRE.pdf (accessed 30 August 2011).

⁸ No 30/2007 of 6 July 2007.

is made of the Ministry of Foreign Affairs chairing the Bureau, the Ministry of Justice being the deputy chair and the NHRC being the secretariat. The Task Force hires a consultant to compile the data and draft a report which the Task Force scrutinises and once it approves it, there is a validation workshop whereby civil society organisations provide their input to the draft report. After the validation workshop, the Task Force submits the Report to the Ministry of Justice which submits it to Cabinet. Once the Cabinet approves the draft report, then the submission of the report to the African Commission is done through the diplomatic channel (Ministry of Foreign Affairs). In spite of all the effort deployed into drafting and presenting the report, concluding observations are not widely disseminated.

13 Communications involving this State

In the communication, *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, the first inter-state communication brought before the African Commission, the Government of Rwanda was found to be in violation of articles 2, 4, 5, 12(1), 14, 16, 17, 18(1), and 19, 20, 21, 22 and 23 of the African Charter. This decision was made against the Governments of Rwanda, Burundi and Uganda. This communication had alleged that the military troops from Burundi, Rwanda and Uganda had committed serious violations of the African Charter in the territory of the Democratic Republic of the Congo. It should be noted that the Government of Rwanda had refused to take part in the proceedings beyond the admissibility stage. The Government of Rwanda never gave any effect to this decision.

This finding has not been given exposure in Rwanda.

14 Special mechanisms and promotional visits by the African Commission

The African Commission has made some promotional visits to Rwanda after the genocide. In its visits, the African Commission managed to meet with whoever they wanted without any hindrance. Recommendations made after the visit have been welcomed by the Government of Rwanda. However, the civil society and the general population are not aware of these recommendations.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

There are factors which may impede the successful implementation of the African Charter and the Women's Protocol. Among these factors, one can note the financial aspect (limited resources) and cultural practices on the ground. The persistent disagreement between the African Commission and the Government of Rwanda on the concept of 'indigenous people' is one of the most serious obstacle which may impede the implementation of the African Charter in Rwanda. Indeed, the Government of Rwanda has consistently dismissed the concept of indigenous people within Rwanda and furthermore has argued that promoting the rights of 'indigenous' people will undermine the national policy on unity. Therefore, whatever the decision made by the African Commission on the violation of the rights of indigenous people is likely not to be

enforced in Rwanda. Like many patriarchal societies, Rwanda has deeply rooted traditional patriarchal stereotypes about the role and responsibilities of women and men in the society and it is, therefore, submitted that this can impede the implementation of the Women's Protocol.

With regard to factors which can enhance the African Charter and the Women's Protocol, the legal framework, especially the 2003 Constitution, is very conducive to enhancing the effect of these instruments because it provides that treaties which have been ratified and published in the official gazette are part of the domestic law and moreover are superior to other acts of parliament. The recognition by Rwandans in majority that the 1994 genocide is the most serious human rights violations and thus only the protection of human rights can prevent such a human tragedy to occur. The Government of Rwanda has established the Gender Monitoring Office (operational since 2007) with the mandate of coordinating and monitoring the implementation of gender policy by various Governmental institutions and private bodies. However, there is likely a duplication of activities between the Gender Monitoring Office and the NHRC.

A Rwandan national is currently a member of the African Commission. She is also the chairperson of the NHRC at national level. Despite the fact the African Commission held a session in Rwanda in 1999, the only positive impact was the Kigali Declaration which is very important, but not known by the majority of Rwandans.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN SENEGAL

*Horace Adjolohoun**



1 Introduction and background

Senegal obtained independence from France in 1960 with Léopold Sédar Senghor as the country's first President. The Country is known as a secular, democratic and social republic. Senegal may be referred to as one of the very few countries to have not experienced dictatorship in sub-Saharan Africa. The country is praised for its international law adherence¹ and is a party to almost all international and regional human rights' instruments² including the African Charter and the Women's Protocol. Senegal ratified the African Charter in 1982 and the Women's Protocol in 2004.

In its preamble, the Constitution of Senegal³ includes an explicit reference to international human rights instruments among which is the African Charter.⁴ The singularity of the Constitution, however, lies in that it raises provisions of the preamble to the rank of full constitutional clauses.⁵ One of the significant consequences is that human rights treaties referred to in the preamble, including the African Charter; acquire a higher value than other international instruments. Although the Constitution preceded the adoption of the Women's Protocol, Senegal has undertaken significant legislative and policy reform to give effect to the protocol many provisions of which were also reflected in the Constitution and other international instruments ratified by the country.

The Ministry of Foreign Affairs serves as a focal point while other relevant ministries and state institutions are involved in the governmental process of preparing the country's response to vari-

* I would like to acknowledge the support of Ella Scheepers (South Africa, LL.M HRDA 2011) who helped with the documentary research in Senegal.

¹ See B Sall & A Mbodji 'Rapport d'enquête et d'analyse sur la Vérification et le Contrôle de Conformité et de Mise en œuvre des Conventions, des Décisions et meilleures Pratiques standards de l'Union Africaine' (May 2010) 4. Senegal was also the first state to have ratified the Rome Statute of the International Criminal Court.

² As above 9-11.

³ As adopted on 22 January 2001 and amended in 2003, 2006 and 2007. For the Constitution including the five subsequent amendments, see *Constitution de la République du Sénégal du 22 janvier 2001* http://www.gouv.sn/textes/Constitution_sn.pdf (accessed 25 October 2011).

⁴ Preamble, Constitution of Senegal.

⁵ See concluding para 18.

ous international human rights monitoring mechanisms, including the African Commission. The process also involves a wide range of non-governmental organisations (NGOs) and institutions as well as the national human rights institution, the ombudsman and civil society at large. The *Comité Sénégalais des Droits de l'Homme*, the national human rights institution, plays an important role in the technical preparation of various reports submitted to international human rights monitoring bodies. The *Comité inter-ministériel des droits de l'homme et du droit international humanitaire*⁶ complements the work of the Senegalese Human Rights Committee and represents Senegal in certain international human rights forum at the request of the Government.⁷

2 Ratification of the African Charter and Women's Protocol

The president may ratify treaties directly or request an authorisation from the Parliament especially those treaties concerned with freedoms and fundamental rights.⁸ The process of treaty ratification in Senegal includes two main phases which are the review of the agreement and ratification.⁹ Under the review process, following signature, the minister of foreign affairs prepares a draft bill for authorisation together with a decree ordering publication which are

forwarded to the Secretary General of the government for submission to Cabinet. Upon adoption by Cabinet, the Secretary transmits the final document to the Constitutional Council for constitutionality check. If the document is declared consistent with the Constitution, it is sent to Parliament, which reviews and adopts a law authorising the president to ratify. Here begins the second phase including preparation of ratification letters by the minister of foreign affairs, signature by the President, and transmission of instruments of ratification to the other party or the depositary.¹⁰

Senegal ratified the African Charter in 1982. For lack of documentary sources of parliamentary nature, one may refer to more recent writings which abound on why Senegal ratified the African Charter. It appears that Senegal had far more reasons than many other African states to ratify the African Charter. First, Senegal is well known to have been the capital of French West Africa until 1960. Its colonial history has placed a burden on the country to abide by democracy and human rights friendly standards in the region. Second, it must be recalled that the Law of Lagos on the need of an African human rights convention was revived at the First Conference of Francophone African jurists held in Dakar in 1967, which led to the adoption of the Dakar Declaration calling for the establishment of an African human rights mechanism.

Another important contribution of Senegal is when its then President, Senghor, tabled the African human rights system's proposition before the OAU Assembly while the project was

⁶ Inter-ministerial Committee for Human Rights and International Humanitarian Law.

⁷ Created by Decree 97-674 of 2 July 1997.

⁸ Art 89 of the Constitution. According to the relevant provision, the considered treaty may be ratified only by virtue of a law.

⁹ For further details on the process of ratification in Senegal, see BC Mbaye 'The Hows and Whys of Promoting the entry into force of the Protocol to the ACHPR on the Establishment of an ACtHPR' (Unpublished paper on file with author) 10 and H Adjolohoun 'Visiting the Senegalese Legal System and Legal Research: A Human Rights Perspective' *Globalex* (March/April) 2009.

¹⁰ On practical aspects of the ratification process in Senegal, see Mbaye & Adjolohoun as above.

stalling in the 1980s. As far as the drafting process is concerned, the 1979 conference of 20 African experts organised in Dakar was presided over by the late Senegalese Judge Kéba M'baye. It is also known that the work of the Expert Committee 'was greatly influenced by the opening address of the host president, President Senghor' who called for a charter focusing on African values and real needs of Africans.¹¹

When it comes to the Women's Protocol, one could wonder why Senegal, a Muslim majority country allowing practices such as polygamy, female mutilation, and child corporal punishment, would be quick to ratify a women's rights protocol. The *exposé des motifs* supporting the Government's application for authorisation stresses the 'contemporary persistence of practices that are discriminatory and harming to women in Africa, which reveal the limitations of the African Charter and other international human rights instruments'.¹² The same motivation concludes that 'by ratifying this convention Senegal would confirm its commitment to the promotion of women's rights'.

3 Domestication or incorporation of the African Charter and Women's Protocol

Article 98 of the Constitution provides that 'treaties and agreements duly ratified or approved have, upon their publication, an authority superior to that of the laws under the condition for each

treaty or agreement of their application by the other party'. The wording of the provision is largely accepted to mean that not only do international instruments automatically enter the municipal law upon publication, but that they also acquire precedence over domestic legislation. However, it is also understood that the precedence thus acquired does not raise international norms to the status of rules of constitutional value which is afforded only to the four treaties expressly mentioned in the preamble of the Constitution.¹³ The idea is that Senegal has expressed its 'adherence' only to those instruments thus granting them a superiority privilege subsequently endorsed by the jurisprudence of the Constitutional Council of Senegal, which added them to the 'constitutionality bloc'.¹⁴ One of the most significant consequences of such jurisprudential determination is that it allows complaints to the council based on those instruments while such suits are not possible otherwise.¹⁵

In line with the argument above, one may argue that if the African Charter enjoys the status of a rule of constitutional value in Senegal, the Women's Protocol which operates in the implementation of the African Charter should have the same precedence over municipal law. The preamble to the Constitution seems to support such interpretation when it provides that the

¹¹ On the history of the African Charter, see Centre for Human Rights & African Commission *Celebrating the African Charter at 30: A guide to the African Human Rights System* (2001) 8-9.

¹² *Loi* no 2004-35 of 8 January 2005 *Exposé des motifs* para 1 in *Journal Officiel* No 6200 of 8 January 2005.

¹³ See Sall & Mbodji (n 1 above) 12-15. Those four treaties are the African Charter, the UDHR, the CRC, and the CEDAW.

¹⁴ For instance in its Decision of 23 June 1993, *Affaire* no 11-93, the Constitutional Council of Senegal made a direct use of the Universal Declaration on the Rights of Man and Citizen (1789) and the UDHR.

¹⁵ See Sall & Mbodji (n 1 above) 12. Alike the majority of its counterparts in Francophone Africa, the Constitutional Council of Senegal has no jurisdiction to receive complaints based on the violation of rights provided in international human rights instruments ratified by the country.

‘sovereign people of Senegal affirms its adherence to international instruments adopted by the OAU, namely the UDHR, CEDAW, CRC and the African Charter’. One could read the provision as encompassing all human rights instruments adopted by the OAU, the comprehensive list of which could not be included in the Constitution.

As to the rank of the two instruments under study in the municipal hierarchy of norms, the superiority of international law further supports their precedence on domestic legislation, arguably including the Constitution. Article 97 of the Constitution regulates inconsistencies between international law and the Constitution by providing that ratification may be authorised only when the Constitution has been put in conformity with the considered international convention.¹⁶ The provision thus suggests that international law has precedence on municipal law including the Constitution which has to be put in conformity with international norms, but not the other way round. Whether international treaties have legal ground in the municipal, normative, or procedural framework to enjoy direct application is another issue altogether.¹⁷

The Constitution of Senegal includes a quite comprehensive Bill of Rights the title of which speaks enough to the major sets of rights enshrined in the African Charter and the Women’s Protocol. The relevant title is concerned

with ‘public freedoms and the rights of the person, economic and social rights, and collective rights’. Article 7 expressly provides for equality between men and women, which is very important in a Muslim majority country allowing men to marry up to four women.¹⁸ The Bill of Rights also guarantees fair trial and civil rights as well as the rights to environment, health, property, education, and religious freedom.¹⁹ The Constitution bans forced marriages²⁰ and guarantees economic and property freedoms for women independently of their husbands’ properties.²¹ While the rights contained in the Constitution are all justiciable, a proper litigation forum is wanting as discussed later in this report.²²

As indicated above, the Presidential Decree ratifying the Women’s Protocol makes explicit reference to the Protocol the full text of which is added to the Decree. Domestication is, therefore, not necessary for international law to become part of the laws of Senegal which is a monist country.

4 Legislative reform or adoption

Senegal ratified the African Charter well before its current Constitution was adopted in 2001. Given the important role played by the Country in the establishment of the African human rights system, one could assume that Senegal had ensured its domestic rules were in conformity with the African Charter. Although such assumption is supported by the place of the African Charter in the normative and constitutional hierarchy, a number of domestic provisions

¹⁶ Art 90 of the Constitution provides that when the Constitutional council has declared that a provision of a treaty is inconsistent with the Constitution the considered treaty may be ratified only after contrary constitutional provisions have been put in conformity with the treaty.

¹⁷ For a more comprehensive discussion, see Adjolohoun (n 9 above). A relevant example on problems relating to applicability was provided in the *Habré* case.

¹⁸ Art 113 of the Family Code.

¹⁹ Art 8.

²⁰ Art 18.

²¹ Art 19.

²² See arts 6 and 7 of the constitution.

namely on marriage, inheritance, child care, and polygamy still fall short of international human rights law standards. In any case, the ratification process guarantees a minimum of compatibility check since the President may not proceed to ratify any international instrument until the constitution is put in conformity with the considered treaty.

There is evidence to show that the Government has embarked on implementation activities since the year 2000. Similarly, civil society and NGOs have influenced legislative and other reforms in a view to ensuring that Senegal complies with its international obligations ensuing from the African Charter and Women's Protocol. It appears that the problem with Senegal is not on the point of adherence with international instruments which the country champions. The issue is the important legislative and policy implementation gap. For instance, set aside the Labour Code, the Country has not passed any major legislation to give effect to the ICESCR.²³ A number of significant reforms were conducted.²⁴

As regards civil and political rights, Senegal has adopted a legislation incorporating the provision incrimination of torture in its Criminal Code,²⁵ in accordance with article 4 of CAT. Following the *Habré* case, the country

has also undertaken wide legislative reform, including amendment of the Constitution to put its domestic law in conformity with the CAT and enable its judiciary to try former Chadian President Hissein Habré.

Recently, the National Assembly has also adopted a law on absolute parity between men and women in elective functions which was said to be the result of pressure from civil society organisations to implement relevant international instruments including the Women's Protocol.²⁶ However, parity as provided under the law is limited to women's right to be nominated in equal number to contest elections for political positions.

The huge gap between ratification and implementation in Senegal is said to have an explanation in both the inconsistency of ratified treaties with socio-economic and cultural realities²⁷ on the one hand, and the lack of well-coordinated institutional mechanisms,²⁸

²⁶ Loi no 2010-11 of 28 May 2010 instituant la parité absolue Homme-Femme (dans les fonctions électives).

²⁷ A number of common practices in Senegal are known to be in blatant lack of conformity with international conventions in force in the country. Some of them include polygamy, corporal punishment of children and the *Talibés* child beggars' phenomenon which concerns thousands of children sent to the streets in Senegal and exploited by masters of Quranic schools known as *marabouts*. Similarly, according Islamic customs largely applied in Senegal, men inherit twice the share of women while art 21(2) of the African Women Protocol and the Constitution of Senegal guarantee equality between men and women. Polygamy is still permitted up to four wives, the husband is head of family and choice of residence lies with him. Whichever parents have child custody, the father remains guardian unless he is unable to fulfil the role. Succession is governed by Muslim succession section of the Family Code.

²⁸ Institutions and mechanisms are put in place but are not made to operate for lack of appointment of the members or funding.

²³ See para 13 of CESCER Concluding Observations E/C.12/1/Add.62 of 24 September 2001 on Senegal's Report.

²⁴ Law No 2005-02 against human trafficking and for protection of victims; Amendments in 2004 to Law Nos 91-92 to make education free and compulsory for children aged 6-16; Incorporation of CRC into the Constitution of 2001; Law No 99-05 of 1999 prohibiting excision, sexual harassment, paedophilia and sexual assault, as well as all forms of sexual mutilation, sexual violence and corruption of minors; and Labour Code of 1997, which fixes minimum age of employment at 15.

²⁵ Loi no 96-15 of 28 August 1996.

resources and political will,²⁹ on the other.

5 Policy reform or formulation

Senegal has a human rights chapter in its PSRP,³⁰ which addresses many of the issues referred to above in greater detail. These issues include, among others, the youth, women, children, elders, and HIV/AIDS. However, the document has no specific reference to issues such as polygamy and the Talibés. Senegal also adopted a legislation which criminalises, among other practices, female genital mutilations, sexual harassment and domestic violence against women.³¹ The Country has enacted legislation on HIV/AIDS.³² Trafficking and worst form of child labour are banned in Senegal since 2007.³³ Abolition of the death penalty on 10 December 2004 is also said to be in implementation of the state's obligations under international human rights treaties, which it ratified.³⁴

6 Court judgments

Reference to both the African Charter and Women's Protocol in decisions of domestic courts is wanting. This is mainly due to the lack of proper domes-

tic judicial forum to receive and entertain allegations of violation based on the said instruments. In very few instances, Senegalese courts were called to adjudicate human rights related cases based on instruments other than the African Charter and Women's Protocol. For instance, in one of such decisions, the Constitutional Council determined that by differentiating between candidates for the magistracy, article 4 of the Law 92-27 of 30 May 1992 was contrary to the Constitution.³⁵ The Council based its decision on 'the constitutional principle of equality by reference to article 6 of the Declaration of the Rights of the Man and the Citizen of 1789 and article 21(2) of the UDHR'. In another decision, the Council made reference to 'equality in law and before the law as enshrined in the Declaration of 1789, the UDHR and article 3 of the ACHPR'.³⁶

According to members of the Court of Cassation and the State Council of Senegal, the poor African Charter and Women's Protocol-based litigation in domestic courts is the result of the fact that municipal law – they cite the Constitution, including its preamble as well as laws on freedoms – already recognises and provides the considered rights.³⁷ It is worth noting that during the colloquium referred to above, the Senegalese justices commented that in the *Habré* case cassation, judges voluntarily decided not to implement the Convention, which article 4 wording gives unequivocal universal competence

²⁹ For instance, it took ten years for the country to ratify the CAT allegedly for lack of definition of torture.

³⁰ République du Sénégal 'Document de Stratégie pour la Croissance et la Réduction de la Pauvreté' (2006-2010) 50-53.

³¹ Loi no 99.03 of January 1999.

³² Loi no 2010-03 du 9 avril 2010 relative au VIH/SIDA.

³³ See Arrêté ministériel no 430 MFFDSEF-CAB-PLCPFTE of 1 February 2007 portant création et fixant les règles d'organisation et de fonctionnement du Projet de Lutte contre la traite et les pires formes de travail des enfants.

³⁴ République du Sénégal 'Rapport National sur le Développement Durable' Contribution du Sénégal aux 16e et 17e sessions de la Commission du Développement Durable des Nations Unies (CDD-16/17) (2008) 15.

³⁵ Decision 15-94 of 27 July 1994.

³⁶ Decision 11-93 of 23 June 1993.

³⁷ In a paper presented at an international colloquium on the application of international instruments by domestic courts, Senegalese highest courts' judges referred to no more than two cases: the *Sega Seck Fall* case of 29 January 1975 decided by the then Supreme Court of Senegal and the *Habré* case of 20 March 2001 decided by the Court of Cassation.

to Senegal to do so, notwithstanding article 669 of the Criminal Code of Procedure. Currently, legislative reforms are being considered to extend the jurisdiction of the Constitutional Council to individual human rights adjudication.

7 Awareness and use by civil society

Senegal may boast of a very dynamic civil society, which actively participates in major human rights, humanitarian and criminal law initiatives at both national and international levels. Awareness of the African Charter and the Women's Protocol, and their use in the work of civil society organisations is proportional to the Country's adherence to international human rights instruments.

The interest of Senegalese NGOs in the work of the African Commission dates back in the earliest of stages in the operations of the regional body. Many such NGOs continue to actively participate in sessions of the African Commission, engage with its various mechanisms and have obtained observer status.³⁸ Arguably due to the good human rights records of the country, such organisations have not engaged in extensive litigation before the African

Commission³⁹ and now the African Court.⁴⁰

8 Awareness and use by practising and other lawyers

Senegalese lawyers are certainly aware of the African Charter, the Women's Protocol and the work of the African Commission. The scarcity of cases based on those instruments in domestic courts is, however, the evidence of a poor use of their provisions by lawyers in proceedings. Given their implications in international adjudication, one would suggest that Senegalese lawyers make use of these norms in their pleadings before international adjudicatory forums.

9 Incorporation in law school education

Some institutions of learning and training have focused on mainstreaming human rights in the curricula of legal practitioners. Senegal has a well-established, organised and productive Judicial Training School (*Centre de Formation Judiciaire de Dakar*), which trains magistrates and other legal practitioners through specialised courses, seminars and other workshops. With regards to initial training of magistrates, the National School of Judicial Training (*École Nationale de Magistrature*) also recruits and selects trainees for a two-

³⁸ Some of them are Association Sénégalaise d'Etudes et de Recherches Juridiques (1989); Association Sénégalaise d'Etudes et de Recherches Juridiques (1989); Organisation Nationale des Droits de l'Homme du Sénégal, Membre de la FIDH (1993); Organisation Sénégalaise d'Appui au Développement et aux Droits de l'Homme (1994); and Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) (1991).

³⁹ Most if not all cases considered by the African Commission against Senegal were inconclusive mainly for lack of domestic exhaustion of local remedies. See for instance, *Mouvement des Réfugiés Mauritaniens au Sénégal v Senegal* (2003) AHRLR 131 (ACHPR 2003) and *FIDH and Others v Senegal* (2006) AHRLR 119 (ACHPR 2006).

⁴⁰ In *Yogogombaye v Senegal* (2009), the African Court could not entertain the case for lack of jurisdiction as Senegal had not made the necessary declaration for individuals to initiative proceedings against the state.

year judicial course although not with specific human rights modules. Both schools are located in Dakar. In addition, the UNESCO Human Rights Chair at Cheikh Anta Diop University in Dakar is renowned for training graduates of civil society groups, women organisations, lawyers and other law faculties in human rights and democracy. As one of the new partners of the Centre for Human Rights, Gaston Berger University in Saint Louis is also currently designing a human rights course to be included in its curriculum.

10 National human rights institutions (NHRIs)

As the national human rights institution, the *Comité Sénégalais des Droits de l'Homme* (Committee)⁴¹ has played an important role in the protection and promotion of human rights in Senegal. Originally, it acted as a representative of trade unions, youth and women's movements.⁴² Its functions have subsequently been enlarged to act as a mediator between public powers and human rights non-governmental organisations, and co-ordinate the work of those organisations. The Committee is also generally assigned by the Government to follow-up on cases in which the State is involved, and for the implementation of the decisions of human rights bodies. Such role is illustrated in the case of *Famara Koné v Senegal* decided by the United Nations Human Rights Committee. The national human rights institution of Senegal has affiliate status with the African Commission. One of its functions is also to support the state in the technical preparation and submission of its reports to various internation-

al bodies, which the Committee does not seem to fulfil effectively.⁴³

11 Academic writing on the African Charter and Women's Protocol

Sustained law shops, journals and reports, legal clinics and other specific legal activities are not part of Law Faculties' tradition in Senegal. In the absence of an official law journal in Senegal, law reflections are published through various revues or bulletins by schools referred to above, as well as other human rights and civil society organisations. Unfortunately, no online access to such publications is available, as they can only be obtained at local bookshops *in situ*. Extensive legal and political science writings involving Senegalese scholars are not mostly concerned with human rights. Existing writings and journals do not specialise in human rights.

12 State reporting

Senegal is one of the countries that owe reports to the African Commission. The tendency seems to be that authorities in charge of preparing the reports consider state reporting as less important than other concurrent activities.⁴⁴ The status of submission of reports to the African Commission has not changed in the recent years.⁴⁵

⁴¹ The Senegalese Human Rights Committee.

⁴² *Décret* No 70-453 of 22 April 1970 establishing a *Comité sénégalais des droits de l'homme*.

⁴³ See Sall & Mbodji (n 1 above) 26.

⁴⁴ As above 13.

⁴⁵ See Centre for Human Rights & African Commission (n 11 above) 38.

13 Communications involving this State

As indicated earlier, there was no decision of the African Commission on the merits in cases involving Senegal.

14 Special mechanisms and promotional visits by the African Commission

In 2004, the 36th Ordinary Session of the African Commission took place in Dakar. The same city hosted several meetings between the Commission and the Court devoted to the harmonisation of their rules of procedure. In 2009, Dakar also hosted the 7th Extra-Ordinary Session of the African Commission. The same year, the Special Rapporteur on the Rights of Human Rights Defenders in Africa undertook a Promotional Mission to the Republic of Senegal. The Mission created an opportunity to for the continuation of a dialogue on human rights issues with all stakeholders in the country, and also to publicise the mandate of the African Commission.⁴⁶

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

The eagerness of Senegal to ratify international human rights conventions and the Country's democratic and human rights records are conducive to the impact of the African Charter, the Women's Protocol and the work of the African Commission. However, several factors impede the full implementation

of the same norms. From ratification to implementation, a huge gap exists in practice. The State does not ensure that an effective structural and institutional organisation is put in place to follow-up on the international obligations that the country is quick to commit itself to.

⁴⁶ See 27th Activity Report of the ACHPR (June 2009 - November 2009) 18.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN SIERRA LEONE

*Augustine S. Marrah**



1 Introduction and background

Sierra Leone is a state party to the African Charter on Human and Peoples' Rights (African Charter), but has only signed and not yet ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol). Sierra Leone is an avid supporter of the modern global human rights efforts, having ratified most if not all of the major human rights instruments both at the international and regional levels. Sierra Leone, relatively speaking, is a human rights-friendly environment, which has attracted the formation of plethora of civil society organisations most of which promote and advocate for fundamental rights. This is also evident in the post-conflict establishment of the National Human Right Commission (NHRC) and an Office of the Ombudsman coupled with a vociferous press and a robust civil society.

Sierra Leone's Constitution¹ guarantees fundamental rights and freedom

of individuals. While this Constitution is rich in terms of the inclusion of civil and political rights, socio-economic rights are conspicuously absent from the Bill of Rights in the Constitution. However, they constitute part of the 'fundamental principles of state policy'² in the Constitution. Although the Constitution broadly enshrines most civil and political rights, these rights are however gravely weakened by claw-back clauses. For instance, even though the Constitution guarantees the right to life, capital punishment is recognised in some circumstances namely murder and treason.

2 Ratification of the African Charter and Women's Protocol

Sierra Leone is a dualist state. This means that Sierra Leone must incorporate or domesticate a treaty or international convention after ratification into its legal system by legislative means in order for that treaty or international convention to constitute part of her body of legislation. Sierra Leone is yet to domesticate or incorporate the African Charter into the corpus of laws. Because of its dualist system, interna-

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¹ Act 6 of 1991.

² Chapter II, secs 7, 8 & 9 of the 1991 Constitution.

tional instruments do not automatically form part of the legal regime of Sierra Leone even after ratification.

Case law is constitutionally regarded as a source of law in Sierra Leone.³ This means, therefore, that if a matter is adjudicated using provisions of the African Charter establishing an unprecedented legal principle, the provisions would form a binding authority in the legal dispensation of Sierra Leone. Once this is done, the African Charter (or some of their provisions) could form part of the legal regime of Sierra Leone. However, there have been very few human right cases or litigation in Sierra Leone. In fact, there is no *locus classicus* in respect of fundamental human rights in Sierra Leone. The long-standing conservative approach to justice and the legal system with a multiplicity of archaic laws largely militate against the growth of case law on human rights and fundamental freedoms. It is manifest that the conduit of case law has not been employed by the judicial lever of Government to bestow domestic legality and justiciability on the African Charter or its provisions.

The Ministry of Foreign Affairs and International Co-operation of Sierra Leone is the focal point in terms of treaties or international conventions signed and ratified by Sierra Leone. There is specifically a human rights division within the Ministry charged with the responsibility of handling, compiling and advising the Government mainly in terms of ratification of human rights treaties signed by Sierra Leonean diplomats. In respect of ratification and domestication, the Ministry of Foreign Affairs liaises with the Office of Attorney General in the Ministry of Justice.

The latter is the principal legal advisor to the Government of Sierra Leone, and has an international division which handles treaties.

Currently, the Ministry of Foreign Affairs, through its human rights division, have compiled a list of all the human rights treaties, and have advised the Government in terms of ratification and domestication.⁴ The African Charter, it was revealed to the author, is one of the Government's top priorities in terms of domestication. A senior statesman in the Ministry of Justice disclosed that Cabinet has received the report from the Ministry of Foreign Affairs and is currently considering it.

3 Domestication or incorporation of the African Charter and Women's Protocol

The Deputy Minister of Justice did not respond when asked what has impeded the domestication of the African Charter and the Women's Protocol. However, it is grossly patent that the requisite political will is unavailable to effect incorporation of these instruments. He noted the mounting interest on the part of the Government of Sierra Leone to fulfil its obligations, chiefly to domesticate these instruments.

Apart from the lack of political will, there has been lukewarm interest towards the African Charter and the Women's Protocol by civil society, academics and the press. The African Charter or the Women's Protocol is rarely used by civil society in their activities and advocacy drives or the media in either their reports or op-eds, or by

³ Sec 170 of the Constitution.

⁴ Interview with some personnel in the human rights division of the Ministry of Foreign Affairs.

academics in their discourse or writings. This has immensely deprived the African Charter of the requisite publicity which would have attracted the attention and won the sympathy of the Government to consider domesticating these instruments.

4 Legislative reform or adoption

The country has not undertaken any considerable legislative reforms in compliance with its obligations under the African Charter and the Women's Protocol. The Constitution is out of touch with modern realities and even though the Law Reform Commission with stakeholders from across the country has put together a new draft constitution and has submitted it to the government, since 2008, there has not been any progress in terms of constitutional reforms. In 2007, three gender laws, namely the Domestic Violence Act, the Registration of Customary Marriage and Divorce Act, and the Devolution of Estates Act, were passed, which marked a legislative milestone in terms of women's rights. Although it could not be vouched for that this legislation was adopted particularly in fulfilment of the country's obligations under the Women's Protocol, they have to a large extent complied with especially the legislative obligations under the Protocol even if it has not yet been ratified.

5 Policy reform or formulation

Sierra Leone has adopted numerous policies in a bid to combat the rising poverty trends which are the enduring legacies of the country's past. For instance, the country has a Poverty Reduction Strategy Paper (PRSP II) which is deemed a comprehensive strategy to fight endemic poverty. There is

also a National Commission on Social Action and a Secretariat on HIV/Aids (NAS). However, the chairman of the Sierra Leonean Human Rights Commission (SLHRC) cautioned that these policies or institutions were not established in fulfilment of the obligations stemming from the African Charter or the Women's Protocol. Instead they were, as the Chairman put it, 'creatures of the Bretton Woods institutions or in accordance with the dictates of the West.'

Sierra Leone has one of the worst maternal mortality rates in the whole world. This tragic situation prompted the Government to introduce free health care policy for women and children throughout the country. However, Amnesty International's Africa Programme Director, Erwin van der Borgh, observed that 'the health care system remains dysfunctional in many respects'.⁵ The US State Department in its 2010 Country Reports also noted the free healthcare policy:⁶ for pregnant women, lactating mothers and children under the age of 5.

However, the launch of the free health care policy was rushed and ill-prepared. Requisition and distribution systems were inadequate, monitoring and accountability mechanisms were largely absent, many women and children still had to pay for some or all drugs. Many factors that contribute to maternal mortality remained unaddressed, such as unsafe abortions, female genital mutilation, early marriage and the lack of sexual and reproductive education.

⁵ <http://www.amnesty.org/en/news-and-updates/report/sierra-leone-pregnant-women-still-denied-lifesaving-medical-care-2011-09-05> (accessed 10 September 2011).

⁶ <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154368.htm> (accessed 10 September 2011).

Even though the free healthcare policy was not adopted in discharge of the country's responsibility under the African Charter or the Women's Protocol, it could be said that the policy is a positively welcoming step by Sierra Leone to give meaning especially to the Women's Protocol.

6 Court judgments

Obviously, because a large portion of legal practitioners in Sierra Leone are unfamiliar especially with regional human rights instruments, it has been immensely difficult for human rights litigation or strategic impact litigation to be undertaken. As a result, case law in regards to the African Charter and the Women's Protocol are few and far between if not virtually non-existent. There is a Pilot National Legal Aid (PNLA) scheme currently undertaken by the government of Sierra Leone with support from the DFID-funded Justice Sector Development Program (JSDP). However, this scheme only provides legal representations on behalf of accused persons and except for the usual applications for bail and general defence (being rights of accused persons), the president of the SLBA noted that human rights law is neither noticeable in the legal practice nor in the general linguistics of litigation in Sierra Leone. In recent times, there was a much publicised case brought by the Sierra Leone Association of Journalists (SLAJ) to the Supreme Court citing several provisions in the Public Order Act of 1965 as being in violation of the constitutional right to freedom of Expression and other basic media rights. Of course, the publicity around the case was not entirely unconnected with the fact that it was brought by media practitioners being themselves publicists. This case, sponsored by the

Society for Democratic Initiatives⁷ represented the premier move in terms of human right litigation in Sierra Leone. However, commentators say that the conservative Supreme Court did not seize the occasion when it held that the provisions were not in breach of any constitutional rights.

The SLHRC through its quasi-judicial competence handles human rights cases, but mainly employs international human rights instruments however the chairman indicated that the African charter and the Women's protocol are sometimes used to reinforce their decisions.

7 Awareness and use by civil society organisations

Ibrahim Tommy, the Executive Director of the Centre for Accountability and Rule of Law, a leading human rights organisation in Sierra Leone,⁸ noted that while it would be fair to say that at least 'some 60% of civil society organisations, especially those that focus on human rights and rule of law issues, are aware of the African Charter and the Women's Protocols, he expressed doubt as to whether they understand or appreciate the contents of these treaties. He further noted that there has been an infrequent usage of these instruments by NGOs in terms of advocacy, policy reviews or litigation purposes as even the few NGOs with observer status with the African Commission 'do not develop policy papers or advocacy plans around such concluding observations'. He added that 'part of the reason is that there are several other international and national instruments such as ICCPR,

⁷ An NGO engaged in the fight for the passage of the Freedom of Information law.

⁸ Interview.

CEDAW, the national Constitution, and the three Gender Acts, that CSOs easily refer to for programming purposes'. Mr Tommy blamed the non-domestication of the African Charter in Sierra Leone as being responsible for the low publicity of the instruments.

8 Awareness and use by practising and other lawyers

The researcher was not able to obtain any relevant information on this issue.

9 Incorporation in law school education

'Very few lawyers know about the existence of the African human rights instruments', the President of the Sierra Leone Bar Association, Reginald Fynn, blatantly remarked.⁹ The President of the Bar further maintained that regional and sub-regional instruments do not form part of the very few human rights instruments employed by practitioners both in the court room and outside. He attributed the modicum of knowledge on the African human rights system by legal practitioners to the conservative nature of the Sierra Leone legal system which is largely unaccommodating to the modern discourse of human rights. Mr Fynn also pointed out that because of the relatively welcoming human rights tolerance in the country, 'lawyers do not bother themselves with human rights issues which to them are not under threat'. According to him, the passage of the gender laws in 2007 was in response to the historic inequalities between men and women in Sierra Leone and noted that lawyers played laudatory roles in making that happen. And this, according to him, is the conse-

quence of the surge of the human rights discourse amongst lawyers, albeit, fledgling.

Currently, there is no human rights module either at the Department of Law at Fourah Bay College, University of Sierra Leone or at the Sierra Leone Law School. Consequently, lawyers and law students alike are not acquainted with human rights instruments including the African Charter and the Women's Protocol. However, the President disclosed that plans are afoot to commence human rights modules both at the University and the Sierra Leone Law School as part of a partnership with the West African Bar Association (WABA).

10 National human rights institutions (NHRIs)

The SLHRC was set up in 2004 pursuant to the Paris Principles. Prior to its establishment, there was the office of the Ombudsman. However, the SLHRC is principally charged with the responsibility of promoting and protecting human right across the country. The Chairman of the Commission informed the author that his Commission mainly utilises international human rights instruments in its activities and reports and that there has been a rare employ of African human rights instruments by the SLHRC. He acknowledged, however, that the SLHRC does make references to certain provisions of the African Charter in its annual reports on the state of human rights in the country, but further stated that the SLHRC predominantly employs CEDAW instead of the Women's Protocol.

The Chairman further noted that it is indeed an unpleasant situation that the SLHRC is employing international

⁹ Interview.

human rights instruments rather than the regional ones. The Chairman informed the observed that this is mainly because of the tenuous relationship between the African Commission and the SLHRC. For instance, no Sierra Leonean has been a member of the African Commission nor has any session been held in Sierra Leone. However, he disclosed that the African Commission has begun to build its relationship with the SLHRC by a workshop conducted two years ago in a bid to train the SLHRC on how to compile a state report to be submitted to the African Commission.

11 Academic writings on the African Charter and Women's Protocol

There is a stark dearth of academic resources in Sierra Leone and this situation is no different from academic materials in relation of human rights. There is a handful of human rights activists and organisations that refer to the African Charter in their brochures, and handbooks on human rights. This is perhaps not entirely unconnected with the fact that there are no human rights modules at the University of Sierra Leone or the Sierra Leone Law School, so very few are interested in human rights as a discipline. Human rights advocates who mostly refer to the African Charter are the ones with human rights qualifications, especially the Centre for Human Rights-trained lawyers. As a result, the African Charter and the Women's Protocol are not widely referenced in the few academic materials on human rights in Sierra Leone.

Sierra Leone has a very vibrant press because of the relatively encourag-

ing media tolerance. In a post-conflict society, heavily laden with corruption and bad governance, the media plays a pivotal role in articulating the concerns of the masses. Many journalists are involved in the fight for human rights and fundamental freedoms and there is even an association, called Journalists for Human Rights. In 2009, the Sierra Leone Association of Journalists sought a Supreme Court declaration to the effect that certain provisions in the 1965 Public Order Act were in violation of the right to freedom of expression. However, Joseph Egbenda Kapuwa, a senior journalist in the state broadcasting corporation, noted that the African Charter or the Women's Protocol are not familiar tools in the hands of journalists and that the level of awareness amongst journalists in respect of these instruments is very low. While many might have heard about these instruments, Mr Kapuwa reiterated, they have not been utilising as much as the ICCPR and CEDAW in their human rights reports, advocacy and publicity.

12 State reporting

Sierra Leone is one of those nations that have never reported to the Africa Commission as part of the African Charter treaty obligation. This unwelcome situation was confirmed by both the Deputy Minister of Justice and the Chairman of the Sierra Leone Human Rights Commission (SLHRC).¹⁰ The chairman of the SLHRC, Edward Sam, further noted that in a bid to commence regular submission of state reports, the SLHRC has recently held workshops in order to train stakeholders on how to compile state reports for the African

¹⁰ Interview.

Commission.¹¹ Currently, there is a draft report which has been compiled by the SLHRC which he said would be sent to the Ministry of Justice to constitute Sierra Leone's maiden state report to the African Commission.

13 Communications involving this State

Only one communication has been submitted against Sierra Leone to the African Commission for *inter alia* contravention of the right to life.¹² However, the African Commission was only seized of the matter after Sierra Leone had executed at least twenty soldiers convicted of treason. The country retains the death penalty although a moratorium has been in place for a while now and prisoners on death row occasionally enjoy presidential clemency.

14 Special mechanisms and promotional visits by the African Commission

The African Commission has not undertaken any promotional or fact-finding mission to Sierra Leone. In 2010, the Special Rapporteur on Prison and Places of Detention in Africa was invited to a workshop in Sierra Leone.¹³ This invitation afforded the said Special Rapporteur to engage with the stakeholders in

the prison sector of Sierra Leone. The Chairperson of the SLHRC confirmed that the his Commission did not only note very seriously the recommendations of the Special Rapporteur during the needs assessment conducted during the tour of some prisons or detention centres. The SLHRC has equally incorporated the recommendations in its 2010 Human Rights Report.

Obligations on state parties also arise from concluding observations or special recommendations which are made upon consideration of state reports or communications brought against state parties to the African Commission respectively. Because Sierra Leone is yet to submit a state report, there has been no concluding observation from the African Commission. Hence no obligation has emanated from concluding observations which Sierra Leone is to respect and fulfil.

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

The African Charter and the Women's Protocol remain largely obscure human rights instruments both in terms of publicity and impact in Sierra Leone. While this is patently because the Protocol has not been ratified and the African Charter not domesticated, many other factors account for its trifling impact in a human rights tolerant society like Sierra Leone. The President of the SLBA acknowledged the general paucity of recognition of African human rights instruments not only amongst lawyers, but also within the general society. The Chairman of the SLHRC attributed the poor popularity to the fact that many

¹¹ In the case of the latter, see <http://news.sl/drwebsite/exec/view.cgi?archive=6&num=15625> (accessed 5 September 2011).

¹² See *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

¹³ The invitation was extended by the Sierra Leone Prisons Service, the African Correctional Services Association (ACSA), the Prisoners Rehabilitation and Welfare Action (PRAWA) and the African Security Sector Network (ASSN) <http://www.achpr.org/english/Commissioners%20Activity/47th%20OS/Special%20Mechanisms/prisons.pdf> (accessed 10 September 2011).

NGOs and even the SLHRC do not widely employ African human rights instruments in particular as part of their activities or events in promoting human rights in Sierra Leone.

First, the non-domestication of the African Charter by the Government of Sierra Leone has considerably forestalled the enormous impact the instruments would have had in terms of enriching the inadequate constitutional rights in Sierra Leone. Thus, domestication is overly critical to trigger a greater impact of the instruments in all spheres of the Sierra Leonean society.

Second, the SLHRC's disinclination to utilise the African Charter has further dwindled the propensity for its huge impact in Sierra Leone. A constant and popular use of the documents by the SLHRC or NGOs in general could foster recognition with the attendant multiplicity of impacts across formal and informal sectors of the country. Even in the absence of domestication, the SLHRC and civil society must endeavour to use the said instruments so as to ignite impacts especially in those areas not otherwise covered by international human rights instruments.

Third, lawyers and academics have been either too conservative or unenthusiastic to tap the rich resources of the regional human right instruments. This, therefore, has largely affected the growth and impact of the regional human rights instruments in Sierra Leone. Active litigious usage of the African Charter and the Women's Protocol could ratchet up a wider popularity and stimulate substantial support and fulfilment of human and peoples' rights instruments across the country. Also judicial activism by using the provisions of the African Charter and the Women's

Protocol could enhance a foothold impact of the instruments. In order to promote and fulfil the human rights in the country, lawyers and academics must move beyond traditional legal and academic contours by engaging the said regional instruments in lawsuits and discourse.

Additionally, the press has visibly not placed the African Charter and the Women's Protocol in the spotlight of their writings or reports. This has resulted in the unfamiliarity of these instruments hence crippling potential impacts of the same in Sierra Leone. It behoves the press therefore to play a leading role in a bid to popularise the African Charter and the Women's Protocol so as to enhance the impact of these instruments in the human right dispensation of the country.

Thirty years after adoption, the African Charter and the subsequent Women's Protocol remain strange pieces of international law in Sierra Leone even though they are of continental origin and patterned after the aggregate of African aspirations. The natural consequence has been some flimsy impact of these instruments in Sierra Leone. However, unnoticed these instruments are in Sierra Leone, the discourse continue to break traditional moulds of justice while gaining entrenchment in all spheres of the country.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN SOUTH AFRICA

*Ayalew Getachew Assefa**



1 Introduction and background

The actual impact of the African Charter and the Women's Protocol should be measured against the level of their influence on national institutions and their ability to result in practical changes in the lives of people in member states. It has been years now since South Africa acceded to the African Charter and ratified the Women's Protocol. Therefore, it is reasonable to expect a significant impact of this system both on the governmental and non-governmental organs. This report examines the extent of accuracy of this expectation. Accordingly, the report is divided into two; the first part discusses the impact of this system on all sectors in South Africa, including on the actions of government organs, civil society actors, academics, lawyers and law societies. The second part will try to briefly identify the factors which impede or enhance the impact of the African Charter and the Women's Protocol in South Africa.

2 Ratification of the African Charter and Women's Protocol

Prior to 1994, in South Africa, it was the

executive which enjoyed exclusive treaty-making power.¹ As Andre Michie states, 'the power to negotiate and conclude treaties, as well as the power to express the final consent of the state to be bound, vested in the head of state, who exercised this authority through ministers and officials'.² However, the current Constitution has made significant changes in distributing the treaty-making power between the legislature and the executive. Section 231 of the 1996 Constitution of the Republic of South Africa (the 1996 Constitution) and Chapter 5 of the Practical Guide and Procedures for the Conclusion of Agreements by the Office of the Chief State Law Advisor (Guideline for Conclusion of Agreements) discussed this issue in detail.³

The 1996 Constitution tried to distribute treaty-making-power between the executive and the legislature. Section 231 of the 1996 Constitution provides for the ratification process. From this provision, we can learn that there are basically two frameworks for

¹ NJ Botha & M Wiechers *South African Year book of International Law* (2005) 17.

² As above.

³ Practical guide and procedure for the binding of agreements, 2nd ed http://www.dfa.gov.za/foreign/bilateral/conclusion_agreement1014.pdf (accessed 17 August 2011).

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conclusion of agreements, namely, the framework that applies to international agreements that requires ratification or accession in order to be brought in to effect. The framework that applies to international agreements merely requires the signature of a duly authorised representative of a state party to come into effect (section 231(3)).

The Guideline for Conclusion of Agreements lists agreements which require parliamentary approval in terms of section 231(2) of the 1996 Constitution. These are: treaties that require ratification or accession (usually multilateral agreements); treaties that have financial implications that require an additional budgetary allocation from parliament; or treaties that have legislative or domestic implication (eg if they require new legislation or legislative amendment).

Both the African Charter and the Women's Protocol fall under the former group. The detail of procedures to be followed in ratifying such kinds of agreements have been provided in the Guideline for Conclusion of Agreements, which can be summarised as follows:

An opinion on the agreement's consistency with domestic law must be obtained from the Office of Chief State Law Adviser (OCSLA) in the Department of Justice and Constitutional Development (DOJ); an opinion on the agreement's consistency with international law and South Africa's international obligations must be obtained from the State Law Advisers referred to as OCSLA (IL)), in the Department of Foreign Affairs; the responsible government department must prepare a President's Minute for signature by both the responsible line function Cabinet Minis-

ter and the President; and the President's Minute, and a short Explanatory Memorandum together with two copies of the agreement must be forwarded to the OCSLA for certification⁴ in accordance with the prescribed procedures, before the line function department can present it to the Presidency for approval.

Section 231 of the Constitution and the Guideline for Conclusion of Agreements entail that treaty-making power in South Africa is shared between the executive and the legislature. The executive plays the initial role by negotiating and signing international treaties. As signature of a treaty does not by itself establish South Africa's consent to be bound by the treaty,⁵ a resolution of ratification must be passed by the National Assembly and the National Council of Provinces.

The Women's Protocol was negotiated during a Ministerial Meeting in Addis Ababa on 27 and 28 March 2003. The South African delegation, led by the Deputy Minister for Justice and Constitutional Development, Cheryl Gillwald, composed of officials from the Office on the Status of Women, the Commission on Gender Equality, the Departments of Foreign Affairs and Justice, as well as academics and members of civil society, attended the meeting.⁶

⁴ The instrument is considered to be certified when the OCSLA affix the official stamp on the final text indicating that the agreement is acceptable to be submitted for the President's approval http://www.dfa.gov.za/foreign/bilateral/conclusion_agreement1014.pdf (accessed 17 August 2011).

⁵ Except in cases provided in sec 231(3), for instance where the treaty states that it is intended to be binding upon signature.

⁶ Briefing to the Parliamentary portfolio committee on Justice and Constitutional Development <http://www.pmg.org.za/docs/2004/appendices/040805briefing.htm> (accessed 10 August 2011).

The reasons for ratification of the Women's Protocol can be inferred from the briefing made by Ambassador Mamabolo, Deputy Director General, about the negotiation of the Women's Protocol.⁷ Ambassador Mamabolo, in his speech, addressed some important points which could be major reasons for ratification of the Women's Protocol by South Africa. He explained the value of the then draft Protocol as part of the current political and democratic change which requires changes in many areas. The Women's Protocol brings a challenge to the traditional mentality of considering women as 'subservient creatures created from the rib of man to serve man and promotes their human rights as equal and integral partners of man with equal role in the family and in the community.' Through ratification of this document, South Africa therefore expressed solidarity with the terms and spirit of the Protocol.

3 Domestication or incorporation of the African Charter and Women's Protocol

In South Africa, sections 231, 232 and 233 of the 1996 Constitution explain the place of international law in the South African legal order.⁸ Particularly, section 231(4) states that self-executing treaty provisions become part of national law once the Parliament has agreed to the executive's decision to ratify the treaty and if the treaty is in line with the Constitution and any other Act of parliament. At face value, the South African Constitution 'presents an example of a system where domestic law is superior in status to international law',

but this position is tempered by the principle of constitutional supremacy.⁹

Many of the provisions of the African Charter and the Women's Protocol correspond to the provisions of the Bill of Rights included in the 1996 Constitution. The next section addresses the level of correspondence between these African instruments and the South African Bill of Rights. As we can see from the discussion below, many of the provisions of the African Charter correspond to the Bill of Rights.¹⁰

⁹ F Viljoen *International human rights law* (2007) 539.

¹⁰ Arts 2 and 3 of the African Charter provide the principle of equality and non-discrimination, which correspond to secs 7 and 9 of the 1996 Constitution; Art 4 of the African Charter sets, among other rights, the right to life, which clearly is in agreement with sec 11 of the 1996 Constitution; Art 5 of the African Charter guarantees individuals rights to dignity including the right to be free from all forms of exploitation and degrading treatment, which is also similarly protected in secs 10, 12, 13 and 28 of South African Bill of rights; Art 6 of the African Charter guarantees the right to liberty and security of person, which corresponds to the rights guaranteed in sec 12 of South African Bill of Rights; Art 7 of the African Charter provides the right to fair trial, which is also protected in sec 35 of the 1996 Constitution; Art 8 of the African Charter provides freedom of conscience, the profession and free practice of religion shall be guaranteed, similarly sec 15 of the Bill of rights guarantees this right; Art 9 of the African Charter ensures freedom of expression which is also enshrined under secs 16 and 32 of the 1996 Constitution; Arts 10 and 11 of the African Charter guarantee the right to freedom of association and assembly, which correspond to the rights protected under secs 17, 18 and 23 of the Bill of right; Art 12 of the African Charter among other rights guarantees the right to movement, which is also the case in 21 of the Bill of rights; Art 13 of the African Charter guarantees citizen's right to participate freely in the government of his/her country; it goes similarly in secs 19 of the 1996 Constitution; Art 14 of the African Charter talks about the right to property, which is also reflected in sec 25 of the Bill of rights; Art 16 of the African Charter corresponds to sec 27 of the Bill of rights in ensuring individual's rights to physical and mental health; Right to education has also been protected under Art 17 of the African Charter and sec 29 of the Bill of rights; As one of its peculiarities, the African Charter in art 19 ensures the right to equality of peoples, in agreement with this. Secs 181(1)(c) and 185 of the 1996 Constitution have also provided for

⁷ As above.

⁸ J Dugard *International law: A South African perspective* (2007) 24.

Although we may not get specific similarities on article basis between the Women's Protocol and the Bill of Rights, the general principles motivates the provisions in both instruments indeed correspond. The Women's Protocol imposes obligations on the ratifying states 'to ensure maximum protection of women's rights, prevent discrimination and undertake measures to ensure women are given appropriate space for development, equal opportunities and full protection of social, economic and civil rights'.¹¹ The 1996 Constitution, in addition to the full range of rights protected under the Bill of rights, includes sections that are designed specifically to protect the rights of women. In fact, it is agreed that it is through the introduction of the Bill of Rights that all women in this country received formal recognition as equal citizens.¹²

Although both the African Charter and the Women's Protocol have been ratified by Parliament, according to section 231(4) of the 1996 Constitution, an Act of Parliament or other form of national legislation¹³ must be adopted for the incorporation of such instru-

the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities which promote; the same analogy works between art 20 of the African Charter. Sec 235 of the 1996 Constitution on the rights of self-determination; and Art 24 of the African Charter on environmental rights clearly corresponds to sec 24 of the 1996 Constitution.

¹¹ R Manjoo 'The recognition of muslim personal laws in South Africa: Implications for Women's Rights' Human rights program at Harvard Law School working paper (2007) 13.

¹² <http://www.constitutionalcourt.org.za/text/rights/know/women.html> (accessed 20 August 2011).

¹³ An Act of Parliament is national legislation which includes, as of sec 239 of the 1996 Constitution: Subordinate legislation made in terms of an Act of parliament and legislation that was in force when the Constitution took effect and that is administered by the national government.

ments into municipal law. Currently, both African Charter and the Women's Protocol are not formally domesticated into the South African law. On this note, Okafor in 2007 stated that 'the DOJCD has begun the process of introducing a Bill into South African parliament that would domesticate the African Charter and make it a formal part of the corpus of South African Laws. The Bill has been prepared and is currently in the consultation phase'.¹⁴ However, to the researcher's knowledge, there is no Bill enacted for such purpose.

However, this should not lead us to the conclusion that these instruments are not reflected in the domestic legislation in any way. The domestic legislations enacted after the ratifications of these instruments clearly entail that South Africa has partly incorporated the African Charter and the Women's Protocol into its formal laws. In submitting the periodic report to the African Commission, the Department of Justice and Constitutional Development states that 'South Africa has also adopted numerous laws, case law and other measures to give effect to the provisions of the African Charter. Thus, the South African legal system is beginning to mirror the protection of rights as provided for in the African Charter, thereby ensuring the protection of human rights through incorporation of African Charter norms into the South African legal system'.¹⁵ Moreover, according to Professor Julia Sloth-Nielsen,¹⁶ the provisions of the Women's Protocol

¹⁴ OC Okafor *The African human rights system, activist forces and international institutions* (2007) 180.

¹⁵ <http://www.justice.gov.za/policy/african%20charter/africancharter.htm> (accessed 15 August 2011).

¹⁶ Interview with Julia Sloth-Nielsen, 25 August 2011, Western Cape.

have also been partly incorporated in the various laws on women's rights that South Africa has adopted after ratification of this instrument.

4 Legislative reform or adoption

As it can be inferred from the deliberations of the Parliamentary portfolio committee, a compatibility study has been done before ratification of the Women's Protocol. On this point Ambassador Mamabolo stated that:

The Department of Foreign Affairs sought the legal opinions of the Legal Advisers of the Departments of Foreign whether the provisions which were contained in the Protocol, such as the imposition of the death penalty, marriage, etc. clashed with certain provisions of our domestic law and public international law. We also queried the validity of the reservations lodged by South Africa during the Ministerial Meeting in Addis Ababa.¹⁷

South Africa has adopted and amended various legislation after ratification of the African Charter and the Women's Protocol. Some of these enactments and changes have been inspired (in most cases implicitly) by these instruments, particularly the African Charter. Generally, after 1994, a considerable number of statutes has been enacted and significant numbers of laws have been amended. These changes have resulted mainly from the South Africa's obligation under international and regional instru-

ments (including the African Charter and the Women's Protocol), which require the government to review its legislations in order to ensure that they are in line with the norms reflected in these instruments. The African Charter and the Women's Protocol influenced the adoption and amendments of legislations in South Africa in three different ways.

First, some of the legislative changes were inspired by court decisions in which the African Charter has been referred to. For instance, the Abolition of Corporal Punishment Act, 1997, (Act 33 of 1997), which partly, is influenced by the decision of the court in *S v Williams and others*, where the Constitutional Court challenged the constitutionality of section 294 of the Criminal Procedure Act, 1977. In invalidating this provision, the court has relied on numbers of international instruments including article 5 of the African Charter;¹⁸ the repeal of the Black Administration Act of 1927 and Amendment of Customary Law of Succession Bill.

Section 25(9)(b) of the Aliens Control Act of 1991 was invalidated, which eventually resulted in the adoption of the new Immigration Act 2002,¹⁹ has also been inspired by the decision of the court in *Dawood* case, where O'Regan J uses article 18 of the African Charter.²⁰ Second, according to DOJCD, the following legislative initiatives have also been taken by departments with a view to enhancing the application of the African Charter

¹⁷ South Africa has made two verbal reservations, relating to the provision in art 4(2)(j) (The Right to Life, Integrity and Security of the Person) dealing with death sentences with regard to pregnant or nursing women, art 6(d) (requirement that every marriage be recorded in writing) and 6(h) (the conditions that equal rights to women and men with respect to the nationality of their children be made subject to national legislation or national security interests) <http://www.pmg.org.za/docs/2004/appendices/040805notes.htm> (accessed 17 August 2011).

¹⁸ *S v Williams* 1995 3 SA 632 (CC) para 21. See further <http://www.justice.gov.za/policy/african%20charter/afr-charter03.html> (accessed 15 August 2011).

¹⁹ Okafor (n 13 above) 181.

²⁰ *Dawood and another v Minister of Home Affairs and others* 2000 SA 35/99 (Cc) para 29.

through removing discriminatory provisions and actively promoting equality.²¹

Third, a number of laws on gender equality have been enacted and amendments have been made to give effect to the international and regional instruments to which South Africa is a party (which includes the African Charter and in some cases the Women's Protocol).²²

5 Policy reform or formulation

The South African executive organ at different levels has used, though implicitly and subtly, the African Charter and the Women's Protocol in formulating its policies. The 2008-2013 Strategic Plan on gender equality puts adoption of international and regional instruments as one of the key methods tied to the activities of the government. Specifically, the document established a system to

ensure that all legislations passing through the Parliament and provincial legislatures are scrutinised from a gender equality perspective as it is guaranteed under international and regional laws to which South Africa is a party.²³ Moreover, the National Policy Framework for Gender Equality, without making clear reference to either the African Charter or the Women's Protocol, has put international, regional and sub-regional laws as justifications for its formulation.²⁴

6 Court judgments

In South Africa, the impact of the African human rights system, mainly through the African Charter, is more visible in the actions of the judicial organ than the other organs of state. This is attributed mainly to the 1996 Constitution as it requires courts, when interpreting the Constitution and any other legislation, to consider international law (sections 39(1) and 233 of the 1996 Constitution).²⁵ Moreover, South African courts enjoy the power of judicial review of legislation.²⁶ Therefore, in addition to using international laws as a guide to statutory interpretation, they can also invoke them to challenge the validity of legislation.²⁷

²¹ See the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. This legislation is enacted as the result of the Equality Legislation Drafting Project which is a joint project of the Ministry of Justice and the South African Human Rights Commission. This legislation, according to the Department of Justice and Constitutional Development (DOJCD), takes into account the provisions of international instruments ratified by South Africa including, the African Charter, the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); Recognition of Customary Marriages Bill, among other things, guarantees the full recognition to customary marriages and repeals relevant provisions in the Black Administration Act; Natural Fathers of Children Born out of Wedlock Act, 1997 which also enhances the application of the Charter by providing adequate protection for children born out of wedlock.

²² Choice on Termination of Pregnancy Amendment Act (No 8 of 2004); Sexual Offences and Related Matters Amendment Act (No 32 of 2007); Civil Union Act (No 17 of 2006); Reform of Customary Law of Succession and Regulation of Related Matters Bill (B10-2008); The Domestic Violence Act of 1998. Parliament of the Republic of South Africa gender and women's issues (2004-2009) www.pmg.org.za/files/docs/090812gender.doc (accessed 18 August 2011).

²³ Commission for Gender equality, Strategic plan 2008-2013 <http://www.info.gov.za/view/DownloadFileAction?id=88576> (accessed 15 August 2011).

²⁴ South Africa's national Policy Framework for Women's Empowerment and Gender Equality <http://www.doh.gov.za/docs/policy/2008/gender.pdf> (accessed 15 August 2011).

²⁵ According to art 2 of the Vienna Convention on the Law of Treaties of 1969, international law refers to an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

²⁶ The Constitution of the Republic of South Africa Act 108 of 1996 Sec 172.

²⁷ Dugard (n 8 above) 67.

Using this opportunity, South African courts comprehensively invoke the norms of the UN treaties, as well as judgments of the European Commission and European Court of Human Rights.²⁸ However, in most of the cases, they fail to give due consideration to the African system in general and the African Charter and its Protocols. There is only a limited number of court judgments, most of them Constitutional Court decisions, where the African Charter and the Women Protocol have been referred to.²⁹ The following section will discuss the extent to which the African Charter and its Protocol on the Rights of Women have been referred to. The next section will try to address the effect of these references on the judgments.

In *S v Williams*,³⁰ and on referral from the Cape of Good Hope Provincial Division under the interim Constitution, the Constitutional Court found that corporal punishment is inconsistent with section 11(2) of the interim Constitution, which prohibited cruel, inhuman or degrading treatment or punishment.³¹ The Constitutional Court, among other international laws, cited article 5 of the African Charter to justify its interpretation of the provision of section 11(2) of the Interim Constitution that prohibited torture, inhuman

and degrading treatment or punishment.³²

In a limited number of cases, courts other than the Constitutional Court have also made references to the African Charter. For instance in *State v Viljoen* the High Court of Transvaal in South Africa, has relied in article 7 of the African Charter to rule upon the case of the accused constitutional rights to have counsel during the investigation of the crime as well as to keep silent at the plea proceedings.³³

Even in those decisions where the African Charter and the Women's Protocol have been referred to, it has been done in a very subtle manner. In most of the cases, these instruments did not influence the decisions of the courts. For instance, in *S v Williams*, the Court has made reference to article 5 of the African Charter. However, the impact of such reference to the African Charter does not make any significant contribution to the outcome. Judges failed to make use of the provision of the African Charter extensively. Rather, judges chose to rely mainly on the jurisprudence of the European court decisions in US and Canada. Similarly, though the judges in the *Bhe* case played a considerable role in integrating the norms of the African Charter into the legal reasoning of South African judiciary, its significance to the outcome was not visible. Moreover, in the *Prince* case the Cape High Court used article 8 of the African Charter, though it left it unclear as to the exact impact of the Charter.³⁴ Generally, we can say that had it not been the contribution of the activist

²⁸ As above 66.

²⁹ *Ferreira v Levin* NO 1996 1 SA 984 (CC); *Samuel Kaunda and others v President of the Republic of South Africa and others* 2005 4 SA 235 (CC); *Bhe v Magistrate Khayelitsha* 2005 49/03 (CC); *Richard Gordon Volks No v Ethel Robinson and others* (2005) (CC); *Dawood and another v Minister of Home Affairs and others* (CCT35/99) [2000]; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 SA 4 294 and *Hoffman v South African Airway* CC para 51.

³⁰ See *S v Williams* 1995 3 SA 632 CC.

³¹ Overview of the judgments of the Constitutional Courts of South Africa from 1994-2005 <http://41.208.61.234/uhtbin/cgiirsi/20090811063354/SIRSI/0/520/caselistC> (accessed 18 August 2011).

³² See *S v Williams* 1995 3 SA 632 (CC) para 21.

See further Okafor (n 13 above) 169.

³³ Okafor (n 13 above) 169.

³⁴ Okafor (n 13 above) 176.

judges, like Ngcobo J, even this limited application of the African Charter would not have happened in South African courts.

7 Awareness and use by civil society

Civil society organisations (CSOs) in South Africa have been playing a significant role in the protection and promotion of human rights in the country. However, the awareness and application of the African system in general and the African Charter and the Women's Protocol in particular does not seem satisfactory among CSOs in South Africa. Currently, there are numbers of CSOs in South Africa which have observer status before the African Commission. Based on current data, there are 418 CSOs with this observer status with the African Commission (updated on May 2011).³⁵

Obviously, these organisations have awareness of the African Charter and the Women's Protocol. However, even if they are aware of the instruments, most of them do not have any specific focus both on the African Charter and the Women's Protocol. Stating this fact, Professor Viljoen stated that, 'it is only recently, with in the past three years, that some Non-Governmental Organisations (NGOs) started working on the Charter. Even those with observer status usually do not have a specific focus on the Charter at the grassroots level'.³⁶

Jacob van Garderen from Lawyers for Human Rights also shares this opinion. He said: 'I doubt that South African civil society organisations are well

informed about the various African human rights instruments, in particular the Women's Protocol'.³⁷ Lukas Muntingh, CSPRI coordinator at the Community Law Centre, also shares this opinion. He stated that South African NGOs lacks awareness not only on the African Charter and the Women's Protocol, but also generally on the African human rights system and on the activities of the African Commission.³⁸

Agreeing with the above assessment, Dr Magnus Killander also stated that the African system is not really known among the broader NGOs. He added: 'My impression is that it is relatively good among some human rights NGOs, but virtually non-existent among broader civil society'.³⁹ Acknowledging the recent improvement as to the awareness of these African instruments among South African NGOs, Roshan Dadoo, regional advocacy officer at Consortium for Refugees and Migrants in South Africa (CoRMSA), also stated that.⁴⁰

I don't think there is great awareness amongst civil society of the Charter or the Protocol or in general of regional mechanisms. However, there have more recently been a number of projects to hold training sessions and workshops on the Charter so maybe that will start to change, particularly amongst larger, active, urban NGOs.

Similarly, Professor Hansungule from the Centre for Human Rights, also asserted the fact that most South African CSOs are generally unaware of the African Charter and the Women's Protocol. He said: 'They, rather, are concerned mostly with South African

³⁵ Document available with the researcher.

³⁶ Telephone communication with Prof Frans Viljoen, 19 August 2011.

³⁷ Email from Jacob van Garderen, 29 August 2011.

³⁸ Interview with Lukas Muntingh, 18 August 2011.

³⁹ Email from Dr Magnus Killander, 16 August 2011.

⁴⁰ Email from Roshan Dadoo, 19 August 2011.

Constitutional Court, South African Human Rights Commission and the Office of the Public Protector'.⁴¹

Though many of the NGOs in South Africa are not aware of the African Charter and the Women's Protocol and they do not use them in their activities, there are limited numbers of CSOs which utilise these instruments in their works. As it has been discussed above in section 5.2, some South African CSOs have been granted observer status before the African Commission. The fact that they have chosen to apply for observer status, which, among other things, requires them to devote their material and human resource to attending the bi-annual ordinary sessions of the African Commission,⁴² implies a certain degree of readiness to commit themselves to the African system. Some of the NGOs got observer status even before South Africa acceded to the African Charter in 1995.⁴³ This clearly shows the greater impact of the African Charter in the activities of these NGOs.

Though nothing much has been done to influence decisions of South African Government using the African system, we may refer to the contribution made by HURISA, Centre for Human Rights, Community Law Centre and Lawyers for Human Rights, during the 38th Ordinary Session. These groups of CSOs have tried to argue that the African Commission, in its decision in the *Ogoni* case, read the right to housing into the African Charter in order to pressure the South African Government to include in that report a discussion of 'the extent to which the right of access

to adequate housing has been utilised' within South Africa.⁴⁴

8 Awareness and use by practising and other lawyers

As many agree and inferred from lawyers' briefs, lawyers in South Africa do not seem to be well aware of the African system in general and the African Charter and the Women's Protocol in particular. Susannah Cowen, a South African lawyer, is of the view that lawyers in South Africa are not well aware of this system. She stated:⁴⁵

In general terms I don't think that lawyers generally are familiar with the African Charter or the Women's Protocol. It is the NGOs and public interest law centre that are familiar with its contents and who, often through amicus interventions, bring it to the court's attention. Obviously there are some lawyers who are more familiar with them than others. But on the whole I would say lawyers don't generally know them or use them and where they do it is often in circumstances where public interest law centres are clients or attorneys.

Endorsing Cohen's comments, Wilmien Wicomb stated that lawyers in South Africa usually do not refer to either the African Charter or the Women's Protocol in their briefs, which clearly show the low level of their awareness of these instruments.⁴⁶

Though there were ample opportunities for the lawyers and law societies to refer to the African Charter and the Women's Protocol, it has never happened almost in all the cases. It is the court, through the judgments, that usually makes references to these

⁴¹ Email from Prof Michelo Hansungule, 21 August 2011.

⁴² Okafor (n 13 above) 192.

⁴³ Okafor (n 13 above) 192.

⁴⁴ Okafor (n 13 above) 195.

⁴⁵ Email from Susannah Owen, 22 August 2011.

⁴⁶ As above, 140.

regional instruments. For instance in the *Dawood* case, none of the briefs filed referred to the African Charter or the Women's Protocol, while there was an ample opportunity for counsels to make use of these instruments.⁴⁷ Similarly in the *Volks* case, none of the parties made reference to the provisions of the African Charter. Rather, as it is stated above, it was the Constitutional Court, particularly, Ngcobo J, who 'deserves most of the credit for the creative invocation of the African Charter in this case.'⁴⁸ The same is true in the *Bhe* case, where none of the briefs filed in this case utilised either the African Charter or the Women's Protocol.⁴⁹

9 Incorporation in law school education

The researcher was not able to obtain any relevant information on this issue.

10 National human rights institutions (NHRIs)

The South African Human Rights Commission (SAHRC) uses the African Charter and the Women's Protocol in various respects. Particularly, it uses these instruments in its operational programmes: research, documentation, education, training, parliamentary and international programmes. The following cases can be some examples to what extent the SHRC is using the African system.

In seeking an order to invalidate some provisions of the Black Administration Act 38 of 1927, which promote the institution of male primogeniture under South Africa's inheritance laws,

⁴⁷ Okafor (n 13 above) 167.

⁴⁸ Okafor (n 13 above) 166.

⁴⁹ Okafor (n 13 above) 165.

the SAHRC has invoked the African Charter to articulate and support its reasons.⁵⁰ It has also invoked the African Charter as interpretative tool in applying the Kampala Declaration and Programme of Action.⁵¹

Judith Cohen's, Head of Program: Parliamentary and International Affairs, presentation to Portfolio Committee on Women, Youth, Children and People with Disabilities, 12 August 2009, has made a clear reference to the African Charter and the Women's Protocol. The South African Human Rights Commission made the Committee aware of a number of international and regional covenants that South Africa is a party.⁵²

The SAHRC's participation in the African Commission is also another area where it uses the African Charter and the Women's Protocol. For instance, on the 43rd Ordinary Session of the African Commission, SAHRC was the only national human rights institution that has made a statement, through which it discussed the human rights situation in South Africa and across the continent.⁵³

11 Academic writing on the African Charter and Women's Protocol

Going through the various academic legal writings in South Africa, one can easily observe that there are a number

⁵⁰ Okafor (n 13 above) 162.

⁵¹ See the SAHRC Report of the national prison project 1998 <http://www.sahrc.org.za/home/21/files/Reports/National%20prison%20project.pdf> (accessed 25 August 2011)

⁵² <http://www.pmg.org.za/report/20010627-national-policy-framework-women%E2%80%99s-empowerment-and-gender-equality-par> (accessed 25 August 2011).

⁵³ 43rd Ordinary Session Report <http://www.communitylawcentre.org.za/achpr/reportReport%2043rdSess%20ACHPR%2010Jul08.pdf> (accessed 23 August 2011).

of publications (books, journals and reports), which make direct reference to the African system in general and the African Charter and the Women's Protocol in particular. Numbers of authors have contributed significantly towards the growing number of publications in this regard. One can refer to the contributions made by John Dugard,⁵⁴ Christof Heyns,⁵⁵ Frans Viljoen,⁵⁶ Magnus Killander,⁵⁷ and others.⁵⁸

In addition, the African Charter and the Women's Protocol have also been

reflected in the journal publications in the country. The *African Human Rights Law Journal* published by the Centre for Human Rights of the University of Pretoria is the main contributor in this regard. Starting from 2001, the Centre has been publishing various articles with extensive discussions on the African Charter and the Women's Protocol. Some of the volumes are actually dedicated to the African system and hence consist of articles only on the African Charter and other African system instruments. For instance, one can refer to volume 2001(2), volume 2003(1), volume 2004(2) and volume 2006(1). There are also some volumes, such as volume 06 no 1 2006, which are dedicated mainly to the African system. Moreover, the African Charter and the Women's Protocol have been reflected throughout all the volumes.

These and other academic publications in the country clearly show that the African Charter and the Women's Protocol have impacted the academic circles meaningfully. Most of the key academics in the country also share this

⁵⁴ J Dugard 'The influence of international human rights law on the South African Constitution' (1996) *Current Legal Problems* 305, J Dugard 'International Law and the South African Constitution' (1997) *EJIL* 77, J Dugard 'The role of human rights standards in domestic law: The Southern African experience' in P Alston and L Crawford (eds) *The Future of UN human rights treaty monitoring* (2000) 269 and J Dugard *International law: A South African perspective* (2005).

⁵⁵ CH Heyns *Human rights law in Africa* (1999), CH Heyns *Human rights law in Africa* (2000), CH Heyns *Human rights law in Africa* (2001) and CH Heyns *Human rights law in Africa* (2002).

⁵⁶ F Viljoen *International human rights law in Africa* (2007), F Viljoen 'An introduction to the Protocol of African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) *WASH. & LEE J. C.R. & SOC. JUS* 11, F Viljoen 'Recent developments in the African regional human rights system' (2004) *African Journal of Human Rights* 344, F Viljoen 'Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 5 *African Journal of Human Rights* 237-448, and F Viljoen 'The African Charter on Human and Peoples' Rights: The Travaux préparatoires in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 313-326.

⁵⁷ M Killander & CH Heyns 'The African regional human rights system' (2006) in C Heyns & K Steffiszyn (eds) *Human rights, peace and justice in Africa: A reader* 195, M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010), M Killander & J Biegon 'Human rights developments in the African Union during 2009' (2010) 10 *African Human Rights Law Journal* 212-232, M Killander & J Biegon 'Human rights developments in the African Union during 2008' (2009) 9 *AHRLJ* 295-311, Communications before the African Commission on Human and Peoples' Rights 1988-2002 (2006) 10(1) *Law, Democracy and Development* 101-117.

⁵⁸ N Botha 'Riding the tide: South Africa's 'regular' courts and the application of international law' (1996) 21 *SAYIL* 174; E de Wet *The place of public international law in the new South African constitutional order: With special reference to international human rights and humanitarian law* (1998); RC Blake 'The world's law in one country: The South African Constitutional Court's use of public International Law' (1998) 115 *SALJ* 668; M Olivier 'South Africa and International Human Rights Agreements: Procedure, Policy and Practice' (2003) *TSAR* 293; J Ford 'International and Comparative influence on the Rights Jurisprudence of South Africa's Constitutional Court' in M du Plessis & S Pete (eds) *Constitutional Democracy in South Africa 1994-2004* (2004) 33; H Strydom *South Africa and international law from confrontation to cooperation* (2004) 33; N Botha & M Olivier 'Ten years on international law in South African Courts: Reviewing the past and assessing the future' (2004) 29 *SAYIL* 42.

opinion.⁵⁹ Endorsing this opinion, Professor Steytler from the Community Law Centre states that 'these enormous writings clearly show the African human rights jurisprudence in fact has influenced the academics'.⁶⁰ However, some questions this conclusion. As Magnus Killander said: 'Only those interested in the system makes cursory reference to the Charter and the Women's Protocol'.⁶¹

12 State reporting

In South Africa, the responsible organ for state reporting under the African Charter and the Women's Protocol is the Department of Justice and Constitutional Development. South Africa's initial report was due in October 1998 and was submitted on time. In preparing the report, it has been stated that all sectors and departments of the Government have participated and hence the report is largely based on information provided by national departments.⁶² With regard to participation of CSOs, it was also stated that the information was sourced from both from government departments and NGOs.⁶³

The second, third and fourth reports were due in October 2000, October 2002 and October 2004, respectively. These were submitted late as a consolidated report in May 2005. One shadow report was also submitted.⁶⁴ The participation of CSOs in this report was not meaningful. The South African Government did not make known that it was in the process of preparing and submitting a report to the African Commission. Civil society was not involved in the process of drafting the report, and civil society organisations have not been given an opportunity to comment on the draft.

The African Commission voiced concerns with the late submission of the report and other concerns, such as:⁶⁵ the provision of general description of the provisions of the African Charter and the legislation or policies in place, without indicating how they have contributed in enhancing rights; the lack of details on the measures taken by the State Party to eradicate the phenomenon of xenophobia directed towards African migrants in particular; and the high incidence of sexual violence against women and children.

⁵⁹ Email from Professor Michelo Hansungule, 21 August 2011; email from Professor Christof Heyns, 20 August 2011; telephone communication with Professor Frans Viljoen, 19 August 2011; interview with Nico Styeler, 18 August 2011 and interview with Professor Julia Sloth-Nielsen, 25 August 2011.

⁶⁰ Interview with Professor Nico Steytler, 18 August 2011.

⁶¹ Email from Dr Magnus Killander, 16 August 2011.

⁶² Republic of South Africa: First Periodic Report on the African Charter on Human and Peoples' Rights (2001).

⁶³ The research paper by the community law centre presented at the seminar on promoting constitutional rights through international human rights law <http://www.communitylawcentre.org.za/clc-projects/childrens-rights/researchreports/Research%20paper%20on%20the%20state%20of%20South%20Africa%20state%20reporting%20under%20IHL%2023%2009%202010.PDF> (accessed 1 September 2011).

⁶⁴ The shadow report was prepared by the Centre for Human Rights, University of Pretoria; Socio-economic rights project, Community Law Centre, University of the Western Cape; the Human Rights Institute of South Africa; Lawyers for Human Rights; Central and Gauteng Mental Health Society; Gauteng Children's Rights Committee and the Community Law and Rural Development Centre http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica_ng_o_shadow_report_2005.pdf (accessed 1 September 2011).

⁶⁵ Concluding observations and recommendations on the first periodic report of the Republic of South Africa http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica_concluding_observations_periodic_report_2005.pdf (accessed 1 August 2011).

13 Communications involving this State

The researcher was not able to obtain any relevant information on this issue.

14 Special mechanisms and promotional visits by the African Commission

The African Commission has two important mandates: a protective and promotional mandate. Under its promotional mandate, there was a visit undertaken from 25 to 29 September 2001 by Commissioner Chigovera. The visit report was adopted by the 33rd Ordinary Session of the African Commission.⁶⁶ With regard to special mechanism, the Special Rapporteur on Prison and Conditions of Detention, Commissioner Chirwa, accompanied by Mr Robert Eno, visited South Africa from 14 to 30 June 2004.⁶⁷

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

Some of the factors impeding and highlighting the impact of these instruments have been discussed earlier in this report.

⁶⁶ List of promotion, protection and special mechanism missions of the ACHPR, updated June 2011, on file with the researcher.

⁶⁷ List of promotion, protection and special mechanism missions of the ACHPR, updated June 2011, on file with the researcher.

THE IMPACT OF THE AFRICAN CHARTER AND WOMEN'S PROTOCOL IN ZIMBABWE

*Tarisai Mutangi**
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1 Introduction and background

Zimbabwe became a state party to the African Charter on Human and Peoples' Rights (African Charter) in 1986. Communication with the African Commission is done through the Ministry of Justice and Legal Affairs and more specifically the office of the Permanent Secretary.¹ It was not until 2000 that Zimbabwe came into the lime light of African Commission processes because of the increasing cases of human rights abuses and violation of several of its obligations under the African Charter. Because of the high number of cases files against Zimbabwe and the increased resolutions and statements by the African Commission on Zimbabwe, the last ten years saw increased communication between the African Commission and the government of Zimbabwe.

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** LLM HRDA 2003, Gender and Development Consultant, South Africa.

***LLM HRDA 2006, Project Lawyer, Southern African Litigation Centre, South Africa.

¹ Interview with government official.

2 Ratification of the African Charter and Women's Protocol

The most recent regional instrument ratified by Zimbabwe is the Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol). This was ratified in 2008. Using this process as an example, the process of ratification and its justification started off with the Ministry of Gender. The responsible Minister tabled the proposal for ratification with Cabinet which approved the ratification process. The ratification was presented to Parliament which does not debate it, but simply takes note of the proposed ratification. The ratification instruments were prepared and lodged through the Ministry of Foreign Affairs.²

3 Domestication or incorporation of the African Charter and Women's Protocol

As regards the hierarchy of sources of law in Zimbabwe, the Constitution provides in section 3 that '[t]his Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to

² Interview with government official.

the extent of the inconsistency, be void'. This means that any other law, despite its nature or origin, should conform to the provisions of the Constitution. Generally, the relationship between municipal and international law is spelt out in national legislation and the debate on supremacy has been raging for centuries with no visible signs of coming to finality.

Zimbabwe is typically dualist in every sense of the word. In terms of section 111B(1)(b) of the Constitution, all international treaties, agreements and conventions ratified by Zimbabwe which binds Zimbabwe and other countries such as the African Charter and Women's Protocol, 'shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament'. This means that domestication is a pre-requisite for international instruments to be part of the domestic law.

However, section 111B of the Constitution has a history of being changed from monist to dualist, back to monist and then finally into dualist, as it stands today, by virtue of constitutional amendments. In a recent case decided by the Supreme Court of Zimbabwe sitting as a Constitutional Court in *Kachingwe and Another v Minister of Home Affairs and Others*,³ it was held that 'the Constitution of Zimbabwe Amendment (12) Act, 1993 (4 of 1993)' ... amended the then dualist section 111B ... 'so that any convention, treaty or agreement which was acceded to, concluded or executed by or under the authority of the President before 1 November 1993

and which, immediately before that date, did not require approval or ratification by Parliament, remained part of the law of Zimbabwe after the 1993 Amendment'. Zimbabwe ratified the African Charter in 1986, thus making it part of the law of Zimbabwe without need for any further legislative act. Technically, this seems to be the position in Zimbabwe. Nevertheless, the Women's Protocol, having been ratified in 2008, does not form part of domestic law until such time as it has been domesticated by virtue of a legislative act in terms of the current provisions of section 111B of the Constitution.

The Constitution of Zimbabwe provides for civil and political rights with socio-economic and cultural rights not even mentioned anywhere in the document. Women's rights are not distinctly provided for except for those generally enjoyed as part of humanity. Discrimination on the basis of sex is, however, provided for in section 23 of the Constitution, but still it is a general provision with many prohibited grounds. Women-specific rights such as those against harmful cultural practices are not specifically provided for in the Constitution. What is in fact worrying is that section 23A 'allows' discrimination when it comes to matters of personal law and the application of African customary law to Africans. This is worrying as the scope and application of African customary law has traditionally perpetuated the violation of rights of women in patriarchal societies. In that vein, the ratification of the Women's Protocol has not resulted in any legal reform to bring national law in conformity to international standards, perhaps mainly due to the fact that this Protocol needs domestication for it to be part of the law.

³ SC145/04 (18 July 2005) <http://www.chr.up.ac.za/index.php/browse-by-subject/514-zimbabwe-kachingwe-and-others-v-the-minister-of-home-affairs-and-others-2005-ahrlr-228-zwsc-2005.html>

The only noticeable changes to the Bill of Rights were by the introduction of the right to vote in section 23B in 2009. This seems to have been due to political concessions between the feuding political parties as opposed to any reaction to the ratification of the African Charter. Furthermore, it must be noted that Zimbabwe has gone through many occasions where the issue of free and fair elections has been a thorn in the flesh, even up to now. It is on this basis that the writer relates the inclusion of the right to vote to political arrangements as opposed to adoption of human rights standards.

Perhaps owing to the lack of realisation that the Charter is part of domestic law, there has not been any incorporation of the Charter or Protocol into national legislation. Other international instruments such as the Geneva Conventions have been fully domesticated by Parliament, resulting in the Geneva Conventions Act [Chapter 11:06], or the Child Abduction Act [Chapter 5:05] giving effect to some aspects of the Convention on the Civil Aspects of International Child Abduction which was signed at the Hague on 25 October 1980.

4 Legislative reform or adoption

There is no record of a compatibility study before the 1986 ratification of the African Charter by Zimbabwe. Similarly the research was unable to find evidence that a compatibility study was carried out before the ratification of the Women's Protocol in 2008. Since the ratification of the African Charter in 1986, several laws have been passed in Zimbabwe, some giving effect to the African Charter and some derogating from the rights that are provided for in the African Charter. Amendment 17 to

the Constitution, which was passed in 2005, expanded the grounds for which discrimination is prohibited to include disability, sex, gender and marital status. The same Amendment also recognised and protected women's rights to equal access to land. It also legislated for affirmative action for previously disadvantaged groups. Amendment 19 of the Constitution passed in 2008 created the Zimbabwe Human Rights Commission (ZHRC) and Zimbabwe Electoral Commission which was a progressive step by the state. Enabling legislation such as the Domestic Violence Act of 2006 was passed to further afford protection of rights of women. These and other progressive legislation do not however make explicit reference to the African Charter or Women's Protocol.

However, retrogressive legislation was passed by Zimbabwe after its accession to the African Charter leading to major human rights abuses and violations which have been the subject of litigation in national courts as well as with the African Commission. Two of these are key. These are the Public Order and Security Act of 2002 (POSA) and the Access to Information and Protection of Privacy Act of 2002 (AIPPA). POSA seriously curtailed the exercise of freedom of assembly and the African Commission, in its 2002 Fact Finding Mission Report, recommended its repeal. AIPPA, on the other hand, limited freedom of the press and freedom of expression. Again the African Commission recommended the repeal of this legislation. Since becoming party to the African Charter, Zimbabwe has therefore had a mix of progressive and retrogressive legislative reform.

5 Policy reform or formulation

The researcher was not able to obtain any relevant information on this issue.

6 Court judgments

International human rights instruments may be directly applied at the domestic level after domestication through parliamentary approval. This is provided for in section 111B (1) of the Constitution of Zimbabwe (Constitution). This has been the position since 1993 where the old section 111B was held not to have the effect of requiring approval by Parliament of any convention, treaty or agreement which was acceded to, concluded or executed by or under the authority of the President before 1 November 1993 and which immediately before that date, did not require approval or ratification by Parliament.⁴ Despite this provision the application of the African Charter by the Zimbabwe Supreme Court (ZSC) has been disappointing. This assessment covers the period 2002 to 2011 and out of the 642 surveyed cases, the ZSC made reference to the ACHPR in only two cases.

The first case in which the African Charter was referred to is *Capital Radio v Broadcasting Authority of Zimbabwe, Minister of State for Information and Publicity and the Attorney General of Zimbabwe*.⁵ In that case Capital Radio, which had been granted a license to broadcast in Zimbabwe, brought in broadcasting equipment, but the Minister of Information and Publicity sought to stop the applicant from broadcasting on grounds that this violated the Presidential Powers (Temporary Measures) Act. The Presidential Powers Act was later superseded

by the Broadcasting Act. Capital Radio's constitutional challenge was that a number of provisions of the Broadcasting Act infringe section 20(1) of the Constitution, which guarantees freedom of expression.

One of the issues that the ZSC had to grapple with was whether section 20 includes freedom of the media. The Court relied on the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (CCPR) and the African Charter. Chidyausiku CJ made reference to article 9 of the African Charter and the twin articles 19 of the UDHR and CCPR. He further quoted the African Commission's interpretation of article 9 and concluded by saying that 'Zimbabwe ... is a party to the African Charter and consequently article 9 should provide guidance in interpreting section 20 of the Constitution'. The Court then held that freedom of expression has to be interpreted to include freedom of the press and is also enjoyed by corporate persons. About six sections of the Broadcasting Act were found to fail the constitutional muster, and were accordingly struck down.

The ZSC was not so progressive in *Association of Independent Journalists and Others v Minister of Information and Publicity and Others*.⁶ In that case the applicants were challenging sections 79, 80, 83 and 85 of the Access to Information and Protection of Privacy Act. Section 79 provides for the accreditation of journalists, section 83 outlaws the practice of journalism without accreditation and section 85 provides for the development of a code of conduct by the Media and Information Commission and confers on it disciplinary powers and provides

⁴ See sec 111B of the Constitution of Zimbabwe.
⁵ SC128/02.

⁶ SC136/02.

guidelines on sanctions for misconduct. The applicants sought to have these four sections declared unconstitutional.

The Court referred to jurisprudence from the Inter-American Commission and Court on Human Rights as well as the European Court on Human Rights. There was no reference to the African Charter or the African Commission's Declaration of Principles on Freedom of Expression in Africa. Principle IX of the Declaration provides as follows:

Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts. Effective self-regulation is the best system for promoting high standards in the media.

If the ZSC had referred to and applied these progressive provisions they might have come up with a more positive decision. That Declaration is an elaboration of the African Charter guarantee of freedom of expression and it would have been appropriate for the ZSC to be guided by its principles. Instead the Court refused to apply the Advisory Opinion of the Inter-American Court⁷ on the desirability of media self-regulation as opposed to statutory control and a system of registration and compulsory accreditation of journalists that interferes with freedom of expression. The Court accordingly found sections 79, 80(1)(d) and (2), 83 and 85 to be constitutional.

In the case of *Nancy Kachingwe and another v Minister of Home Affairs and Another*,⁸ the ZSC made extensive refer-

ences to the African Charter, the ICCPR and the European Convention on Human Rights. In that case the applicants were challenging the conditions of police cells and contended that these conditions constituted inhuman and degrading treatment in contravention of section of the Constitution. The Court held:

I have no doubt, in my mind, that the holding cell that the court inspected at Highlands Police station, the same holding cell in which Kachingwe was detained overnight, does not comply with elementary norms of human decency, let alone, comply with internationally accepted minimum standards.

The Court further held that Kachingwe and Chibebe were detained in conditions that constituted inhuman and degrading treatment in violation of section 15(1) of the Constitution. The court observed that the African Charter prohibits torture, inhuman and degrading punishment in article 5 and concurred that the African Charter and the ICCPR were signed before 1993 and became part of Zimbabwe law by virtue of section 111B of the Constitution. The Court further made reference to the jurisprudence of the African Commission in which there was a finding of a violation of article 5 of the African Charter.⁹ Surprisingly the ZSC did not find a violation of section 15(1) of the Constitution in another case of inhuman and degrading treatment and punishment in prisons in the case of *Woods v Commissioner of Prisons and another*¹⁰ and there was no reference to the African Charter.

⁷ OC5/85 Series A No 5.

⁸ SC 145/04.

⁹ *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000); *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999) and *John D Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000).

¹⁰ SC 137/02.

In conclusion, it is hoped that in future the superior Courts in Zimbabwe will apply the African Charter and the Women's Protocol to protect rights more robustly and achieve justice for all. The current jurisprudence has shown glaring paucity in the application of these important regional human rights instruments.

7 Awareness and use by civil society¹¹

The African Charter and Protocol are very well known in the NGO sector especially with respect to those NGOs that have international human rights programmes. For instance, Zimbabwe Lawyers for Human Rights (ZLHR) has an international litigation project through which they engage international human rights institutions and procedures. They have observer status before the African Commission, and therefore orient some of their projects around this area.

On its part the NGO Human Rights Forum focuses on ending impunity in the context of torture. After failing to secure effective remedies at national level, the Forum has looked at regional mechanisms such as the African Commission for such relief. It has accordingly filed a number of cases before the African Commission many of which have already been decided on the merits and often against the state. This goes a long way to show that the African Charter and the Women's Protocol are right at the core of these internationally focused programmes and projects.

¹¹ Information gathered from interviews held with personnel from the NGO sector especially Zimbabwe Lawyers for Human Rights and the Zimbabwe Human Rights NGO Forum.

Both organisations have submitted shadow reports more particularly in 2006 when Zimbabwe submitted its inaugural and combined report to the African Commission. At the time of writing in 2011, the ZLHR was working tirelessly in terms of preparing a shadow report that was submitted parallel to Zimbabwe's Universal Peer Review. Although this is before a United Nations mechanism, it goes to show the extent to which some NGOs are reaching in terms of utilising regional and international standards and human rights protection mechanisms.

Other organisations such as the Zimbabwe Women Lawyers Association (ZWLA) are increasingly getting involved in utilising the African Charter and the women's Protocol in their projects and programmed. ZWLA was recently accorded observer status by the African Commission. It ought to be recalled that ZWLA focuses on women's rights in the country. Although they have been mainly engaging and utilising national mechanisms and laws, observer status is clear testimony of their growing involvement in human rights (women's rights) dialogue at international level. One has to bear in mind that the African Commission is the oversight institution monitoring the implementation of the Women's Protocol, hence such organisations are drawing near this Commission to influence its role in monitoring national implementation.

8 Awareness and use by practising and other lawyers¹²

The Law Society of Zimbabwe (LSZ), to which every practising lawyer manda-

¹² Based on information provided from the LSZ advocacy and policy department.

torily registers, oversees the legal profession in Zimbabwe especially through enforcing ethical conduct as well as negotiating for legal fees tariffs for various attendances. However, since the early 2000s with the deteriorating human rights situation and disregard of rule of law on issues such as the land reform programme, the LSZ has increasingly been involved in advocacy and litigation around these issues with an international flavour. This means that advocacy programmes initiated by the LSZ together with continuing education initiatives for LSZ members, are now being punctuated with reference to regional and international human rights instruments and institutions.

Illustratively, the LSZ now teams up with prominent NGOs in the human rights sector in providing national workshops on human rights litigation at the national level targeting upcoming lawyers to consider human rights litigation as a career. A close look at the content of these workshops has shown that there is a deliberate intention to introduce young lawyers to international human rights law, processes and procedures in a bid to draw their attention to issues of international concern. Instruments such as the Universal Declaration, the African Charter and the ICCPR are commonly cited and utilised as resource material in such workshops.

Furthermore, the LSZ Council has been increasingly involved in issues of regional concern such as the trials and tribulations through which the SADC Tribunal is going through right now. They make an effort to ensure representation of the LSZ in forums where such issues are being discussed. Although the LSZ has not yet submitted a shadow report on Zimbabwe, it is a matter of

time for that to happen provided the LSZ leadership keeps the current zeal and momentum.

As regards reliance by lawyers on the African Charter and Women's Protocol in litigation (briefs) it has come up very clearly that only a few lawyers are in fact aware of the existence of the African human rights system or any other human rights system in the world. The root of this problem goes back to the fact that human rights as a module has only been recently introduced in local universities' curricula. Even so, the module remains elective hence tends to slip through fingers of many lawyers. This research revealed that many lawyers do not take human rights as a career possibility on its own hence they leave it to human rights NGOs.

As a result of the above observation, one would note that most of the lawyers who in fact directly rely on human rights instruments are those from human rights NGOs undertaking public interest litigation. Where advocates are involved, one usually discovers that the heads of argument would have been prepared by human rights attorneys. Advocates therefore argue cases without intimate knowledge of the dynamics of international human rights instruments. Many cases in which the instruments have been cited are usually those initiated by human rights NGOs whose objective, among others, is to argue international law in domestic courts so as to familiarise the courts with the development of international law and practice in this sector.

9 Incorporation in law school education

There are only two law schools in Zimbabwe. The most established one is

at the Faculty of Law, University of Zimbabwe. The other one, and relatively new, Midlands State University, Gweru, Zimbabwe. The writer has learnt that both law schools offer a module in Human Rights – as an elective at the University of Zimbabwe, and as a compulsory course at Midlands State University. The content of the module includes the national bill of rights, the African human rights system as well as the United Nations system for the promotion and protection of human rights. As a result, there is a deliberate inclusion of the African Charter and the Women’s Protocol as part of the sources of the catalogue of rights protected therein. At Midlands State University, the human rights module was introduced at the inception of the University around 2005.

10 National human rights institutions (NHRIs)¹³

The Zimbabwe Human Rights Commission (ZHRC), created in terms of section 100R of the Constitution, was only established in 2009 following the adoption of Constitution of Zimbabwe Amendment No 19. To date the only progress noted in this regard is the appointment of Commissioners as well as the introduction of the Human Rights Commission Bill in or around June 2011. By July 2012, the Bill had been passed by Parliament, and awaited presidential assent.

Bearing in mind the fact that the Human Rights Commission is still to open its doors to the public, it is prema-

ture to discuss the content of its programmes in as far as they relate or make references to the African Charter or the Women’s Protocol. However, one can only conclude that the ZHRC will most likely engage these international human rights instruments in view of the provisional reference to ‘international human rights’ ratified and domesticated in Zimbabwe. Taking into account that the African Charter is already part and parcel of the Zimbabwean legal system and the ZHRC’s proposed mandate of assisting in the preparation of state reports, one can only hope that both instruments will play a central role in this Commission’s programmes.

11 Academic writing on the African Charter and Women’s Protocol

There is no evidence of formal academic publications in Zimbabwe, except for Zimbabwean authors who tend to publish in international journals for lack of publishing facilities in the country.

12 State reporting

In 1994, the Government of Zimbabwe established the Inter-Ministerial Committee on Human Rights and Humanitarian Law with the mandate to carry out various human rights functions on behalf of the Government. Amongst its responsibilities is the writing of state party reports to different treaty monitoring bodies, dissemination of concluding observations and following up on recommendations of treaty bodies as well as advising Government on which human rights instruments to accede

¹³ This part of the report was prepared from the information gathered from interviews with UNDP Zimbabwe officials, which organisation is involved in capacity building initiatives with the Human Rights Commission in order to adequately prepare it as it looks ahead to commence its mandate.

to.¹⁴ The Inter-ministerial Committee is comprised of 22 government ministries and departments and is hosted by the Department of Policy and Legal Research under the Ministry of Justice and Legal Affairs which is its secretariat. Important and relevant departments such as the army, police, security, gender, health, the ombudsman and justice are part of the Committee. The setting up of this Committee was applauded by various treaty monitoring bodies that Zimbabwe reported to such as the Committee on the Rights of the Child (CRC), Committee on the Elimination of Racial Discrimination and The Committee on the Elimination of all Forms of Discrimination Against Women.¹⁵ Senior civil servants represent these government ministries and departments in the Inter-Ministerial Committee.

Using the last state party report that Zimbabwe submitted to the African Commission as an example, the process of preparing the report is initiated by the Secretariat of the Inter-Ministerial Committee which is hosted by the Ministry of Justice. The secretariat produces a first draft which is then shared with the entire Inter-Ministerial Committee. The Committee is organised through sub-committees with various expertise and knowledge on different issues. It is the responsibility of these sub-committees to give further details, analysis and information including statistics from different government

ministries and departments on each of the issues under the African Charter that the Government will be reporting on. Once a substantive first draft has been developed, the report is shared with members of civil society and other government departments that are not involved in the preparation of the draft as well as independent bodies and commissions. The sharing of the report is the beginning of a consultative process where the Inter-Ministerial Committee will hold meetings with different stakeholders to seek their input and in some cases written submissions are made by stakeholders.

Based on the input from stakeholders and any further information, further drafts of the report are prepared until the final draft which is then passed on to Cabinet through the channels of the Ministry of Justice for approval before submission to the African Commission. The final report is shared with civil society to enable them to prepare their shadow reports.

The State through the relevant department in the Ministry of Justice and Legal Affairs disseminates the concluding observations. The main targets for dissemination are members of the Inter-ministerial Committee on Human Rights and relevant government departments and ministries with a responsibility to implement, take action or make follow ups on the concluding observations and recommendations of the African Commission. This is a very government inward looking process. There seems to be no set out process by civil society or government to disseminate the concluding observations to the public.

The Government of Zimbabwe has received several concluding observations

¹⁴ Zimbabwe reported on the setting up of this Committee to the African Commission on Human and Peoples' Rights in its Second report submitted in 1997 http://www.achpr.org/english/Archives/State%20reports/eng/Zimbabwe/Zimbabwe_2_eng.pdf.

¹⁵ Concluding observations for each of these treaty bodies applauding Zimbabwe on the creation of the Inter-ministerial Committee <http://www.ohchr.org/EN/countries/AfricaRegion/Pages/ZWIndex.aspx>.

based on the three periodic reports that it has submitted so far to the African Commission. This sections looks at some of the concluding observations issued by the African Commission in respect of the second periodic report which was presented and considered in 2007. Steps have been taken to give effect to some of the observations while none has been taken in respect of the others.

In respect of the recommendations to expedite the establishment of a human rights commission, Zimbabwe passed a Constitutional Amendment in 2009 creating the ZHRC. Commissioners for the human rights body were appointed in May 2010. However, the enabling legislation (the Zimbabwe Human Rights Commission Bill) has still not been passed into law due to disagreements on some of the provisions between the two feuding political parties in the Unity Government.

Zimbabwe ratified the Women's Protocol in 2008, in response to the African Commission's concluding observations. However, the country has still not acceded to other key instruments such as the Protocol establishing the African Court on Human and Peoples' Rights and the Convention on Preventing and Combating Corruption.

The African Commission recommended the Government of Zimbabwe to incorporate socio-economic rights in its Constitution. Zimbabwe has been engaged in a protracted constitution-making process since 1999. The current process has seen strong public representations for the inclusion of these rights in the new constitution and it is hoped that the final constitution that will be adopted will take these views into account.

Through the Unity government, steps are now being taken to amend the media laws in Zimbabwe and in particular the Access to Information and Protection of Privacy Act as well as security laws such as the Public Order and Security Act.

Overall some of the concluding observations of the African Commission highly relate to legislative and institutional reforms which still remain contentious issues between the two political parties in the Unity Government. As a result of disagreements, the never ending impasse and horse trading between the parties, a lot of the reforms that could see an improvement in the human rights, rule of law and independence of the judiciary have been stalled.

13 Communications against this State

From around 2000 there was an upsurge of communications filed against Zimbabwe because of the deteriorating human rights situation in the Country. A total of seven communications were filed and decided upon between 2002 and 2011. In four of these communications, the African Commission found that the Government of Zimbabwe had violated some provisions of African Charter and recommendations were made for redress including payment of compensation and repeal or amendment of laws. The findings and recommendations of the African Commission have not been widely publicised beyond a few reports in the media and dissemination within the circle of human rights organisations. The cases and their findings are not widely known within the broader Zimbabwean civil society.

The Ministry of Justice and the Attorney General's department repre-

sent the state in communications. When findings and recommendations are made against the state, the Ministry of Justice submits these to the relevant government ministry or department affected by the decision such as the police. There is no wide publication or dissemination of the findings and recommendations broadly within government beyond the concerned departments.

In four of the seven cases, there were findings against the state. While several recommendations were made, few steps have been taken to give effect to these. For example in the case of *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe*,¹⁶ the African Commission found Zimbabwe to be in violation of articles 1, 2, 3, 7(1)(a) and (b), 9, 12(4) and 26 of the African Charter in its 2009 decision. The African Commission recommended Government among others to rescind the deportation orders against Mr Andrew Meldrum, ensure that the Supreme Court finalizes the determination of the application by Mr Meldrum, on the denial of his accreditation as a journalist. However, none of these findings and recommendations has been implemented.

In the case of *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe*,¹⁷ the African Commission found the State in violation of articles 9 (2), 14 and 15 of the African Charter and recommended the government of Zimbabwe to provide adequate compensation to the complainants for losses incurred due to the

violations. In another case, *Scanlen & Holderness v Zimbabwe*,¹⁸ the African Commission found Zimbabwe to be in violation of several articles of the African Charter and recommended that the government takes several actions among them (i) to repeal sections 79 and 80 of the Access to Information and Protection of Privacy Act (AIPPA); (ii) to decriminalise offenses relating to accreditation and the practice of journalism; (iii) to adopt legislation providing a framework for self regulation by journalists; and (iv) to bring AIPPA in line with article 9 of the African Charter and other principles and international human rights instruments. In response, minor amendments were made to AIPPA but in essence the law still remains intact and some contentious provisions are still operational.

In the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe*,¹⁹ The African Commission held that Zimbabwe was in violation of articles 1 and 7(1) of the African Charter and recommended establishment of a Commission of Inquiry to investigate the causes of the violence which took place from February – June 2000 and bring those responsible for the violence to justice, and identify victims of the violence in order to provide them with just and adequate compensation. The Government of Zimbabwe did not establish a Commission of Inquiry into the violence and no other steps were taken to redress the human rights violations that took place during that time. In fact an amnesty law for perpetrators of the political violence which was passed in 2000 remained in force.

¹⁶ (2009) AHRLR 268 (ACHPR 2009).

¹⁷ (2009) AHRLR 235 (ACHPR 2009).

¹⁸ (2009) AHRLR 289 (ACHPR 2009).

¹⁹ (2006) AHRLR 128 (ACHPR 2006).

14 Special mechanisms and promotional visits by the African Commission

In 2002, the African Commission sent a special Fact-Finding Mission to Zimbabwe to investigate the cases of human rights abuses after the holding of Presidential elections which were marred with high levels of political violence.²⁰

The stated purpose of the mission was to gather information on the state of human rights in Zimbabwe. Amongst its findings, the African Commission noted that there was enough evidence to suggest that human rights violations such as torture, arbitrary arrests and acts of political violence had occurred in Zimbabwe. The Mission also noted the flurry of repressive legislation such as the Public Order and Security Act of 2002 (POSA), the Access to Information and Protection of Privacy Act of 2002 (AIPPA), all of which stifled democratic space and freedom of expression in Zimbabwe. Based on these and other observations on the rule of law and independence of the judiciary, the Mission made several recommendations to the government of Zimbabwe.²¹

The government of Zimbabwe did not immediately comply with and

implement the above recommendations of the African Commission. In fact it took two more elections which were characterised with political violence in 2005 and 2008 before serious measures were put in place to engage the country in national dialogue and reconciliation. Government engagement in national dialogue resulted in the formation of a Unity Government in September 2008.

Since the Mission, Zimbabwe has taken some measures to restore the independence of the judiciary and respect for the rule of law, though these measures have not been adequate to instil public and stakeholder confidence at national, regional and international levels. In 2006, the Minister of Justice, the Chief Justice of Zimbabwe and other senior judges of the Supreme and High Courts meet with members of civil society including the Law Society for the first time since 2000 to discuss issues of rule of law and impasse between the civil society and the judiciary. Between 2006 and 2007, the Judiciary and the Ministry of Justice were part of a UNDP lead process to assess the capacity needs of the Judiciary in Zimbabwe and an analysis of the issues of the rule of law and independence of the judiciary. The Government showed goodwill in agreeing to table and discuss these issues with stakeholders. Although this was a positive response to the recommendations of the Mission and other regional and international bodies, other challenges in this area continued such as the selective application of the law, which saw many opposition party leaders arrested, detained and tried. Political gatherings of the opposition party were not allowed under POSA and were often disrupted.

Through the Constitutional Amendment 19 of 2009, Zimbabwe ultimately established two significant independent

²⁰ The fact-finding mission was from 24-28 June 2002 after a decision was made the African Commission to undertake this mission at its 29th Ordinary Session which was held in Tripoli in April of the same year.

²¹ Working on national dialogue and reconciliation across the political divides; Creation of an environment conducive for democracy and human rights through repealing of the AIPPA and POSA and abiding by court judgments; Restoring rule of law and respect of independence of the judiciary; Establishment of independent human rights body and an Independent Electoral Commission in the place of the Electoral Supervisory Commission which was viewed as highly compromised; Zimbabwe was behind in terms of its reporting obligations and was reminded to submit outstanding reports under the African Charter on Human and Peoples' Rights.

bodies which are the Zimbabwe Electoral Commission and the ZHRC. This came almost three years after the recommendations of the Fact Finding Mission and in the context of further highly contested elections of 2008, the creation of the Unity government and increasing national, regional and international pressure for legislative and institutional reforms.

The increased cases of human rights abuses and violations in Zimbabwe, especially between the period 2000 and 2008, attracted both international and regional attention. Civil society in Zimbabwe worked hard to highlight these abuses and bring attention as well as remedies. One of the forums and mechanisms that was widely utilised was the African Commission. As a result of this the African Commission attempted during this period of time to engage its special mechanisms on Zimbabwe, though with limited success. For example, after operation Murambatsvina (a government clean up exercise to rid the major cities of illegal vendors, buildings and squatters among others) in June 2005, the African Commission's Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons, Commissioner Nyanduga, issued a statement, expressing his concerns on the operation. He urgently appeal to the Government of Zimbabwe, 'to halt the eviction and demolition exercise, and assist the victims of the operation, by providing them with humanitarian assistance in the form of temporary shelter, accommodation, water, food, medicines and other forms of assistance, while looking for an amicable solution to the illegal settlements and squatter problem in a manner that upholds the dignity of the individuals and the families, which have become victims of the ... operations'.²²

As a follow up to this action, the Special Rapporteur was then requested by the African Commission of the African Union to undertake a fact-finding mission to Zimbabwe between 30 June and 4 July 2005. This mission was not carried out due to an alleged failure of negotiations with the Zimbabwe Government. The Ministry of Foreign Affairs in Zimbabwe requested the Special Rapporteur to leave the country.²³

In June 2007, the Special Rapporteur of the African Commission on Human Rights Defenders in Africa, Me Reine Alapini-Gansou, issued a press statement in which she expressed particular concern on the alleged acts of violence and harassment of human rights defenders in Zimbabwe.²⁴ Her press statement was in particular reference to the unlawful arrest and detention of members of the Women of Zimbabwe Arise. The Special Rapporteur urged the Zimbabwean authorities to take all necessary measures to guarantee the freedom of human rights defenders in Zimbabwe to carry out their work as human rights defenders.

In addition to these special mechanism engagements on Zimbabwe, the African Commission has made and published several resolutions on Zimbabwe. The following are just but a few examples. In and around the period of the highly contested presidential election in Zimbabwe in 2008, the Commission passed statements and resolutions

²² 19th Activity Report of the African Commission on Human and Peoples' Rights (2005) 12 http://www.chr.up.ac.za/test/images/files/documents/ahrdd/theme02/african_commission_19th_activity_report.pdf.

²³ As above.

²⁴ African Commission 'Press release on the situation in Zimbabwe; 18 June 2007 http://old.achpr.org/english/Press%20Release/press%20release_Zimbabwe2_en.htm

expressing its concerns on the human rights violations occasioned by the violence that followed the March 2008 elections.²⁵ Prior to these highly contested elections, the Commission passed a resolution in which it urged the government to ensure the holding of a free and fair election.²⁶

15 Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission

The main impediment to a positive impact of the African Charter in Zimbabwe is clear lack of political will. For over a decade now, Zimbabwe has slumped to deplorable levels in terms of commitment to protection and promotion of human rights taking into account legislation that has been adopted to stifle democratic processes such as freedom of expression and lawful assembly. The African Charter rights will only be fully realised after the corpus of laws has been rid of legislation such as the Public Order and Security Act (POSA) and the Access to Information and Privacy Act (AIPPA). Human rights defenders continue to operate in dangerous environments due to the fact that politicians are committed to reducing democratic space. It, therefore, adds no value that the African Charter is part of national law because the state is just not interested in the realisation of human rights despite their source.

On its part, Zimbabwe is well known for its negative influence in the African Union structures where issues of human rights are concerned. In 2007, Zimbabwe blocked the publication of the African Commission fact-finding Report of 2002. Needless to add that Zimbabwe had a very significant hand in the suspension of the SADC Tribunal, which experts trace to the refusal by Zimbabwe to comply with a human rights-related decision of that Tribunal. That stalemate has resulted in the review of the constitutive statutes of the SADC Tribunal leaving the SADC citizenry without a sub-regional court until such a time the SADC Summit of Heads of State decide of the fate of the community court.

The Women's Protocol is one poised for a successful implementation simply because of robust women organisation in the country. Furthermore, the rights contained therein have no effect on determining the political underpinnings of the country. Such treaties are almost always fully implemented for political mileage. Zimbabwe has already enacted the Domestic Violence Act, a piece of legislation that is at the heart of implementing the rights of women as enunciated in the Women's Protocol.

In all this, all stakeholders in the full implementation of the African Charter and the Women's Protocol should pool their efforts towards achieving the same goal – namely, the full enjoyment of the rights and freedoms contained in these leading African human rights instruments.

²⁵ See ACHPR Resolution 132 adopted at the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights held in Ezulwini, Swaziland, 7-22 May 2008.

²⁶ See ACHPR Resolution 128 adopted at the 42nd Ordinary Session held in Brazzaville, Republic of Congo, 2007.

SCHEMATIC SUMMARY OF MAJOR TRENDS

Indicators/ Questionnaire	Results
<p>1. Introduction and background, Government focal point</p>	<ul style="list-style-type: none"> • President is responsible internationally. • In practice, Ministries of Foreign Affairs (MoFA) represent the state internationally in terms of responding to international obligations – they receive power from the President. In many study countries they are the focal points for state’s response on the African Charter and Women’s Protocol. • In Mauritius, the ministry responsible for the specific treaty conducts the process up to approval by parliament; then MoFA takes over to complete the process. • In Eritrea, only MoFA has had communication with the Commission. • In the majority of countries, Ministries of Justice, Legal Affairs and Human Rights lead inter-ministerial body in charge of responding specifically with regards to the Charter and Protocol – but channelling and submission is done by MoFA in several countries – in Nigeria e.g., it is the Department of Comparative and International Law within Ministry of Justice.
<p>2. Ratification of Charter and/or Protocol</p> <ul style="list-style-type: none"> • What is the process of ratification: Role of Parliament? Executive? • What are reasons for ratification – were any reasons articulated in parliamentary debates or elsewhere? Please identify sources. 	<ul style="list-style-type: none"> • In all constitutions the President of the Republic is vested with powers to ratify international agreements and is thus responsible for state’s compliance/ implementation. • Generally, in dualist countries the President has full power to ratify; then Parliament has power over domestication – majority to pass domestication law depends on subject of treaty (e.g., Nigeria). • In monist countries, it depends on whether subject matter falls within the competence of Executive or Legislature; status of persons falls within Legislative functions; so approval is necessary before ratification of human rights instruments. • South Africa’s process is slightly different; resolution by Assembly and provinces. • In the majority of study countries, the Charter was ratified while the country was ruled by military regimes (before 1990) with no parliament (Burkina Faso), a legislative body merged with the Executive (Chad, Niger) or Legislature had no legislative powers to overview international agreement (Benin). • No express reason behind ratification other than regional trends, African lawyers and civil society pressure and international pressure to go to African human rights instrument in the 1980s. • For Protocol, a few governments provided reasons (e.g., to advance women’s rights – Burkina Faso, to give effect to Charter – Senegal). • Rwanda said to have been pushed by Beijing Conference and AU Solemn Declaration on Gender. • Protocol severally rejected by parliament for opposition of religious stakeholders (Muslims in Chad). • Ratification of the Women’s Protocol was fiercely criticised by religious stakeholders (e.g., Catholics in Cameroon). • In Eritrea, executive and legislative powers are concentrated in the hands of the President, who chairs both Cabinet and Parliament, but the parliament enacted a law to ratify international instruments. • Reasons for South Africa’s ratification of Women Protocol inferred from Ambassador Mamabolo’s briefing to parliamentary committee.

<p>3. Domestication/ Incorporation of Charter (Protocol)</p> <ul style="list-style-type: none"> • What is the constitutional status of the Charter/ Protocol? (between the Charter/Protocol and the Constitution or other legislation, which prevails?) • To what extent do Charter/ Protocol rights correspond to the domestic Bill of Rights? Are Charter/ Protocol rights included in justiciable Bill of Rights? Has Bill of Rights been changed after state becoming a party to the Charter? • Has the Charter or Protocol been domesticated or 'incorporated' into ordinary legislation (explicit reference to Charter/Protocol)? Find such legislation. 	<ul style="list-style-type: none"> • In dualist countries, both the Charter and Protocol are above legislation and below the Constitution. • In some countries, socio-economic rights (SER) are under Directive Principles of State Policy (DPSP) – e.g., Lesotho, Sierra Leone and Nigeria. • In some countries the Charter is wholly part of the Constitution (Benin); or recognised as constitutional law by a declaration that preamble is part of the constitution (Cameroon, Senegal). • In Côte d'Ivoire, treaties are explicitly given higher status than the Constitution (art 87, 2000). • In Francophone countries, superiority of Charter and Protocol depends on incorporation and use by courts; in general, international instruments are below the constitution; but most constitutions provide that they must be amended to comply with international instruments prior to ratification. • In Mauritius, international law is valid to the extent of its consistency with the constitution. • In a few cases do Bill of Rights (BoR) differ from African Charter rights; except where SER as under DPSP; e.g., Lesotho has no express rights to dignity and to receive information; in Gambia there is no constitutional protection of health, work, food, environment, shelter and development. • In Eritrea, the constitution has no provision on relationship between international and national law (namely the constitution). • Several key rights are missing in constitution of Mauritius: integrity and security of the person, cruel punishment, legal status, explicit independence of judiciary (fair trial), work, health, and education. • In Anglophone countries, no domestication was reported (except Nigeria); in most cases, incorporation is not explicit for the Charter. • In Francophone countries, direct incorporation in constitution is clear in Benin, and in Cameroon and Senegal through express constitutional value of the preamble; almost all Francophone constitutions refer to UDHR. • In Niger, despite monism, a law authorised ratification of the Charter; presidential decree and order authorised ratification in Rwanda. • Zimbabwe is monist before 1993, i.e. African Charter is applicable; but dualist after 1993, Protocol is not applicable. • Case law is constitutional source of law in Sierra Leone and both Charter and Protocol could have entered through jurisprudence but for the lack of reference by courts. • Eritrea has not ratified Women Protocol nor domesticated African Charter but ratified 13 international agreements (mostly related to aid or loan), between 1993-1997, which were all duly domesticated. • However, Eritrea translated African Charter in Tigrigna local language. • Sometimes major international law instruments, including Charter/Protocol provisions had already been translated in national law before ratification (e.g., Protocol in Nigeria). • There could be a possibility of using art 18(3) of the African Charter to make Women Protocol binding on all state parties. • In South Africa, national law is superior to international law; none of Charter and Protocol is domesticated.
<p>4. Legislative reform/ adoption</p> <ul style="list-style-type: none"> • Was a compatibility study of domestic law with Charter/ Protocol undertaken before ratification of the Charter/ Protocol? • Has any legislation been amended or adopted to give effect to Charter/Protocol? (implicit/explicit?) 	<ul style="list-style-type: none"> • Compatibility study is not reported in any country for the Charter. • But automatic constitutionality test in Francophone countries would stand for compatibility test because constitution is the highest norm; but inconsistent provisions may remain in force (e.g., Benin: until 2009 women adultery was still constituted on a discriminatory basis in the Penal Code despite gender equality in 1990 Constitution and 2004 Family Code; Senegal: polygamy, discrimination on the basis of sex and corporal punishment of children are still in force despite ratification of Charter, Protocol and equality in constitution). • Amendment of decrees in Nigeria due to pressure using African Commission's findings. • Even in countries which had no human rights in the constitution, the later was not amended prior to ratifying the Charter (e.g., Côte d'Ivoire). • Compatibility study is done in Mauritius while the Attorney General is reviewing the treaty before ratification – a quite detailed review process is in place. • Compatibility was done for the Protocol in Burkina Faso and South Africa. • Academic study reveals that laws in Lesotho are not compatible with the Protocol while the country had ratified. • A body is formally established in Mozambique to harmonise national law with international instruments ratified. • Amendments to give effect to Charter and Protocol are mostly implicit. • In Gambia, Women Act and Legal Aid Act are said to have been enacted to give effect to the African Charter and Women Protocol.

<p>5. Policy reform/ formulation</p> <ul style="list-style-type: none"> • Has any government policy (HIV/AIDS Strategy, PSRP, plan of action, white paper, codes, etc.) been adopted or amended to give effect to the Charter/ Protocol? (explicit/ implicit) 	<ul style="list-style-type: none"> • Most countries have Poverty Reduction Strategic Papers (PSRP); some include specific human rights chapter, e.g., Benin, Burkina Faso, and Senegal. • Specific policy papers and regulatory legislation implicitly give effects to the Charter and Protocol rights. For instance laws on HIV/AIDS, Children, Women, Family Code, inheritance and succession are in place in almost all study countries. • The Charter/Protocol-policy causality is implicit in almost all countries. • For instance, several countries have added the human rights section to their ministries of justice with a specific view to formulating draft policies that advance human rights. • In almost all countries, action to give effect to United Nations human rights treaties have also implicitly advanced the African Charter/Women Protocol implementation (CEDAW, anti FGM laws, violence against women legislation, HIV/AIDS laws, ...) – sometimes this has happened despite the absence of ratification of Women Protocol (Côte d'Ivoire). • There are measures as original as appointing a Minister of HIV/AIDS (Côte d'Ivoire) which had the effect of reducing prevalence from 10 to 4%. • Even 'not free' and 'non-democratic' countries have adopted a wide range of human rights related policies which implicitly advance both Charter and Protocol's rights (Eritrea). • Mauritius National Human Rights Action Plan makes no reference to African Charter. • A direct influence of the African Charter is noted in Nigeria through National action plan for promotion and protection of HR and national gender policy. Even the National Action Plan was significantly influenced by the Charter though it was explicitly adopted in implementation of Vienna Declaration. • South Africa: In invalidating provisions of some laws, courts have referred to the African Charter – Department of Justice and Constitutional Development also justifies some legislation by the need to give effect to the Charter (e.g., Equality Act). Many laws were adopted to 'give effect to international instruments adopted by South Africa' – international and regional law used as justification in policy adoption/reform, e.g. strategic plans.
<p>6. Court judgments</p> <ul style="list-style-type: none"> • Has the Charter/ Protocol, case-law by African Commission or Resolutions adopted by the Commission been referred to as an interpretive source in any judgment by any of the domestic courts? If so, what was the effect on the judgment? • Have domestic courts used any provision of the Charter/Protocol as a basis of a remedy (as self-executing)? If so, describe. 	<ul style="list-style-type: none"> • In Francophone countries very few domestic courts make reference to both instruments (Benin, Constitutional Court; Niger, Constitutional and Supreme Courts; and Chad, Supreme Court make reference to the African Charter as a matter of principle, though in different ways; generally, use and reference are unprincipled). • Francophone courts seem to stick to French jurisprudence although nothing in municipal law prevents them to use Charter/Protocol. • There was no indication of the use of the African Commission's work in any Francophone countries. • In Anglophone countries, few courts have applied or referred to the African Charter (Ghana, Nigeria) and Women Protocol with reluctance, or progressive approach (e.g., Lesotho). • Courts in the Gambia have referred to the work of the African Commission. • An unprincipled reference to the Charter was reported in Zimbabwe. • Four major influences have been observed in Nigeria: African Charter supremacy; Charter used as basis of remedy, interpretative guidance and source of legitimacy. • South African courts have rendered a limited number of decisions using African instruments though the constitution expressly provides so. Courts are reluctant and rather turn to European and Inter-American jurisprudence.

<p>7. Awareness and use by civil society</p> <ul style="list-style-type: none"> • What is the extent of awareness of Charter/Protocol among civil society organisations? • To what extent have NGOs used the Charter/Protocol in their work? Advocacy, promotional tools, policy reviews, litigation, law reform, etc.(explicit/implicit?) Also, do they use concluding observations issued after state reports/ other reports or resolutions of Commission, etc.? • Have NGOs with observer status submitted shadow reports to the Commission? 	<ul style="list-style-type: none"> • A weakness identified by all reports is the lack of knowledge and use of the Charter, the Protocol and the work of the African Commission by civil society. • Good knowledge is reported in Gambia, where civil society is said to have pushed for CEDAW and African Women Protocol domestication through 2010 Act. • Good knowledge and use by NGO are reported in Zimbabwe. • Mostly where civil society use international law in litigation they refer to international but not African instruments. • Very sweeping mention of use of concluding observations, reports, and resolutions. • A few NGOs submitted shadow reports (Benin, Congo). • NGOs strongly relied on the Charter to circumvent the non justiciability of SER in the constitution (e.g., Nigeria); CSOs also use it widely for education and awareness raising purposes. • In South Africa, there is an important number of CSOs with observer status with the African Commission but not much engagement with the Commission and a limited use in its work.
<p>8. Awareness and use by lawyers (law societies and other practising lawyers)</p> <ul style="list-style-type: none"> • What is the extent of awareness of the Charter/Protocol among lawyers/the law society? • To what extent have lawyers used the Charter/Protocol in their arguments before courts? 	<ul style="list-style-type: none"> • The general trend is of a limited use, if no use at all. • General use in constitutional human rights litigation in Benin, Chad and Niger, though suits are mostly initiated by individuals on their own behalf and to a less extent by lawyers. • The Charter, Protocol and work of the Commission are generally unknown or considered as not the main source of reference in submissions. • A good knowledge and use are reported in Zimbabwe. • Human rights reference by lawyers in Mauritius is rather European human rights system oriented.
<p>9. Law school education</p> <ul style="list-style-type: none"> • Does the curriculum of law schools include the Charter/ Protocol? If so, when was it introduced; what is its content? 	<ul style="list-style-type: none"> • There is a general reference to Charter and Protocol rights as 'public freedoms' in law faculties/schools curricula, namely in the form of an LLB module taught in 2nd, 3rd, 4th year (Benin, Congo, Gambia, Chad, Lesotho, Niger and generally francophone countries' law faculties). • Optional courses are in place in a few countries (Cameroon, Zimbabwe). • Human rights centres, chairs, institutes, modules, or courses exist in Benin, Burkina Faso, Côte d'Ivoire, Mozambique, Senegal, and South Africa. • As a general trend, the Charter and Protocol are not part of the training of lawyers and magistrates. • A detailed study of international human rights instruments is part of modules in schools of judicial training in Burkina Faso, Benin, Niger, and Senegal. • A human rights centre is run by Amnesty in Mauritius and a new partnership is starting between the Centre for Human Rights, Pretoria, and the Law Faculty at the University of Mauritius. • In Nigeria, the African human rights system is taught in the majority of law faculties at undergraduate level; the programme is compulsory at some universities and is also part of law school curriculum. Lecture series are also organised to promote the Charter among the judiciary and bar associations.

<p>10. National human rights institutions (NHRIs, Ombudsman offices, etc.)</p> <ul style="list-style-type: none"> • Do these institutions include reference to the Charter/Protocol in their programmes? • Do these institutions follow up on the implementation of concluding observations and/or decisions of the Commission? • Are they involved in the submission of state reports to the Commission? 	<ul style="list-style-type: none"> • Very few laws establishing NHRIs make reference to the African Charter. • However, most NHRIs participate in reporting processes. • Benin NHRI does not have affiliate status as it could not have complied with the Paris Principles at inception in 1986; a bill is before the parliament to amend the NHRI law. • Many study countries have affiliate status, but still adopt no better reference to the Charter and the work of Commission (e.g., Mauritius). They rather stick to the constitution and other international instruments. • Chad NHRI is not functional due to logistic problems; the same may apply to Benin - in process of new establishment - though it is still represented in international forums. • Gambia has no NHRI and Lesotho is in the process of establishing NHRI. • Mozambique established its NHRI in 2009 but it is yet to operate. The same applies to Zimbabwe. • Niger NHRI law has no reference to the Charter but the NHRI uses the instrument in human rights cases brought before it. • Côte d'Ivoire's Commission relies on human rights instruments ratified by the country in compiling its report. • In Nigeria, the African Charter is one of material tools of the NHRI and influences the work of the Commission. • South African Human Rights Commission has good records in respect of use of the Charter and Protocol.
<p>11. Academic writing</p> <ul style="list-style-type: none"> • To what extent do academics (especially in law) refer to/discuss the Charter/Protocol in academic writing? If so, what views are expressed? 	<ul style="list-style-type: none"> • Academic writing focusing on the Charter and Protocol is generally scarce. • Relevant and specialised writings exist in a few countries (Benin, Burkina Faso, and South Africa). • General writings in Côte d'Ivoire and Senegal. • More extensive writing is reported in Lesotho based journals though not all writers are nationals. • Nigerian writers widely involved in human rights writing in both local and international journals. • South Africa has a wide range of writers/publications.
<p>12. State reporting</p> <ul style="list-style-type: none"> • Which department(s) is responsible for state reporting under the Charter/Protocol? • Describe the process of preparing a report (inclusion of civil society; cross-departmental) • Are concluding observations disseminated (by state, civil society)? • Has the government taken any steps to give effect to concluding observations? What steps? 	<ul style="list-style-type: none"> • In most countries departments of justice and human rights take the lead although foreign affairs and departments responsible for specific obligations are always associated (Benin, Cameroon, Chad, Congo, Lesotho). • In Mauritius the process is led by the Human Rights Unit within the Prime Minister's office in collaboration with human rights ministry but the report is submitted by MoFA. • Inter-ministerial approach is widely adopted with civil society being involved. • Informal inter-ministerial task force is established in Rwanda. • In Burkina Faso, Justice and Human Rights ministry compiles the report but it is presented by MoFA. • CSOs are not involved at all in Cameroon and Mauritius. • Status of state reporting to the African Commission varies from 'all reports submitted' (Benin, Mauritius) - 'recently submitted' (Burkina Faso) - to 'never submitted' (Côte d'Ivoire, Eritrea, Sierra Leone) - 'no report since 1994' (Gambia) or 'only one report' (Chad). • Congo adopted the first national indigenous peoples' legislation in Africa. • Abolition of death penalty in Benin. • Generally, a limited dissemination and exposure is given to outcomes of state reporting. • In Zimbabwe, Women Protocol was ratified in follow-up to the African Commission's concluding observations on a state report. • In Côte d'Ivoire, the Government almost always attend sessions of the Commission but has never submitted the state report. • Poor state reporting is observed in Senegal as opposed to best ratification standards. • Eritrea has submitted three reports according to the website but MoFA fails to confirm the submissions or provide any information on the said reports. • Quite detailed report drafting process in Nigeria and good trends in CSOs involvement including follow-up of concluding observations in advocacy work.

<p>13. Communications</p> <ul style="list-style-type: none"> • If any communication has been decided against the state, what exposure has been given to this finding? • Has the government taken any steps to give effect to this finding? 	<ul style="list-style-type: none"> • The African Commission has received communications against almost all countries ranging from those perceived as 'free and democratic' (Benin, 3 communications; Burkina Faso, 2 communications) to 'un/less democratic' (between 10-18 communications for Nigeria, Cameroon, Gambia, and Zimbabwe). • A notable progress is recorded in terms of decrease in number of communications (for instance there was no communication against Nigeria in 2009, 2010, 2011). • There has been only 1 communication against Lesotho despite the fact that there have been serious human rights violations particularly post the 1998 general elections, which could have presented opportunities for national stakeholders to take cases to the Commission. • No communication was brought against Mauritius. • Only 2 complaints were lodged against Côte d'Ivoire despite massive violations related to civil war and post electoral conflicts (meanwhile, between 2007 and 2010 the ECOWAS Court received 5-7 human rights cases against Côte d'Ivoire). • Information on implementation is not reported.
<p>14. Special mechanisms - promotional visits of the African Commission</p> <ul style="list-style-type: none"> • Has a promotional or protective/ fact-finding visit by the African Commission taken place to the country? If so, what has the effect been/ Has any recommendations been given effect to by government? • Has a special mechanism of the Commission visited the country/made recommendations to the country? What has its effect been? 	<ul style="list-style-type: none"> • At least one member of the African Commission or its special mechanisms has visited all study countries except Sierra Leone. • Impact is relative but relevant impacts are reported (e.g., in Zimbabwe, the Electoral Commission and human rights Commission were established following visits and recommendations of special mechanisms). • Yet, in 2005, the Special Rapporteur on Refugees was asked by the Minister of Foreign Affairs to leave Zimbabwe. • The Special Rapporteur on Human Rights Defenders was refused visit to Congo. • Rwanda did not comply in the only case in which it was involved. • In Sierra Leone, even though no visit has taken place, at least one member of African Commission or its Special mechanisms has participated in civil society activities. • A national of almost all study countries has been member of the African Commission though no particular impact of such membership was reported. For instance the African Commission had 3 commissioners from Gambia. • A promotional visit prompted the establishment of the NHRI in Mozambique but there is a slow pace in improving situation in prisons following post-visits recommendations. • The majority of study countries hosted a session of African Commission.
<p>15. Factors that may impede or enhance the impact of the African Charter, the Women's Protocol and the African Commission</p> <ul style="list-style-type: none"> • What are the factors that impede or enhanced the 'impact' of the African Charter in your country? • Consider whether a session of the Commission has ever taken place in your country, and, if so, what its role was. • Consider whether a national has been a member of the African Commission and, if so, what role this factor played. • Consider the role of the media. 	<ul style="list-style-type: none"> • All reports highlight the lack of knowledge, awareness and use of the Charter. Namely, domestication and popularisation of the Charter is wanting. A better awareness and knowledge of the Protocol does not enhance its use otherwise than within much specialised legal, academic and NGOs circles. • Lack of publicity around the work of the African Commission is equally widely singled out. Some reports stress that the African Commission does not do enough to market its work. • However, there is a growing knowledge and awareness among civil society organisations and the work of the media may enhance better implementation of the Charter and Protocol.

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