

General acceptance of regional human rights standards

Before addressing the specific rights of right to life; freedom from arbitrary arrest and detention; freedom from torture and other cruel, inhuman or degrading treatment; freedom of expression; and access to justice, it is important also to look at the state's general acceptance and respect for human rights which can be displayed through its willingness to submit itself to review at the regional level.

The following indicators were used in this area:

- Is the state a party to the African Charter on Human and Peoples' Rights?
- Does it submit state reports to the African Commission on Human and Peoples' Rights, as stipulated under paragraph 16 of the Grand Bay Declaration and paragraph 26 of the CSSDCA Memorandum of Understanding?
- Have allegations of human rights violations been brought before the African Commission on Human and Peoples' Rights? If so, has the country implemented the Commission's decisions?
- Has the state ratified the Protocol to the African Charter on the Establishment of an African Court for Human and Peoples' Rights as stipulated under section 2, paragraph s of the CSSDCA Memorandum of Understanding and paragraph 14 of the Grand Bay Declaration?
- Does the state have an independent national human rights institution as stipulated under paragraphs 16 and 27 of the Grand Bay and Kigali Declaration, respectively?

2.1 General commitments under the African Charter

State support for the African Charter on Human and Peoples' Rights is encouraged in the Constitutive Act of the African Union,¹⁸ the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance,¹⁹ and the CSSDCA Memorandum of Understanding.²⁰

2.1.1 Party to the African Charter

All of the countries under review are a party to the African Charter and each recognises the competency of the African Commission on Human and Peoples' Rights to hear allegations of human rights violations against it. Senegal, Nigeria and Uganda were among the first states to ratify the Charter, having done so in 1982, 1983 and 1986 respectively. The last states to become a party to the Charter were South Africa and Ethiopia, having done so in 1996 and 1998, respectively – placing them among the last of all African states to ratify the Charter.

2.1.2 State reporting

State reports are to be submitted every two years, as stipulated under article 62 of the Charter. The OAU, in its second annual activity report, entrusted the African Commission with reviewing periodic state reports. The amount of reports due depends on when the state became a party to the Charter. As of 2003, Nigeria, Senegal and Uganda all should have submitted eight reports. Algeria and Ghana each should have submitted six reports. Kenya owed five reports. South Africa owed three reports. Ethiopia owed two reports. Actual submissions differ greatly from these numbers for two reasons: firstly because most African states are behind in

18 Constitutive Act, *op cit*, art. 3 states that one of the objectives of the Union shall be to “promote and protect human and peoples’ rights in accordance with the African Charter.”

19 NEPAD Declaration, *op cit*, para. 15.

20 The “unhindered” exercise of individual rights according to the African Charter is stated as a “core value” in the CSSDCA Memorandum of Understanding, at section I(h). Section II (s) calls for “observance, protection and promotion of human rights in accordance with the Charter.”

their submissions, and secondly, because the Commission decided, in 1995, that several reports could be combined into one report.²¹ This was done in an attempt to address the backlog of submissions.

For example, in 1995 Algeria submitted its first state report which should have been submitted in 1989. Instead, the 1995 report combined reports from 1989, 1991, 1993 and 1995. Algeria submitted its second and most recent report in 2000, which combined its 1998 and 2000 reports. Of its eight owed reports, Nigeria submitted one in 1990. Senegal has submitted three reports, with the most recent one combining five overdue reports. Of its eight reports, Uganda submitted one in 2000. Of its six reports, Ghana has submitted two reports, the last one having combined three overdue reports. Of its three reports, South Africa submitted its first, and only, report in 1998. Kenya and Ethiopia have not yet submitted any state reports to the Commission.

Thus, of the states under review, Algeria, Ghana, and Uganda owe one report. Ethiopia and South Africa owe two reports (a third report from Ethiopia being due in June of this year). Nigeria owes five reports and Kenya owes six reports (the sixth report was due in January of this year) to the Commission.²²

2.1.3 Communications

Complaints brought against states before the African Commission are called communications. Of the countries under review, Nigeria has had the most communications lodged against it, numbering approximately 33.²³ South Africa has not had any communications lodged against it. Lack of communications against a state, however, is not necessarily a reflection of a strong human rights record. Oftentimes, what the numbers are

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21 *Note Verbale* ACHPR/PR/A046 of 30 November 1995.

22 See Status on Submission of State Periodic Reports to the African Commission on Human and Peoples' Rights, DOC/OS(XXXIII)/310a, May 2003.

23 Many of these cases were eventually joined by the Commission and considered together.

indicative of is the state's unwillingness or inability to address allegations of human rights abuses at the national level.

Of those cases brought against Nigeria, all of them were allegations brought against the government of General Sani Abacha. Since the end of Abacha's regime, no communications have been lodged against Nigeria, although some communications that had been submitted against Abacha's government were only considered in the post-Abacha era.²⁴ In 28 of the communications heard against Nigeria, the Commission found that violations of the African Charter had been committed. The types of violations found included violations of the right to life, the right to be free from torture, the right to have one's cause heard, the right to liberty, and freedom of expression. Four cases against Nigeria were declared inadmissible. One was resolved amicably.

The Commission has considered five communications against Ghana. Two of those communications were declared inadmissible because Ghana had not yet become a party to the Charter. One communication was withdrawn by the author. Another was declared inadmissible because of non-exhaustion of domestic remedies. In the only communication where the merits of the case were considered, the Commission found violations of articles 6 and 7.1(d), freedom from arbitrary arrest or detention and the right to have one's cause heard respectively.

Kenya has had four communications lodged against it. Three of those communications were declared inadmissible, one for non-exhaustion of local remedies, one because Kenya was not yet a party to the Charter and the other because of vagueness and incoherence on the part of the author. In the fourth and most recent communication against Kenya, violations of articles 5, 6, 9, 10 and 12 (1) and (2) were found, which included violations of the rights to freedom from inhuman and degrading treatment, freedom from arbitrary arrest or detention, freedom of expression, freedom of association, freedom of movement and freedom of re-entry into one's country.

²⁴ Because the African Commission only meets twice a year during a 14-day period, there is a backlog in hearing communications. Once lodged, a communication can take a couple of years to be resolved.

Algeria and Senegal have both had two communications lodged against them. Uganda has had one. The Commission declared all five of those communications inadmissible. The seven communications lodged against Ethiopia were also declared inadmissible because Ethiopia had not yet become a party to the Charter, having only done so in 1998.

Unfortunately, the lack of an enforcement mechanism and, of course, a lack of political will by member states to adhere to the Charter's principles, often renders the Commission's decisions meaningless in respect of the state's adherence to them. It is rare that a state actually abides by the Commission's decisions and takes the Commission's recommendations into consideration.

2.2 The African Court on Human and Peoples' Rights

The establishment of an African Court on Human and Peoples' Rights is a milestone for human rights in Africa and will hopefully provide the necessary components that the regional human rights system has been lacking – that is, decisions that are binding as well as an enforcement mechanism. Although the Court has yet to be established – judicial nominations and a location are to be determined in July of this year – many believe that the Inter-American system will be used as a template for the African system, since the Inter-American Commission uses both a commission and a court to address human rights violations within the Americas.²⁵

²⁵ In the Inter-American system, petitions are first brought before the Inter-American Commissions which is located in Washington D.C. The Commission attempts to resolve the matter between the state and the complainant through the process of friendly settlement. Similar to the African commission, complainants before the Inter-American Commission can include individuals, groups of individuals, or NGO representatives. Depending on how this process progresses, after reviewing a petition, the Commission can decide whether to forward the matter to the Inter-American Court, which is located in Costa Rica. Thus, the Commission acts as a filter between petitioners and the Court, in that only it can decide whether a matter will be heard by the Inter-American Court.

The Kigali Declaration and the CSSDCA Memorandum of Understanding encourage the ratification of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights.²⁶ The Protocol, which entered into force on 25 January 2004 after receiving the required number of ratifications, has been ratified by Algeria, Senegal, South Africa and Uganda. Ethiopia, Ghana, Kenya and Nigeria have yet to do so.

Thus far, the states having ratified the Protocol have recognised the competence of the Court to hear cases against it that are brought by the African Commission, by another state and by African intergovernmental organisations. State parties can also lodge complaints against other state parties, although this mechanism, which is also provided for in the Commission system, has never been used. Lacking in the ratification of the Protocol is the ability of individuals and non-governmental organisations, representing groups or individuals, to bring cases against a state party. These types of case submissions can only be considered if a state party to the Protocol makes a declaration saying so. None of the state parties to the Protocol have yet taken this step, but should be strongly encouraged to do so.

2.3 National human rights institutions

Article 26 of the African Charter encourages the creation of national institutions to promote and protect human rights. This is also stipulated in the Kigali and Grand Bay Declarations, at paragraphs 27 and 15, respectively.

All of the countries under review, with the exception of Ethiopia,²⁷ have some form of national institution in place to address human rights issues. Three of the countries – Ghana, South Africa and Uganda – have made provisions for a national human rights institution in their constitutions.

²⁶ Kigali Declaration, *op cit*.

²⁷ The Legal Affairs Committee of the House of Peoples' Representatives published a draft document on the establishment of a Human Rights Commission and Office of the Ombudsman in three main local languages and distributed it to the public, but these bodies still have not been formed.

Those same countries have formed national bodies to address past human rights violations that were committed on a mass scale.

Algeria's *Observatoire Nationale des Droits de l'Homme* (National Observatory for Human Rights) was created by Presidential Decree 97-72 in 1992, with the mandate of promoting human rights, observing and evaluating the application of human rights standards at the national level, taking action when allegations of human rights violations are presented to it, and issuing annual reports. In October 2000, the Observatory was replaced with the *Commission Consultative Nationale pour la Promotion et Protection des Droits de l'Homme* (National Consultative Commission for the Promotion and Protection of Human Rights) whose mandate includes reporting on human rights issues and addressing human rights allegations, human rights advocacy, mediation between the Government and the Algerian public, and co-ordinating with the police and judiciary. The Commission's membership comprises 45 members, including 22 governmental bodies and 23 representatives of civil society and non-governmental organisations.

Senegal's first human rights institution was founded in 1970, but its activities were promotional and educational and were in relation to its international commitments. The newer *Comité Sénégalais des Droits de l'Homme* (Human Rights Committee of Senegal) was established in 1997 under Law 97-04 of 10 March of the same year. It is defined as an independent institution with the tasks of consultation, observation, evaluation, dialogue and promotion of human rights. Probably the Committee's most important task is to address allegations of human rights violations and to mediate between victims and proper governmental authorities. Its membership comprises representatives of various institutions, including members of non-governmental organisations and the national assembly, a representative of the judiciary, the bar, the media, universities, unions, and representatives of women's organisations.

Uganda, Ghana and South Africa all have national human rights institutions that are constitutionally-based. In 1988, when a new draft constitution was being examined in Uganda, the Commission of Inquiry argued for a constitutionally mandated human rights commission, thus leading to the creation of the Ugandan Human Rights Commission, whose organisation and mandate are defined in articles 51 through 58 of the

Ugandan Constitution. Its mandate includes investigating violations of human rights; visiting, assessing and monitoring jails, prisons and other places of detention; research and education; and to monitor government compliance with international human rights obligations.

Ghana's Commission on Human Rights and Administrative Justice (CHRAJ) received its mandate from the 1992 Constitution and was established in 1993, replacing the Ombudsman which had existed since 1980 and which had also been constitutionally created.²⁸ Under article 218 of the Constitution, CHRAJ is charged with investigating allegations of human rights violations as well as complaints of corruption, abuse of power, education and unfair treatment of a person by a public official. Its mandate also includes investigating allegations of human rights violations committed by persons, private enterprises and other institutions.

South Africa's Human Rights Commission (SAHRC) receives its mandate from chapter nine of the Constitution; however, prior to that, former President Mandela had signed the Human Rights Commission Act, no 54 of 1994, which came into force in 1995. The Commission was actually inaugurated in October 1995, two years before the recent Constitution was adopted. The SAHRC also has a wide-ranging mandate, including the authority to investigate relationships between private persons, between individuals and corporate entities, and, of course, relationships between the state and individuals. Much of the Commission's focus has been in the area of economic and social rights. It has limited its activities because the constitution also provides for other bodies, which deal more specifically with certain issues. For example, the Commission on Gender Equality addresses women's rights issues, the Independent Complaints Directorate (ICD) investigates complaints against the police and the Public Prosecutor addresses issues of administrative justice. In addition, there is a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities.

In Kenya, the Standing Committee on Human Rights was created in 1996 with a mandate of investigating allegations of human rights violations and education. Its members were government-elected and its

²⁸ Constitution of the Republic of Ghana 1992, chapter 18, Commission on Human Rights and Administrative Justice, art. 216.

functions and powers were government-defined. Thus, the Committee was criticised for its lack of independence. In 2002, parliament passed a bill calling for an independent Kenyan National Commission on Human Rights. The Commission was established in 2003, replacing the Standing Committee. Its mandate includes investigating complaints of human rights violations, and formulating, implementing and overseeing human rights programmes, and public education. The Commission is to act as a “watchdog on how the Government protects and promotes human rights and fundamental freedom of Kenyans”.²⁹

Nigeria’s National Human Rights Commission was created in 1995 by military decree under General Sani Abacha. It serves as the Ombudsman for human rights protection in the country. The Commission’s mandate includes addressing allegations of human rights violations and seeking redress and reparations where violations are found. It also conducts mediation and conciliation efforts, and makes recommendations to the government. Research and investigations are also part of its mandate.

South Africa, Ghana and Uganda also have established bodies to deal specifically with violations of mass human rights abuses. Most recently, the National Reconciliation Commission was formed in Ghana, primarily to address the human rights atrocities committed under the regime of former President Jerry Rawlings. It was established under the National Reconciliation Commission Act 2002, Act 611 of 11 January 2002 and 6 May 2002, and began public hearings on 14 January 2003. Its mandate is to promote national reconciliation by establishing a complete and accurate record of the human rights violations and abuses that were committed during periods of unconstitutional government, and other periods since independence, and to provide redress for the wrongs that were committed. The Commission has stated that it would not recommend prosecutions or punishment but, instead, would focus on reparations. In South Africa, the Truth and Reconciliation Commission (TRC) was formed to address mass human rights abuses committed under the apartheid regime. The TRC held public hearings from 1996 to 1998. While strongly debated, amnesties were handed out to perpetrators of human rights abuses, who came

²⁹ Statement of the representative of the government of Kenya to the 34th ordinary session of the African Commission on Human and Peoples’ Rights, 6–20 November 2003, Banjul, The Gambia.

forward and provided as much information as possible as to the crimes committed. Uganda's first national institution, the Commission of Inquiry into Violations of Human Rights, was established in 1986 by the Museveni government to investigate human rights abuses that had been committed from independence until Yoweri Museveni came to power. In 1994, it published a report of over 700 pages which gave an overview of human rights abuses that had been committed from 1962 until 1986.

2.4 Conclusion

All of the states under review have shown a basic commitment to regional human rights standards by becoming a party to the African Charter on Human and Peoples' Rights, and by their willingness to place themselves under the scrutiny of the African Commission on Human and Peoples' Rights. Most have taken a big step in submitting periodic state reports, which can be a time-consuming and expensive task, when done properly. With the exception of Ethiopia, all have established national human rights institutions, which provide important safeguards to their respective communities. Senegal, Algeria, South Africa and Uganda have taken a major step by ratifying the Protocol on the Establishment of an African Court on Human and Peoples' Rights, a body which will surely be the most effective human rights monitoring mechanism that the African region has had thus far. It is hoped that Ethiopia, Ghana, Kenya and Nigeria will soon make the same commitment by also ratifying the Protocol.

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