

Celebrating 30 Years of the African Commission on Human and Peoples' Rights: Presentation of the Current Work of the Commission (2010 – 2017), Including the Work of its Special Mechanisms, its Achievements and the Challenges Confronting It¹

INTRODUCTION

The focus of this paper is to discuss the period 2010 to date in the human rights journey of the African Commission on Human and Peoples' Rights (African Commission) as this impressive human rights body celebrates its 30 years. We thank the organisers for such an opportunity, which allowed for the review of the relevance of the Commission's work today while reflecting on its path through signposts: namely its 10th Anniversary in Grand Bay, Mauritius in October 1996, then its 20th Anniversary in Brazzaville, Republic of Congo in 2007, and in Banjul, The Gambia in 2017.

It is always useful to take stock of the situation, especially at anniversaries, to be able to do better, to correct strategic trajectories and to review the ways and means different groups, as actors and stakeholders, interact on human rights issues as the African Commission, the premier human rights body on the continent, deals with human rights in a changed landscape with more human rights bodies than when it started². Seven areas were cherry-picked for discussions, namely: state reporting, the promotional mandate of the African Commission, its protective and interpretative mandates, selected mechanisms of the African Commission, granting of observer status to civil society organisations, and gender parity at the African Commission.

The thrust of this paper's argument is that assessing the performance of the African Commission over the period 2010 – 2017 reveals a mixed bag of achievements, some powerful and others less, as well as some setbacks. But what about the future? Up to now the African Commission has carefully charted its way and reinvented itself in a new dispensation at continental level with the advent of other institutions within what is termed as the 'African Human Rights Architecture' or system.

The African Commission is the premier human rights body in the African Human Rights Architecture. When the Organisation of African Unity (OAU) was replaced in 2002 by the African Union (AU), the continental organisation pledged explicitly to embrace a more interventionist approach in cases of conflicts, unconstitutional change of government and

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² The African Commission on Human and Peoples' Rights is a quasi-judicial body established under Article 30 of the African Charter on Human and Peoples' Rights, entrusted with the monitoring and implementation of the African Charter.

human rights violations³. With regards to human rights protection, the AU adopted specific protocols to the African Charter, including the Protocol on the Establishment of the African Court on Human and Peoples' Rights in 1998 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) in 2003. Alongside the standard-setting at continental level, one also notes the adoption of sub-regional protocols by the Regional Economic Communities (RECs)⁴. In addition to the norm-setting and adoption of standards, human rights could also be claimed or vindicated through different regional structures⁵. To this one should add the African Court on Human and Peoples' Rights in Arusha, Tanzania.

This proliferation of standards and structures begs the question: which venue has the primacy on the adjudication of human rights in Africa? The AU endeavoured to establish a 'human rights architecture' with the aim of 'promot[ing] and protect[ing] human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'⁶. This got translated through the establishment of further institutions and structures, all contributing toward the respect for human rights and good governance⁷. Notwithstanding these developments, the African Commission, at 30, remains the 'jewel in the crown' of the African Human Rights Architecture.

BRIEF CONTEXTUALISATION

Decades of armed conflict, civil unrest, and human and natural disasters, have inflicted suffering on the continent. To many Africans 'human rights' still remain but mere words. While instruments and institutions continue to be created as discussed above, the gap between commitments and practice remains wide. In several countries, rule of law and legal institutions are still weak, fostering a climate of impunity, despite few advances such as the indictment, trial and sentencing of Hissène Habre by the Extraordinary African Chambers in Senegal, a high watermark for African justice.

The egregious human rights situation in several African countries is evident to all – South Sudan and Burundi, for example. Having heard more about the human rights situation around the continent during the 61st Ordinary Session of the Commission, there is no need to dwell further on these. It is against this backdrop that the work of Africa's most

³ See Article 4 of the Constitutive Act of the African Union.

⁴ Economic Community of West Africa (ECOWAS), adopting the ECOWAS Protocol on Democracy and Human Rights in 2001, the Southern African Development Community (SADC), adopting its Gender and Development Protocol in 2005, the East African Community (EAC) adopting its Second Plan of Action on the Promotion and Protection of Human Rights in East Africa (2012-2015), deriving from the Treaty for the establishment of the EAC, which upholds respect for human rights in accordance with the African Charter on Human and Peoples' Rights.

⁵ ECOWAS Court of Justice - Abuja, Nigeria; the Court of Justice of the Economic and Monetary Union of West Africa (UMOE) - Ouagadougou, Burkina Faso; the SADC Tribunal - Windhoek, Namibia (though this one is currently suspended); the Common Market for East and Southern Africa (COMESA) Court of Justice - Lusaka, Zambia; and the East African Court of Justice - Arusha, Tanzania.

⁶ See Article 3(h) Constitutive Act of the AU.

⁷ New Partnership for Africa's Development (NEPAD), the Economic, Social and Cultural Council (ECOSOCC), the Pan-African Parliament (PAP) and the African Peer Review Mechanism (APRM), all of which function either directly or indirectly to promote 'good governance' and human rights.

established regional human rights enforcement body, the African Commission, should be viewed. The following quote aptly sums the most important human rights challenges which the African Commission has had to deal with, given that the African Charter contains all three generations of rights:

“What does it mean to have a right to vote if one is too hungry to lift the ballot paper? Conversely, does it matter that you have a right to food if your freedom to speak out on the lack of it is muzzled? Put another way, what difference does it make if you are starved to death (a violation of your economic rights), or die from torture (in violation of your civil right not to be tortured)? The net effect is that you are dead, and the death is certainly not the result of natural causes. Ultimately, of what help is the categorization of rights if you are in a situation of conflict (a violation of the right to peace), your environment is despoiled, or you are dying from poverty, and consequently denied the right to development?”⁸

STATE REPORTING

The duties of the African Commission include the examination of state reports about human rights which each state is required to submit every two years under the African Charter⁹. The primary objective of the state reporting procedure is ‘to establish a framework for constructive dialogue between the Commission and the State’.¹⁰ State reporting procedure allows for the monitoring of the implementation of the treaty, the identification of difficulties and the sharing of information among states.

To guide states in the submission of their state reports, the African Commission adopted guidelines on state reporting under the African Charter in 1998. The 2010 Rules of Procedure (Rules 73 to 78) further elaborate on the state reporting procedure. Interestingly, Rule 74(2) creates space for institutions, organizations or any interested party wishing to

⁸ J. Oloka-Onyango, *Reinforcing marginalized rights in an age of globalization: international mechanisms, non-state actors and the struggle for peoples’ rights in Africa*, 18 Am. U. Int’l L. Rev. 851

⁹ Chapter II: Mandate of the Commission

Article 45:

The functions of the Commission shall be:

1. To promote human and peoples’ rights and in particular:
 - (a) to collect documents, undertake studies and research on African problems in the field of human and peoples’ rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights and, should the case arise, give its views or make recommendations to Governments;
 - (b) to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation;
 - (c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.
2. Ensure the protection of human and peoples’ rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

¹⁰ <http://www.achpr.org/states/reporting-procedure/>

contribute to the examination of the Report. They shall send their contributions, including shadow reports, to the Secretary at least 60 days prior to the examination of the Report’.

54 out of 55 African countries have ratified the African Charter, with Morocco currently the exception. As at October 2017, seven countries have not reported since their ratification/accession of the African Charter¹¹. Since 2010, 16 countries have submitted their state reports to the African Commission, with 6 countries namely, Democratic Republic of Congo, Niger, Rwanda, Burkina Faso, Gabon and South Africa, submitting their initial report, three of which namely, Democratic Republic of Congo, Niger and Rwanda, have not yet considered.

State reporting is an important obligation for all state parties and the above figures positively demonstrate that there has been an increased interest in the state reporting procedure post 2010. Still, although a commitment under the African Charter, the Commission cannot hold states accountable or sanction them in the event they do not submit a state report. In such cases, the powers of the Commission are limited to reminding states to submit their report every year.¹²

Periodic reporting is a key legal obligation given that the African Charter becomes a binding instrument, once a country has ratified it. However, even though there have been countries reporting for the first time, and the guidelines being considered during the preparation of the state reports, the state reporting procedure is still dependent on the political will of states parties. The African Commission cannot hold states accountable or sanction them in the event they do not submit a state report apart from reminding states to submit their state report every year.

What is needed today to make the state reporting system more efficient and meaningful? A few ideas:

- State reports, while following the different guidelines, for example, the Tunis Reporting Guidelines for reporting on Economic, Social and Cultural Rights¹³, should be more focused and analytical, informed by the implementation of previous concluding observations from the African Commission;
- In turn, the African Commission will be able to adopt more focused, concise and implementable recommendations;
- It is hoped that these would foster effective compliance by States of the African Commission’s recommendations, concerning specific Charter rights.
- States should be reminded that the state reporting procedure is not a mechanism to put them to shame but rather to assist them in the implementation of their key legal obligations under the African Charter.

¹¹ Comoros, Equatorial Guinea, Eritrea, Guinea Bissau, Sao Tome and Principe, Somalia and South Sudan.

¹² See Rule 76 dealing with non-submission of reports.

¹³ The Tunis State Reporting Guidelines were developed further to the adoption of the Principles and Guidelines on the implementation of economic, social and cultural rights, in the African Charter, on 26 May 2010.

- All these aim at ensuring an effective and meaningful dialogue with the state, which can be translated as better compliance from the state and enhanced enjoyment of human rights by rights-holders.

THE PROMOTIONAL MANDATE OF THE COMMISSION

Article 45(1) of the African Charter elaborates on the promotional mandate of the African Commission. In brief, the Commission's promotional mandate comprises of 'the dissemination of information, research and formulation of normative standards and co-operation with national and international institutions for purposes of promoting respect for human rights'.

Since the adoption of the 2010 Rules of Procedure, there has been a change in the landscape of the promotional mandate of the African Commission. For instance, the African Commission has, as at October 2017, on the soft law front, adopted 14 instruments which in effect, may have hard impact, during the period being covered (2010 to date)¹⁴. Among these are five general comments on different articles of the African Charter and the Maputo Protocol to guide states parties in the implementation of those articles.

In her opening speech of the 61st Ordinary Session of the African Commission on 1 November 2017, the Outgoing Chairperson, Adv. Pansy Tlakula, indicated that Commissioners have undertaken over 45 promotional missions. During these promotional visits, one of the issues that Commissioners raise relate to concluding observations and decisions following communications with governmental authorities.

Under the promotional mandate of the African Commission, one can also add its activities involving collaboration with civil society. The presence and active participation of Commissioners during the NGO Forum preceding the ordinary sessions of the Commission represent a good illustration of such collaboration, as is the development of soft law instruments, noted above. Both activities point to the strong mutually-beneficial relationship between the Commission and civil society.

¹⁴ Guidelines on Freedom of Association and Assembly in Africa, 21.09.2017; General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 11.05.2017; Banjul Declaration of the 59th Ordinary Session of the African Commission on Human and Peoples' Rights under the theme "Women's Rights: Our Collective Responsibility", 04.03.2017; Guidelines on Policing Assemblies in Africa, 04.03.2017; Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, 03.08.2016; General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4), 12.12.2015; Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 09.03.2015; General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 28.11.2014; General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 06.11.2012; Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 24.10.2011; Guidelines for African Union Electoral Observations and Monitoring Missions, 24.10.2011; Model Law for African States on Access to Information, 24.10.2011; State Party reporting guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines); and Principles and Guidelines on the implementation of economic, social and cultural rights, in the African Charter, 26.05.2010.

The African Commission relies on civil society to provide critical information on the behaviour of states through shadow reports, collaboration with special mandates holders as well as the submission of communications. Civil society has also helped increase awareness of the Commission and of its work on the continent. For civil society representatives, the seriousness and solemnness brought by the African Commission in highlighting issues of concern on the domestic front has allowed them to engage with their governments more effectively for Charter-based rights to gain local support.

However, a concern raised during the first day of the celebratory events is that while there are more NGOs, there is less engagement and commitment. There was further a call for professionalization in this space. While agreeing in principle, an unintended consequence of professionalization within the civil society space is that specific vulnerable groups, including women, minorities, people with disabilities, the poor, may be further excluded from fora where human rights are discussed, or their visions distorted, whereas a more inclusive approach is needed. Up to now, the African Commission has been able to preserve such a space, and it should bear in mind any unintended consequences of a call for professionalization of NGOs.

THE INTERPRETATIVE MANDATE OF THE COMMISSION

The African Commission has a broad interpretative function with regards to the African Charter. The General Comments and Resolutions adopted during the period under review to give effect to the rights in the Charter have already been mentioned.

Over time, the African Commission has performed a balancing act, in a progressive manner, which entailed reading into the African Charter, 'missing rights' despite the clawback clauses therein contained. One can point to rights such as the right to food or to housing, as in the SERAC case, relying on interpretations of the right to life and dignity¹⁵. The Commission took the same approach in the case of the *Nubian Community in Kenya v. The Republic of Kenya*, a decision delivered on 28 February 2015, where in the absence of the right to a nationality in the Charter, it held that:

*The Commission agrees with the position espoused ..., namely that nationality is intricately linked to an individual's juridical personality and that denial of access to identity documents which entitles an individual to enjoy rights associated with citizenship violates an individual's right to the recognition of his juridical personality. The Commission considers that a claim to citizenship or nationality as a legal status is protected under Article 5 of the Charter*¹⁶.

While there may be more, two current areas where the African Commission will need to heavily rely on the Charter to devise innovative interpretation strategies to provide protection to rights holders, may be noted, namely: (a) discrimination and LGBTI issues and

¹⁵ Paragraphs 59 to 66 Communication 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria, 27 October 2001, last accessed on 31 October 2017 from <http://caselaw.ihrrda.org/doc/155.96>.

¹⁶ Paragraph 140 of Communication 317/06 The Nubian Community in Kenya v The Republic of Kenya, February 28, 2015, last accessed on 31 October 2017 from <http://caselaw.ihrrda.org/doc/317.06/view/en/#2513599>

(b) Corporate responsibility and violations of Charter-based rights by non-state actors, including Transnational Corporations (TNCs). Based on its resilience and to ensure the continued relevance of the Charter in view of new human rights challenges, the Commission is encouraged to find the appropriate arguments for its interpretative tasks to give effect to Charter rights and to advance the cause of human rights at continental level.

THE PROTECTIVE MANDATE OF THE COMMISSION

Member states, individuals and NGOs can bring communications to the African Commission, containing allegations to the effect that a State Party to the African Charter has violated a charter provision. To date, the African Commission has received 659 cases, 446 of which have been finalised¹⁷.

While the rich jurisprudence coming from the protective mandate of the African Commission has already been discussed¹⁸, it is befitting to talk about the specific issue of reparations, which the Vice-Chair of the Commission, Commissioner Lawrence Mute, summarized by saying that there may be tension between effective redress at the ‘micro-level’ and the much bigger picture, that is the macro-level picture. The African Commission has been criticised as reparations did not seem to feature prominently on its agenda, with gaps remaining between its jurisprudence and international standards, including those reflected in the *UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international humanitarian law*¹⁹. Indeed, there is no explicit right to reparation in the African Charter and when it started examining specific communications, the Commission would make a declaration regarding which Charter rights had been violated, granting the requested prayer in the pleadings, such as release the person in detention, but did not provide any compensation to those imprisoned²⁰.

In the Kilwa Case²¹, another landmark decision delivered in 2016, the African Commission awarded USD 2.5 million to victims and their families, following the massacre of over 70 people, whose bodies were dumped into mass graves just outside the town of Kilwa, in Haut Katanga, Democratic Republic of Congo (DRC). The African Commission also provided for a range of remedies, including asking the state to take measures to ensure that the bodies found in the mass graves were exhumed and placed in coffins to give the dead a dignified burial. The ACHPR also recommended that the DRC government should launch new criminal

¹⁷ Inter-Session Activity Report (June-November 2017) of Hon. Commissioner Lucy Asuagbor, presented at the 61st Ordinary Session of the African Commission on Human and Peoples’ Rights para 17

¹⁸ 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, the Nubian case, or the Ogiek case, among others.

¹⁹ ‘UN Basic Principles and Guidelines’, Adopted by General Assembly resolution 60/147, 16 December 2005, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>. See also Redress, *Reaching for justice, the right to reparation in the African human rights system*, (2013) Redress, London, UK, accessed from <http://www.redress.org/downloads/publications/1310reaching-for-justicefinal.pdf> on 18 August 2017.

²⁰ See for example, Communication 250/02 Liesbeth Zegveld and Mussie Ephrem/Eritrea, accessed on 12 August 2017 from <http://caselaw.ihrda.org/doc/250.02/view/en/#holding>.

²¹ Communication 393/10 – Institute for Human Rights and Development in Africa and Others v. Democratic Republic of Congo, on file with the authors.

investigations while taking all necessary measures to prosecute and punish agents of the state and Anvil Mining, a multi-national which at the material time, operated a mine at Dikulushi, which had provided logistical support to the armed forces of the DRC, the FARDC²².

It can be concluded that the Commission is willing to grant specific reparations to victims when there is an explicit request to that effect in the pleadings, as its jurisprudence over the years demonstrates. The onus is on the victims or their representatives to formulate specific demands which would allow the Commission to frame specific reparations in its recommendations to the state found to have violated Charter rights.

The Communications procedure, as one of its most effective tool, has rendered the work of the Commission tangible to the public and increased its visibility. Victims of human rights violations have a home-grown African human right body to which they can address themselves to obtain redress.

REFERRAL TO THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

It has also been put forward that the African Commission has been the initiator of human rights instruments and institutions on the continent²³. Interestingly, Article 5 of the Protocol on the Establishment of an African Court (Access to the Court) includes the African Commission as one of the bodies entitled to submit cases to the Court²⁴.

The first case which the Commission referred to the African Court concerned Libya in 2011. Three human rights organisations initiated the case against Libya before the African Commission, based on allegations of human rights violations on 28 February 2011, including killings of people participating in peaceful protests. The Commission decided that there had been 'serious and widespread' violations of human rights in Libya, prompting it to submit the case to the African Court. The Court, holding that in circumstances where the human rights situation demonstrated 'extreme gravity and urgency', found it befitting to order provisional measures against Libya, requiring it to end all acts that risked violating the right to life or physical integrity.

²² Paragraph 154 de 393/10 : (i) Demande à la République Démocratique du Congo de prendre toutes les mesures diligentes à l'effet de la poursuite et de la sanction des agents de l'Etat et du personnel de la Société Anvil Mining ; impliqués dans les violations constatées.

²³ C Odinkalu, Keynote speech on the first two decades of the African Commission, at the 30th Anniversary Celebrations of the African Commission, 2 November 2017, Banjul, The Gambia.

²⁴ Article 5: Access to the Court

Article 5 ACCESS TO THE COURT

1. The following are entitled to submit cases to the Court:

- a) The Commission
- b) The State Party which had lodged a complaint to the Commission
- c) The State Party against which the complaint has been lodged at the Commission
- d) The State Party whose citizen is a victim of human rights violation
- e) African Intergovernmental Organizations

2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.

3. The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.

After this first case, the Commission referred others to the Court, including the Ogiek case, under the complementary protective mandates of the two bodies, as provided for in Article 2 of the Protocol²⁵. With these cases, one can concretely see complementarity between the two institutions at work.

SPECIAL MECHANISMS: SPECIAL RAPORTEURS AND WORKING GROUPS

The African Commission currently has fifteen special mechanisms, a remarkable number, with the Special Rapporteurs and Working Groups covering an array of different thematic issues²⁶. It is to be noted that the African Commission has not created any country-specific mandate, unlike the UN Human Rights Council, which has 12 country mandates as at 1 August 2017, with five in Africa²⁷. In many instances, the establishment of special mechanisms, that is Special Rapporteurs and Working Groups, arose further to a variety of considerations, including the need to be doing something in the context of a thematic area and NGO lobbying.

It is very important to note that all Special Rapporteurs and Chairs of Working Groups are part of the membership of the Commission, serving as Commissioners. This practice, which may stem from the Commission's reluctance to entrust some responsibility to outsider experts is self-limiting and restrictive, impacting on the delivery of the special mechanisms. Another limiting factor is the inadequate budget provided to special mechanisms, which has created a situation whereby those which have been able to obtain external funding and support are able to deliver whereas others lag, struggling to live up to the expectations of their mandates.

To conclude, the Commission needs to carefully think through the thematic areas it deems pressing to respond to the needs on the continent in terms of human rights. The setting up of relevant special mechanisms, while encouraged, should bear in mind funding. Additionally, the Commission may consider appointing external Special Rapporteurs who are not part of its membership, with a view to alleviate the already heavy workload of Commissioners.

²⁵ Application No 006/2012 – African Commission on Human and Peoples' Rights v. Kenya, introduced in July 2012 and Decision on 26 May 2017.

²⁶ Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa (1996); Special Rapporteur on Rights of Women (1999); Working Group on Indigenous Populations/Communities in Africa (2000); Special Rapporteur on Freedom of Expression and Access to Information (2004); Special Rapporteur on Human Rights Defenders (2004); Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons (2004); Committee for the Prevention of Torture in Africa (2004); Working Group on Economic, Social and Cultural Rights (2004); Working Group on Specific Issues Related to the work of the African Commission (2004); Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa (2005); Working Group on Rights of Older Persons and People with Disabilities (2007); Working Group on Extractive Industries, Environment and Human Rights Violations (2009); Advisory Committee on Budgetary and Staff Matters (2009); Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV (2010); Working Group on Communications (2011).

²⁷ Central African Republic, Eritrea, Mai, Somalia and Sudan.

GRANTING OF OBSERVER STATUS TO CIVIL SOCIETY ORGANISATIONS

One mechanism used by the African Commission to formally acknowledge civil society and the work it does is through the granting of observer status. Since the establishment of the Commission, the granting of observer status allows NGOs to: (i) present shadow reports to the Commission, (ii) to have access to documents under certain conditions and (iii) to participate in the proceedings of the Commission by, for example, making oral contributions from the floor during ordinary sessions of the Commission.

As of the 60th Ordinary Session in May 2017, 511 NGOs had been granted observer status. The granting of observer status has been quite an uneventful procedure until The Coalition of African Lesbians (CALs) put forward its application in 2008. The application was rejected in October 2010, resubmitted in August 2014 and finally granted in April 2015 after a tight vote with five Commissioners voting in favour, three for deferment while the others were either absent or abstained.

In July 2015, in its decision on the 38th Activity Report of the Commission, the Executive Council however requested the Commission to consider “fundamental African values, identity and good traditions and to withdraw the Observer Status granted to NGOs which may attempt to impose values contrary to African values”. The Executive Council requested the African Commission to review its criteria for granting observer status and to withdraw the Observer Status granted to CALs.

Since then, the Commission adopted the Resolution on the criteria for granting and maintaining observer status to non-governmental organisations (NGOs) working on human and peoples’ rights in Africa²⁸. The resolution however brought no substantive change to the one previously adopted during the 25th Ordinary Session held in Bujumbura, Burundi, from 26 April - 5 May 1999.

In the meantime, the Centre for Human Rights, University of Pretoria, together with CALs, submitted a request for an Advisory Opinion to the African Court on 2 November 2015 under Article 4 of the Court Protocol. The Centre and CALs asked the court to clarify the nature of the ‘consideration’ by the African Union’s political organs, in particular the Executive Council of the activity reports of the African Commission. They contended that: (i) they have standing before the court to bring the request in that they are African Organisations recognised by the African Union and that (ii) the political organs have upheld the Commission’s independence and respect its role as an autonomous interpreter of the African Charter.

In its judgment dated 26 September 2017²⁹, the Court referred to the circumstances and subject of the request, including the Executive Council’s recommendation that the Assembly of the AU authorize the publication of the report only after the its update and incorporation therein of the proposals made by Member States. Two states, namely Ethiopia and Cote

²⁸ 361: Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples’ Rights in Africa, adopted at the 59th Ordinary Session, 21 October to 4 November 2016, Banjul, The Gambia.

²⁹ (No 002/2015)

d'Ivoire, intervened in this case. While referring to an earlier decision in another request for an advisory opinion by SERAP³⁰, where the question of what organisations are recognised by the African Union was addressed, the Court concluded that while the two organisations had observer status before the African Commission, they were not organisations recognised by the African Union and therefore have no standing before the court. Two important questions crop up: (a) which organisations have observer status with the AU and how does an organisation acquire status as a recognised organisation? (b) So, what next with the CALS observer status?

This is an issue the African Commission will have to tackle on its own. Would the commission comply with the request of the Executive Council? If it does so it compromises its status as an independent, autonomous treaty body. If it does not, what are the consequences? The answers are not available currently but whatever decision the Commission takes, it should ensure that its status as the premier human rights body on the African continent is not jeopardized.

GENDER PARITY AT THE AFRICAN COMMISSION

It would be remiss, before ending, if the African Commission were not commended regarding the current gender parity within its midst. The first batch of Commissioners in 1988 were 11 men elected by the State parties to serve on African Commission. The first woman Commissioner, Vera Duarte-Martins, from Cape Verde, was elected in 1993. As of 1 November 2017, we have six women and five men Commissioners, with a higher female representation ratio. Until 31 October 2017, the leadership was female, with both the Chair and the Vice-Chair of the Commission being women. Currently, there is parity within the leadership³¹. It is to be noted also that there have been at least seven women Chairpersons of the Commission in its thirty years.

However, a view has been expressed that there is no deliberate policy to nominate women as Commissioners and that the increase the number of women Commissioners at the African Commission appears to have been by chance rather than an imposition to attain gender parity³². There is a need to include a specific recommendation that the African Commission adopts gender parity as one of its basic principles.

CONCLUDING REMARKS

Over time, the African Commission has made use of different avenues to give effect to the rights in the African Charter. While the rich jurisprudence coming out of the Commission under its protective mandate indicates that its decisions have matured, there are still many people on the continent who do not know enough the Commission and what it can do, even

³⁰ Request for an advisory opinion by the Socio-Economic Rights and Accountability Project (SERAP) No. 001/2013 (26 May 2017).

³¹ The new bureau of the African Commission was elected in Banjul during the 61st Ordinary Session of the Commission. Commissioner Soyata Maiga, from Mali, is the chairperson while Commissioner Lawrence Murugu Mute, from Kenya, is the vice-chairperson.

³² O Ojhigo, Presentation at the GQUAL Conference: Changing the Picture of International Justice, 3 – 5 October 2017, The Hague, Netherlands.

thirty years down the line. This is cause for concern and making sure that people are aware of its existence and its work should remain one of the Commission's top priorities. However, one cannot but ask whether it is becoming a victim of its own success, with the political organs wanting to hold it in check, Whatever the case, the Commission needs to remain that body which provides reparations and hope to people on the African Continent when their rights are violated.