

By Ibrahima Kane

minority  
rights  
group  
international



# Protecting the rights of minorities in Africa

A guide for human  
rights activists  
and civil society  
organizations

## **Acknowledgements**

Minority Rights Group International (MRG) gratefully acknowledges the support of DFID and Trocaire EARO (East African Regional Office), and all of the other organizations and individuals who gave financial and other assistance for this publication, including the independent expert readers.

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The partner organizations gratefully acknowledge the assistance of the many individuals involved in the preparation of this guide, in particular Paile Chabane, MRG's International Human Rights Officer, Africa; Neil Clarke, Programme Assistant, ACHPR Project; and Gioreley Rios, MRG intern. Edited by Mandy Macdonald.

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recycled paper. *Minority Rights Advocacy in the European Union: A Guide for NGOs in South-East Europe* is published by MRG as a contribution to public understanding of the issue which forms its subject. The text and views of the authors do not necessarily represent in every detail and all its aspects, the collective view of MRG.

## **Minority Rights Group International**

Minority Rights Group International (MRG) is a non-governmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. Our activities are focused on international advocacy, training, publishing and outreach. We are guided by the needs expressed by our worldwide partner network of organizations which represent minority and indigenous peoples.

MRG works with over 150 organizations in nearly 50 countries. Our governing Council, which meets twice a year, has members from 10 different countries. MRG has consultative status with the United Nations Economic and Social Council (ECOSOC), and observer status with the African Commission on Human and Peoples' Rights. MRG is registered as a charity and a company limited by guarantee under English law. Registered charity no. 282305, limited company no. 1544957.

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# **Protecting the rights of minorities in Africa**

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**Published by Minority Rights Group International, March 2008**



### **ACDHRS**

The African Centre for Democracy and Human Rights Studies (ACDHRS) is a regional, independent non-governmental organisation, established in 1989, which aims to promote and protect human rights in Africa, by cooperating with as well as supporting, facilitating and encouraging the work of partners, through the development, strengthening, effective use and implementation of international and regional standards and mechanisms. [www.acdhrrs.org](http://www.acdhrrs.org)



### **CEMIRIDE**

The Centre for Minority Rights Development, CEMIRIDE, is an African NGO registered in Kenya working to secure the realization of minority and indigenous peoples rights through capacity building, public policy advocacy and strategic litigation and thereby ensure inclusive societies and address identity based conflicts. [www.cemiride.info](http://www.cemiride.info)

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- ECOWAS**
 **SADC**
 **The East African Community**
- SADC and The East African Community**



# Abbreviations

<b>ACHPR</b>	<b>African Commission on Human and Peoples' Rights</b>
<b>ACERWC</b>	<b>African Committee of Experts on the Rights and Welfare of the Child</b>
<b>ACRWC</b>	<b>African Charter on the Rights and Welfare of the Child</b>
<b>APRM</b>	<b>African Peer Review Mechanism</b>
<b>AU</b>	<b>African Union</b>
<b>CEDAW</b>	<b>Convention on the Elimination of All Forms of Discrimination against Women</b>
<b>CRC</b>	<b>Convention on the Rights of the Child</b>
<b>CSO</b>	<b>civil society organization</b>
<b>ECOSOCC</b>	<b>Economic, Social and Cultural Council of the African Union</b>
<b>ECOWAS</b>	<b>Economic Community of West African States</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights</b>

## Abbreviations

<b>ICPMWF</b>	<b>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families</b>
<b>ICERD</b>	<b>International Convention on the Elimination of All Forms of Racial Discrimination</b>
<b>ICESCR</b>	<b>International Covenant on Economic, Social and Cultural Rights</b>
<b>ILO</b>	<b>International Labour Organization</b>
<b>MRG</b>	<b>Minority Rights Group International</b>
<b>NEPAD</b>	<b>New Partnership for Africa's Development</b>
<b>NGO</b>	<b>non-governmental organization</b>
<b>OUA</b>	<b>Organization of the African Union</b>
<b>PAP</b>	<b>Pan-African Parliament</b>
<b>PSC</b>	<b>Peace and Security Council</b>
<b>RECs</b>	<b>regional/sub-regional economic communities</b>
<b>SADC</b>	<b>Southern African Development Community</b>
<b>SADC-CNGO</b>	<b>SADC Council of Non-Governmental Organizations</b>
<b>UN</b>	<b>United Nations</b>
<b>UNDM</b>	<b>UN Declaration on Persons Belonging to National or Ethnic, Religious and Linguistic Minorities</b>
<b>UDHR</b>	<b>Universal Declaration of Human Rights</b>
<b>UNESCO</b>	<b>United Nations Educational, Scientific and Cultural Organization</b>
<b>WACSOF</b>	<b>West African Civil Society Forum</b>
<b>WGIP</b>	<b>Working Group of Indigenous Peoples</b>
<b>WGM</b>	<b>UN Working Group on Minorities</b>

# Glossary

**advocacy** – verbal support or argument for a cause or policy

**amicus curiae** – impartial adviser in a court of law

**comparative law** – the comparing of different legal systems with the purpose of ascertaining similarities and differences

**complainant** – a person who files a case before a judicial or a human rights body

**international law** – the body of rules established by custom or treaty and agreed as binding by nations in their relations with one another

**jurisconsult** – jurist, lawyer

**jurisprudence** – term used for case law and to describe the body of law that is established through decisions of courts or the court system

**litigation** – the process of taking a matter before a court of law for a legal decision

**natural or legal persons**– individuals or civil society organizations

**seized of** – apprised of, aware of, has been considering

**shadow report** – additional information submitted to a treaty monitoring body by NGOs and other interest groups, which the government’s report may not have included, in order to give the full picture to that monitoring body on the human rights situation on the ground in that particular country. This is a process within the State Party reporting obligation under international and regional human rights treaties

**State Party** – A State that has ratified a treaty and is therefore bound to the obligations therein

# Acknowledgements

This document was prepared and published as part of a project entitled **Strengthening the Capacity of Minority and Indigenous Peoples in Africa to Advocate for the Implementation of African Regional and International Standards**, carried out in partnership by Minority Rights Group International (MRG), UK, the Centre for Minority Rights Development (CEMIRIDE), Kenya, and the African Centre for Democracy and Human Rights Studies (ACDHRS), The Gambia. The aim of this project is to enable ethnic, religious and linguistic minorities in Africa to be aware of and demand their rights and to challenge inequality, by increasing and improving the use of African and international legal standards and mechanisms.

This guide was prepared in order to outline regional opportunities for minority rights protection in Africa, highlighting the legal as well as the institutional framework that is in place. It is designed to be accessible to representatives of minority communities and civil society organizations (CSOs).

The guide was prepared with the financial support of DFID. The contents of the document are entirely the responsibility of the project partners and in no way represent the views of DFID.

## Acknowledgements

The partner organizations gratefully acknowledge the assistance of the many individuals involved in the preparation of this guide, in particular Paile Chabane, MRG's International Human Rights Officer, Africa; Neil Clarke, Programme Assistant, ACHPR Project; and Gioreley Rios, MRG intern. Mandy Macdonald was the copy editor.



# Foreword

Unlike the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights (hereinafter referred to as the African Charter) and the subsequent African human rights treaties<sup>1</sup> do not consider minorities as a legal category recognized in African human rights law. In a continent where most of the armed conflicts between 1963 and 1998 which affected more than 60% of the population were due to severe identity or religious differences, this seems hardly understandable.<sup>2</sup> It is all the more incomprehensible if we consider that the regional human rights protection system, set up thanks to the activism of President Léopold Sédar Senghor, is aimed mainly at addressing "Africa's **real needs**".<sup>3</sup>

Is this omission the result of a deliberate attempt by those who drafted these various conventions to ignore the existence of minorities completely, or does it reflect the realistic approach which, in the late 1970s, required "a common [legal] denominator" to be established among African countries, prior to a political, economic and social evolution that could pave the way for a more effective protection of collective rights taking place?<sup>4</sup>

This second option is the one which seems to have prevailed, because, as emphasized by Chairman Kéba Mbaye regarding the African Charter, "the writers [of the Charter] were satisfied with making vague hypothe-

ses with regard to several aspects. This approach ... was intended to avoid frightening off the representatives of the States and to give way to a dynamic action by the African Commission on Human and Peoples' Rights."<sup>5</sup> This implied that minorities could, by taking bold initiatives, assert before the African Commission on Human and Peoples' Rights (ACHPR) a right to the legal status recognized to certain groups, i.e. that of "oppressed people".<sup>6</sup>

However, the democratization process African States went through in the late 1990s, and in particular the advent of the African Union – which believes the development of African societies should enable Africans "to assume their identity and condition instead of having to be burdened by them"<sup>7</sup> – opened a new era for minorities, as African States clearly committed themselves to promoting peace, safety and stability within the continent (Constitutive Act of the African Union, Article 3 (f)) and to ensuring that their actions are always based on such essential principles as respect for the sacrosanct nature of human life (Constitutive Act, Article 4 (o)), respect for democratic principles, human rights, the rule of law and good governance (Article 4 (m)), the promotion of equality between men and women (Article 4 (l)), and the condemnation and rejection of impunity.

The new environment not only creates the conditions for an effective consideration of the situation of minorities by African human rights law, but also, and more importantly, offers the possibility to all those who are directly interested in the issue to display more creativity and imagination in using the current regional legislation in order to promote and protect the rights of minorities in Africa.

This guide is precisely designed to provide all those fighting for the recognition of the inalienable rights of minorities, including organizations created by and for minorities, human rights activists and lawyers, with legal tools that can enable them to cope with the numerous violations of their rights that they encounter on a daily basis.

It is also designed to be an effective instrument in pleading the cause of human rights before African regional or sub-regional political institutions put in place to contribute to the promotion of human rights in general and of minorities in particular.

## Foreword

What is a minority? What are the rights minorities can claim, in the absence of a clear legal definition of “minority”, within African States? What are the regional or sub-regional bodies that can be turned to with regard to the implementation of, or advocacy for, these rights? How can the organizations promoting or defending the rights of minorities usefully employ these bodies to promote and defend their cause? How to ensure that the decisions taken by regional jurisdictions and political authorities are effectively implemented? This guide tries to provide useful insights into these questions.

The ambition of this guide is to be not only a useful instrument helping in the promotion and defence of the rights of minorities but also an invaluable tool in the training of African activists on the law regarding minorities in Africa.

Finally, MRG and its partners hope this guide will lay the foundations for a productive debate on the protection of the rights of minorities in Africa and will pave the way for the imminent elaboration of a treaty which would take into account the specific rights of the legal category of minorities.



# **Part 1**

# **Introduction to the rights of minorities in international human rights law**

## Definition of minority

The concept of **minority**, which is our main concern, is agreed by most specialists to refer principally to the recognition that different groups can exist in a particular territory, with their differences based on culture, language, and religion.

These groups exist because of the subjective criteria of self-definition or identification. However, it is vital to note that people can belong to several different groups at the same time and so there should also be objective criteria that could be used to make the determination – for example, the length of time during which a group has inhabited the same place.

Where these groups exist, some will be in a position of being in a minority, usually on a numerical basis.

However, it is important to emphasize that it is those minority groups which are marginalized that will need minority rights protection. This is because a numerical “minority” can, in some cases, be in a position of domination, as was the case under the apartheid system in South Africa. Universally, simply belonging to the “majority” is not a guarantee of respect for one’s rights. In Latin America, indigenous people in Bolivia and Guatemala, though in the majority, do not enjoy certain of their basic rights.

The state of **marginalization** or **vulnerability**, **social exclusion**, and even **persisting discrimination** or being in a **situation of subordination** would then justify the undertaking of extra protection measures.

The definition or identification of **indigenous peoples**, as adopted by the Working Group of Experts on Indigenous Populations/Communities of the ACHPR in its report of 2005, has several overall characteristics. These include the cultures and ways of life of the community, which would be significantly different from those of the mainstream society. These cultures and ways of life would also be under threat or at risk of extinction. Furthermore, the survival and way of life of these communities must also be linked to their traditional land and the natural resources there. They often suffer from discrimination because they are considered to be less developed than mainstream society. Consequently, they are also discriminated against and marginalized with respect to political, social and economic participation, even in decisions that directly affect them.

## Legal elements of the definition and distinction of a minority

The UN Declaration of 1992 on Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM) is the only document hitherto adopted to ensure, among other things, “the enforcement of the rights of people belonging to minorities”. It only lists a set of legal principles aimed at making up for the restrictive international human rights norms already in force and which indirectly guarantee the respect of the rights of minorities.

The International Covenant on Civil and Political Rights (ICCPR) is the only international treaty to date that addresses the minority issue. It does so in its Article 27 by imposing on States in which there are “ethnic, religious or linguistic” minorities the duty to abstain from depriving people belonging to these minorities of the right to “enjoy their own culture, to profess and practise their own religion, or to use their own language”.

### General legal elements

The possession and exercise of these rights rests on two basic principles contained in the Universal Declaration of Human Rights (UDHR): that

people are born **free and equal in dignity and in rights** (Article 1) and that everyone can enjoy these rights and liberties regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2).

These principles have been stated in several international and regional legal instruments subsequent to the UDHR in the effort to ban all forms of discrimination, distinction, exclusion, restriction or preference based on race, colour, language, religion, national or social origin, and so on.

At the international level, these include:

- the International Covenant on Civil and Political Rights (ICCPR) (Articles 2 (1) and 26);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 2 (2));
- the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD) (Article I);
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Article 1);
- the Convention on the Rights of the Child (CRC) (Article 2);
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMWF) (Articles 1 (1) and 7);
- ILO Convention No. 111 concerning discrimination in employment and occupation (Article I);
- the UNESCO Convention on the fight against discrimination in the education sector (Article I);
- the Declaration on Race and Racial Prejudices adopted by UNESCO in 1978 (Articles 2 and 3);
- the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (Article 2).

Clauses to this effect also exist in regional treaties, notably the American Convention on human rights (Article I), the African Charter (Article 2), and the African Charter on the Rights and Welfare of the Child (ACRWC) (Article 3).



Principles of equality and non-discrimination are so important in international human rights law that no derogation is permitted (ICCPR, Article 4). This probably explains the move to adopt a broad definition of the term “discrimination”, which, for the UN Human Rights Committee, is tantamount to “distinction”, “exclusion”, “restriction” or “preference” notably based on race, language, religion, etc. (General Observations of the UN Human Rights Committee on non-discrimination, no. 18, para. 7). It is, however, true that this principle “does not entail an identical treatment in all cases” and that States are often led to adopt measures in favour of underprivileged or disadvantaged groups with a view to mitigating or eliminating conditions that contribute to protracted discrimination. To be legally valid, such positive measures must actually be temporary.

### Legal elements specific to minorities

Aside from these standards of general nature, there are others set out to protect national, ethnic, racial or religious groups and ensure special protection for people belonging to a minority group. In this respect, we can mention:

- the Convention for the Prevention and Suppression of Genocide (CPSG) (Article 2);
- the ICERD (Articles 2 (2) and 4);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 13 (1) (3));
- the CRC (Article 30);
- the UNESCO Convention concerning the fight against discrimination in the education sector (Article 5);
- the ICPMWF (Article I, para. 1);
- the UNESCO Declaration on Race and Racial Prejudices (Article 5).

It is the ICCPR, the CRC and the UNDM that have extensively introduced explicit principles relating to minorities. These are:

- the people to whom protection is granted must belong to a **group** and must have **in common** a culture, religion and/or language;
- they might not be nationals or permanent residents in the State Party;
- the rights recognized for them are **individual rights** whose observance depends on “the extent in which the **minority group maintains its culture, language or religion**”,<sup>8</sup>

- the State Party's duty is to "ensure the **survival** and **permanent development** of the cultural, religious and social identity" of the group in question in a bid to enrich the entire society.<sup>9</sup>

It should be noted that Article 27 of ICCPR only addresses minority issues, while the CRC does not, in the undertaking of protection measures, make any distinction between persons belonging to a minority group and persons of indigenous origin.

As to the protection of their cultural identity and their participation in their country's cultural life, people belonging to minority groups can also rely on the following provisions:

- ICERD, Article 5 (e) (vi);
- ICESCR, Article 15;
- CEDAW, Article 13 (c);
- CRC, Articles 17, 23 (3), 29 (1) (c) and 31;
- ICPMWF, Articles 17 (1), 26 (1) (a) and (2), 31, 34, 36, 40, 43(1) (g), 43(2) and 43(3), 45 (1) (d) and 45 (3), 64, 67 (2), 70 and 79.

Concerning more specifically the enjoyment of the right to **religion**, the following provisions provide additional protection to minorities:

- ICERD, Article 5 (d) (vii);
- ICCPR, Article 4 (1), Article 18;
- ICESCR, Article 13 (3);
- CRC, Article 14;
- ICPMWF, Article 12, Article 13 (2) and 3 (d).

In the case of the protection of **linguistic rights**, people belonging to a minority group can invoke the following provisions:

- ICCPR, Article 14 (3) (a) and (f);
- CRC, Articles 17 (d), 29 (1) (c), 40 (1) and (2) (b) (vi);
- ICPMWF, Articles 16 (5) and (8), 18 (3) (a) and (f), 22 (3), 33 (3) and 45 (2–4).

The above provisions have been supported by basic principles stated in a non-binding instrument, the UNDM of 1992, which recognizes a certain number of specific rights for people belonging to minorities, including:

- protection of their existence and their national, ethnic, cultural and linguistic identity (Article I);
- the right to enjoy their own culture, possess and practice their own religion and use their own language in private and in public (Article 2, para. 1);
- the right to participate in the cultural, religious, social, economic and public life of their country of abode (Article 2, para. 2);
- the right to take part, at the national and regional level, in the taking of decisions concerning them (Article 2, para. 3);
- the right to create and manage their own associations (Article 2, para. 4);
- the right to establish and maintain free and peaceful contacts with other members of their group and with people belonging to other minorities, both in their own country and beyond (Article 2, para. 5);
- the possibility to exercise their rights freely, individually but also together with other members of their group, without discrimination (Article 3).

UN Member States commit themselves to undertaking certain measures aimed at promoting and protecting those rights. These measures include:

- the creation of conditions likely to enable minorities to express their characteristics and develop their culture, language, traditions and customs (Article 4, para. 2);
- providing the possibility for minorities to learn their mother tongue or undergo training in their own language (Article 4, para. 3);
- encouraging the knowledge of the history, traditions, language and culture of minorities living in their territory, and training of people belonging to minorities in the knowledge of society as a whole (Article 4, para. 4);
- encouraging minorities' participation in economic progress and development (Articles 4, para. 5);
- the consideration of the legitimate interests of minorities during the drafting of national policies and programmes and in the planning and implementation of cooperation and assistance programmes (Article 5);

- fostering cooperation with other States on issues related to people belonging to minorities, notably by exchanging information and experience data so as to promote mutual understanding and trust (Article 6);
- promotion of respect for the rights stated in the Declaration (Article 7).

From the foregoing it can be concluded that:

- despite the lack of a legal definition of “minority”, the current human rights protection system assures an appropriate legal protection for people belonging to this “new” legal category.
- the diversity of sources of rights for people belonging to minorities in international law on human rights grants it a universal character.
- the legal duties of States party to the different legal instruments are based on explicit legal principles.
- the specific rights of people belonging to minorities coexist with other universal human rights, which are categorized as civil, political, economic, social and cultural rights.
- the rights of minorities are also individual and collective rights that harmoniously complement one another.
- there is no major difference between the rights of minorities and the rights of indigenous populations/communities, even though the latter are clearly collective.

## **Part 2**

# **The legal framework for the promotion and protection of minorities' rights in Africa**

# **Chapter 1**

## **Regional standards**

When speaking of regional standards, reference is made to the Constitutive Act of the African Union, which is the basic legal agreement that governs the relationship between and behaviour of African States including respect for human rights, the African Charter and other regional human rights treaties.

## **The Constitutive Act of the African Union**

The Constitutive Act of the African Union is the regional treaty of regional integration adopted in July 2000. It replaced the Charter of the OAU, which African States had concluded in 1963 in a bid to eliminate all forms of colonialism on the continent and to defend the sovereignty, territorial integrity and independence of the newly independent African States.

The African States through the AU undertook to:

- promote and protect human and peoples' rights, and strengthen democratic institutions and culture;
- promote good governance and the rule of law;
- promote peace, security and stability on the continent.

The action of the AU is based on essential principles such as the sanctity of human life, democratic principles, human rights, the rule of law and good governance, the promotion of gender equality, women's participation in the decision-making process (notably in the political, economic and socio-cultural domains), and the condemnation and rejection of impunity.

The famous principle of the OAU Charter relative to non-interference in the internal affairs of African States was replaced by that of **non-indifference** to problems confronting African countries. Thus the Union, as an institution, can now monitor the application of these standards by Member States and, if necessary, can intervene in a Member State in certain serious circumstances, such as war crimes, genocide and crimes against humanity, as well as serious threat to the constitutional order, with a view to restoring peace and stability. It can also impose sanctions on those States that do not comply with its decisions and policies. These measures can lead to their suspension – for example, in the case of an unconstitutional change of government.

The broad nature of the African Union's objectives and principles reflects a firm resolve on the part of the continental body, basically in the aftermath of the Rwandan genocide of 1994, to compromise itself no longer concerning the protection of human rights in general and the rights of people belonging to minorities in particular.

## The African Charter on Human and Peoples' Rights

The first regional standard for the promotion and protection of human rights in Africa was the African Charter on Human and Peoples' Rights, adopted in 1981.

Recalling that “freedom, equality, justice and dignity are key objectives essential to the achievement of the legitimate aspirations of African people”, the Charter seeks to “offer new conditions of existence to African peoples”

by drawing on the “virtues of historical traditions and the values of African civilization” (Preamble, paras 2, 4).

From a normative standpoint, the African Charter is unique in three main respects:

- a reflection of the indivisibility and interdependence of civil, political, economic and social rights, based on the fact that they cannot be dissociated in their conception as well as universality “and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights” (Preamble, para. 7);
- a juxtaposition of rights and duties justified by the fact “that in African societies, there is no clash between rights and duties or between individuals and community and that they are harmoniously interwoven”<sup>10</sup> and, in particular, that “the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone” (Preamble, para. 6);
- a juxtaposition of individual and collective rights built on the assumption that if “the fundamental human rights stem from the attributes of human beings ... the reality and the respect of peoples’ rights should necessarily guarantee human rights” (Preamble, para. 5).

Like UN treaties, the African Charter does not refer to minorities as a legal category of people to protect. From this viewpoint, the human rights that people belonging to minorities in Africa can claim do not differ from those proclaimed by other international instruments. The African Charter guarantees their right to non-discrimination (Article 2) and their right to equality and equal protection under the law (Article 3), and even adds new rights such as the right of equal access to public property and services (Article 13, para. 3). It also guarantees the right to freedom of movement and residence within their country’s borders, the right to leave any country including his or her own and to return to it, and the right to seek asylum, and states that mass expulsion of non-nationals “which is aimed at national, racial, ethnic or religious groups” shall be prohibited (Article 12).

The African Charter also protects minorities’ right to respect of human dignity (Article 5). Practising the religion of one’s choice is guaranteed (Article 8) and “anybody” can freely take part in the cultural life of the community (Article 17, para. 2).



The African Charter does not allow any suspension of any of the rights it protects, even in exceptional circumstances, nor does it authorize the States Parties to express reservations regarding the interpretation or the application of its provisions. Minority groups are therefore assured of legal protection of their rights at any time and in any circumstances.

The provisions of the African Charter stipulating that the exercise of certain rights may in principle be limited by national laws has been interpreted by the ACHPR as “the expression of the principle whereby the restriction of human rights is not considered as a solution to national problems”. In its view, “the only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27, para. 2: namely, that rights of the Charter “shall be exercised with due regard to the rights of others, collective security, morality and common interest”. In other words, “the reasons for possible limitations must be founded in a legitimate state interest and limitations of rights must be strictly proportionate and absolutely necessary for the advantages which are to be obtained ... Even more important, a limitation may never have as a consequence that the right itself becomes illusory.”<sup>11</sup>

The African Charter enables the ACHPR – the body in charge of monitoring the implementation of its provisions – to take into consideration the body of international and comparative law on human rights, all other international and regional treaties, African practices consistent with international principles on human rights (African Charter, Articles 60 and 61), etc.

Concerning collective rights, the African Charter enshrine peoples' right to:

- equality (Article 19);
- existence (Article 20);
- free possession of their riches and natural resources (Article 21);
- economic, social and cultural development in the strict respect of their liberty and identity (Article 22, para. 1);
- development (Article 22, para. 2);
- peace and security (Article 23);
- a satisfactory environment conducive to their development (Article 24).

As far as duties are concerned, everyone is obliged to:

- respect and consider their fellow beings without any discrimination whatsoever and share with them relationships likely to promote, preserve and strengthen mutual respect and tolerance (Article 28);
- serve their national community by putting their physical and intellectual capacities at its service (Article 29, para. 2);
- not undermine State security (Article 29, para. 3);
- preserve and strengthen social and national solidarity, mainly when the latter is in jeopardy (Article 29, para. 4);
- see to the preservation and strengthening of positive African cultural values in a spirit of tolerance, dialogue and consultation ... and contribute to the promotion of society's moral health (Article 29, para. 7).

For its part, the government must, as part of the protection of human rights, promote and protect the morality and traditional values recognized by the community.

From the foregoing it can be concluded that:

- The African Charter is a legal framework conducive to the promotion and protection of the rights of people belonging to minorities in that it harmoniously integrates the application of individual and collective rights.
- The African Charter does not make any clear distinction between the notions of “minority” and “indigenous population/people”, though the ACHPR has recently posited that the rights of minorities “are formulated as rights of individuals, while the rights of indigenous people are collective rights”.<sup>12</sup>

# The African Charter on the Rights and Welfare of the Child

Like the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted with the aim of ensuring that African States recognize certain specificities relative to the protection of the child. For this reason, it differs from the Convention on the Rights of the Child on the following points:

- the definition of the child, who is considered in Africa as a person under 18 years old (Article 2);
- the protection of children against harmful social and cultural practices;
- the protection of family by the State;
- the parents' level of responsibility over the child;
- the protection of the child against forced recruitments;
- imposing duties on the child;
- the protection of the child against all forms of discrimination, which is more restricted in Africa than under the CRC;
- the existence of many claw-back clauses in the provisions of the Charter;
- the non-existence of the right to social security for the child and special protection for children belonging to minority groups.

Nonetheless, the ACRWC is an important treaty for the promotion and protection of children belonging to national minorities, in the sense that it:

- very clearly prohibits discrimination based on cultural identity (Article 3; Article 26, paras 2–3);
- aims to safeguard the identity and culture of the child (Article 9, paras 1 and 3; Article 11, para. 2 (b)–(d), (g); Article 12; Article 13, paras 1 and 2; Article 17, para. 2(ii); Article 21, paras 1 and 2; Article 23, para. 3; Article 25, para. 3) and, especially, imposes duties on children (Article 31) and parents (Article 20, para. 1).

Lastly, the ACRWC empowers the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) to follow, in the implementation of the relevant provisions of the treaty, international and comparative law on human rights and other legal instruments adopted in the framework of the United Nations and by African States, and to draw inspiration from “African values and traditions” (Article 46). This facilitates adequate protection of the rights of children belonging to minority groups and indigenous populations or communities.

## **The African Convention on the Conservation of Nature and Natural Resources**

Adopted in 1968 by the OAU, the African Convention on the Conservation of Nature and Natural Resources – the Convention of Algiers – is a treaty whose main objective is to “put the continent’s human and natural resources at the service of African people’s progress in all domains of human activity” (Preamble), notably by:

- improving the protection of nature;
- promoting the conservation and sustainable use of natural resources.

The application of the convention is based on people’s right to a satisfactory environment conducive to their development, and the State’s duty to ensure that people’s needs in matters of development and environment are addressed in a sustainable, fair and equitable manner (Article 3).

The treaty imposes important obligations on States in terms of nature and natural resources conservation. States are obligated, among other things, to:

- prevent soil deterioration and adopt integrated strategies for the conservation and sustainable management of land-based resources,

including soil, vegetation and hydrological processes, and for land policies that take into account the rights of local communities (Article 6);

- Manage water resources and make sure the quality and quantity of these remain at the most satisfactory levels, in order to prevent an overuse detrimental to communities and to the State (Article 7);
- Preserve local communities' traditional and ownership rights and demand the prior consent of the communities concerned before any access and use of the traditional knowledge (Article 17, paras 1 and 2).

## The Cultural Charter for Africa

The Cultural Charter for Africa, adopted in July 1976, is an additional milestone in the OAU's unremitting struggle against colonialism.

Its objectives seek, among other things, to:

- liberate the African peoples from socio-cultural conditions that impede their development in order to recreate and maintain the sense and will for development;
- rehabilitate, restore, protect and promote the African cultural heritage;
- assert the dignity of Africans and of the popular foundations of their culture;
- combat and eliminate all forms of alienation, cultural suppression and oppression everywhere in Africa;
- encourage cultural cooperation among the States with a view to strengthening African unity;
- promote popular knowledge of science and technology in each country as a necessary condition for the sustainable management of natural resources;
- develop all dynamic values in the African cultural heritage and reject any element which is an impediment to progress (Cultural Charter, Article 1).

The most remarkable aspect of this treaty is that the achievement of its objectives depends on principles as important as:

- access of all citizens to education and culture;
- liberation of the creative talents of the people and respect of the freedom to create;
- respect for specificities and national authenticities in the field of culture;
- exchange and dissemination of cultural experiences among African States (Cultural Charter, Article 2).

The Cultural Charter contains a list of principles that should guide the African States' policies in the cultural field and the identification of priorities with regard to cultural development.

They include:

- respect of the cultural diversity of States as a factor in creating “balance within the nation and a source of mutual enrichment among the various communities” (Article 3), and a source of “unity and an effective weapon for genuine liberty [and] the effective responsibility ... of the people” (Article 4);
- the fact that the assertion of national identity must not be at the cost of impoverishing or subjecting different cultures within the State (Article 5).

As regards the priorities in the cultural policy field, African States undertake to:

- transcribe, teach and develop the use of national languages;
- collect, conserve, use and disseminate information on the oral tradition;
- adapt educational curricula to development needs and to national and African socio-cultural realities;
- protect creative artists and cultural assets (Article 6, para. 1).

This will be done through:

- the introduction and intensification of teaching in national languages;

- the creation of appropriate institutions for the development, preservation and dissemination of culture;
- the sensitization and mobilization of all citizens to ensure their willing participation in cultural activity (Article 6, para. 2).

For such a policy to succeed, African States also undertake to:

- create conditions enabling their peoples to participate fully in the development and implementation of cultural policies;
- defend and develop the peoples' culture (Article 8, paras (a)–(b));
- prepare laws aimed at protecting cultural assets (Articles 26–9);
- strengthen inter-African cultural cooperation.

The Cultural Charter recognizes both individual (citizens') and collective (peoples') rights.

## The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa has been drafted to accelerate the elimination of discrimination and practices harmful to women in Africa.

Like all human rights treaties, the Protocol states the principles of non-discrimination and respect for women's dignity. It addresses almost all aspects of women's life; however, it does not make specific mention of the concerns of women belonging to minority groups or indigenous peoples/communities. However, it insists on:

- the promotion of peace through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimize and exacerbate the persistence thereof and tolerance of violence against women (Article 4, para. 2(d));
- the protection of women facing harmful practices or any other forms of violence, abuse, and intolerance (Article 5);
- the protection of women in armed conflicts (Article 11);
- women's rights to a healthy and sustainable environment (Article 18).

The Protocol also outlines legislative, institutional and other measures that States Parties are required to adopt in both public and private spheres to accelerate the implementation of its provisions.



## Chapter 2

# Regional economic communities' treaties

The inclusion of principles for the protection of human and peoples' rights in the legal instruments of the African regional economic communities (RECs) is a very recent phenomenon. It is linked to the fact that the creation of these communities, the purpose of which is to "raise the living standard of [their] peoples, maintain and increase economic stability, strengthen relations between [member] States and contribute to the progress and development of the African continent",<sup>13</sup> was backed up by the establishment of common legal rules to enable these entities to manage rather complicated political, economic and social integration processes.

Today, most of the RECs have set standards that are so important that they have become a human rights protection framework as appropriate as the regional system described above. For the purpose of this guide, we will limit our analysis to the economic communities of East, West and Southern Africa, which are the oldest and have the most elaborate operating rules.

The treaties establishing most of these RECs refer to the African Charter (ECOWAS revised Treaty, Article 4, para. (g); EAC Treaty, Article 6, para.

(d)) and base the functioning of their organs on the principles of democracy, the rule of law and respect for peoples' rights and fundamental freedoms.

The treaties and their numerous protocols also contain provisions relative to:

- non-discrimination (ECOWAS revised Treaty, Article 59; ECOWAS Protocol on democracy and good governance, Article 1 (g)) and gender equality (Article 40);
- freedom of movement of persons, goods, right of abode and the right of establishment (ECOWAS revised Treaty, Article 3 (2) (d) (iii); EAC, article 104);
- economic, social and cultural rights such as the rights to education (ECOWAS revised Treaty, Article 60), health (EAC, Article 118; SADC Protocol on health; SADC Charter on basic social rights, Article 12), culture (ECOWAS revised Treaty, Article 62; EAC, Article 119; SADC Charter on basic social rights), practising the religion of one's choice (ECOWAS Protocol on democracy and good governance, Article I (f)), environmental protection (ECOWAS revised Treaty, Articles 29–31), intellectual property (EAC, Article 103) and development (SADC Treaty, Article 5).

The Economic Community of West African States (ECOWAS) obliges its Member States to ensure a fair distribution of resources and income in order to step up national cohesion and solidarity (ECOWAS Protocol on democracy and good governance, Article 27, para. 4). Also, considering that education, culture and religion are key factors essential to development, peace and the stability of each Member State, the sub-regional body commits the Member States to:

- respecting and developing the culture of every group of people in their country (ECOWAS Protocol on democracy and good governance, Article 31 (1));
- instituting permanent structures of consultation at the national level in a bid to eliminate or prevent any religious conflict and foster religious tolerance and concord (ECOWAS Protocol on democracy and good governance, Article 31 (3)). In this framework, ECOWAS is even assigned to play a role of support, notably through the

holding of periodic consultation meetings between the religious structures of the Member States (ECOWAS Protocol on democracy and good governance, Article 31 (4));

- staging periodic cultural events among them (ECOWAS Protocol on democracy and good governance, Article 31 (2)).

The model treaty in this field is that of the East African Community (EAC) of 1999, which compels the States Parties to:

- promote cultural activities and the conservation, protection and development of their cultural heritage, including historical materials and antiquities;
- develop and promote indigenous languages, particularly Kiswahili as a common language;
- control the cross-border trade in ethnographic assets and develop a common approach and cooperation with a view to curbing the illicit trade in cultural property;
- ratify international treaties relative to culture, notably the Hague Convention on the Protection of Cultural Property in case of Armed Conflict and the UNESCO Convention on ways to prevent and ban the importation, exportation and illicit transfer of cultural property;
- promote East African identity.



# **Part 3**

# **Advocacy and litigation strategies**

# **Chapter 3**

## **Working with bodies responsible for the promotion and protection of the rights of minorities in Africa**

The primary goal of any regional human rights system is to ensure the effective protection of human and peoples' rights in States Parties. Thus, the efficiency of the system depends on the capacity of the body (or bodies) in charge of monitoring the respect of the said rights at regional level, effectively to prevent the violation of rights or react rapidly to violations and to make sure that the decisions taken are fully implemented.

The system's efficiency is also dependent on the nature of relations between the State and other actors involved in activities for the promotion and protection of these rights in its territory.

The young African human rights system fulfils these requirements by instituting procedures combining an approach based on the cooperation of

Member States with a quasi-judicial and judicial approach, through which the basis of an open and constructive dialogue between the different actors intervening at national level in the promotion and protection of peoples' rights is established.

The ACHPR, ACERWC and the African Court for Human and Peoples' Rights are the organs specially created to provide direct support to the different institutions of the African States (Executive, Legislative and Judiciary) for the effective application of the African Charter and other African treaties on human and peoples' rights to which they adhere.

The ACHPR and the ACERWC perform their monitoring functions through procedures for the review of periodic State reports, promotional visits, fact-finding missions, inquiry into individual complaints and normative activities, while the African Court has the more restricted but fundamental role of examining complaints about the violation of relevant provisions of these treaties. These functions are discussed in Chapter 4.

The RECs have at the same time established judicial and political mechanisms responsible for applying human rights standards which they have adopted in order to support the integration processes that they have initiated. These are discussed in Chapter 4.

At continental level, the organs of the African Union have oversight responsibility over the human rights system by monitoring the work of the regional bodies and ensuring the effective implementation by States of their recommendations and decisions (see Chapter 5). They also establish new legal standards in order to strengthen the protection of human rights on the continent.

Such a system is definitely an adequate platform to advocate for the cause of people belonging to minority groups or indigenous peoples/communities and, if need be, provide them with better protection.

Advocacy and litigation are important techniques of human rights promotion and protection.

**Advocacy** in the field of human rights mainly seeks to:

- highlight a particular problem as coming under the scope of human rights;
- encourage States Parties to adopt a particular regime of promotion and protection of these rights;
- engage States Parties to give effect to the undertakings made under a treaty;
- cast light on specific or systematic breaches of human rights;
- sensitize public opinion on the realities of human rights violation(s);
- educate and inform the population on the content of these treaties and the legal obligations of States Parties;
- obtain reparations for damages caused by any violation(s).

**Litigation** in human rights seeks to:

- trigger the effective application of an existing law;
- oblige the incriminated State to comply with international standards compelling it to apply good practices;
- seek clarity regarding an existing law;
- test rules of procedures.

The complainant should take the following factors into account:

- the specific objectives to be achieved through litigation (make the problem known or conduct political lobbying);
- the impact of the issue on the State, the community and the other stakeholders concerned;
- society's perception of the issue and possible hostility;
- the difficulty of obtaining evidence to buttress the complaint;
- the unavailability of resources;
- the fear of "backlash";
- the inefficacy of the sanctions that might be imposed;
- the level of knowledge of the judges on the issue being examined.

Once these problems are resolved, another crucial point is the choice of the body to which the matter will be referred for adjudication. The following factors should be taken into account:



- preference for the African human rights bodies over the bodies of the UN system;
- the importance of the applicable law;
- procedural elements (court costs, deadline for obtaining a ruling, the possible intervention of a third party, the rules governing the production of evidence, exhaustion of the national means of redress, and pleading methods);
- the type of reparation sought.

# Chapter 4

## Monitoring bodies at regional level

The regional-level monitoring bodies are as follows:

As judicial and quasi-judicial bodies:

- the ACHPR;
- the ACERWC;
- the African Court on Human and Peoples' Rights.

As political organs:

- the Executive Council of the African Union;
- the African Union Assembly of Heads of State and Government.

## The quasi-judicial bodies

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

The ACHPR, which was created to “promote human and peoples' rights and ensure their protection in Africa”, is also in charge of interpreting the

provisions of the African Charter and implementing, at the request of the main organ of the African Union, any necessary action with respect to human rights on the continent.

The ACHPR is composed of 11 commissioners elected by the Summit of Heads of State and Government of the African Union for a renewable mandate of six years. According to the African Charter, their selection is based on “their high moral standards and their impartiality . . . [their] competence in the human and peoples’ rights field and . . . [their] legal experience” (Article 31 (1)). They sit on the ACHPR in an individual capacity (Article 31 (2)). Every two years, the commissioners elect from among themselves a chairperson and a vice-chairperson, to form the Bureau of the Commission. The Commission has a Secretariat in charge of the daily management of its activities.

To fulfil its mission, the ACHPR cooperates closely, and as a matter of priority, with the States Parties to the African Charter. However, since the start of its activities in 1986, it has established collaborative relations with civil society organizations in general and human rights organizations in particular. This has enabled it to improve its methods of intervention and establish a more effective mechanism whereby the States Parties can monitor the implementation of the African Charter. In this section describing the activities of the ACHPR, emphasis will be placed on the opportunities provided by the African system to the NGO community to contribute to the promotion and protection of human rights in Africa.

### **Promotional activities of the ACHPR**

The promotional activities undertaken by the ACHPR include the review of periodic State reports, public information and research, counselling and institutional cooperation.

Every year, the ACHPR holds two ordinary sessions of 15 days each, either in its headquarters in Banjul (Gambia) or in the territory of a State Party at the latter’s invitation. It may also organize extraordinary sessions at the request of its members or of the chairperson of the Commission of the African Union.

During these sessions, the promotional activities of the ACHPR are scrutinized and institutional partners have the opportunity to express their views on the work of the continental institution.

Between sessions, the Commission organizes a continuum of activities aimed at promoting the African Charter and sensitizing African public opinion about human rights and the various actors' roles in their promotion and protection. To that end, members of the Commission travel to States Parties for "promotional" visits, while the Secretariat publishes information about the activities of the Commission.

The ACHPR also has additional mechanisms through which it deals with delicate human rights issues more subtly. These are:

- special rapporteurs: members of the Commission who have been mandated to specifically focus on specific issues on either a country or thematic basis;
- working groups.

**The Working Group on Indigenous Peoples/Communities**

In response to the numerous complaints made by representatives of African indigenous populations/communities about the discrimination they experience, the ACHPR adopted at its 28th ordinary session a resolution "on the rights of indigenous populations/communities". This provided for the establishment of a working group of experts on the rights of indigenous populations/communities in Africa with a mandate to:

- examine the concept of indigenous peoples and communities in Africa;
- study the implications of the African Charter on Human and Peoples' Rights on the well-being of indigenous communities, especially with regard to:
  - (a) the right to equality (Articles 2 and 3);
  - (b) the right to dignity (Article 5);
  - (c) protection against domination (Article 19);
  - (d) self-determination (Article 20);
  - (e) the promotion of cultural development and identity (Article 22);
- consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities.

Composed of members of the ACHPR, expert representatives of indigenous communities and an independent expert, the working group started its activities in 2001.

During its first two years, the working group prepared and submitted to the ACHPR for adoption a comprehensive conceptual framework report, drafted in collaboration with human rights experts and representatives of indigenous peoples/communities.

The interim report of the working group examined the human rights situation of indigenous peoples, characterized by the confiscation of their lands and productive resources through the establishment of national parks and conservation areas, mining, logging, creation of plantations, oil exploitation and dam constructions, biased development policies and expansion of areas of agricultural production, discrimination and denial of justice and of the right to political recognition. The report also examined the lack of representation and participation of indigenous communities, their marginalization from social services, and other significant human rights violations.

An analysis of key provisions of the African Charter and its jurisprudence was also conducted, and the working group reached the conclusion that “the provisions of the African Charter offer protection to indigenous peoples in Africa and should be made available to sections of populations within Nation States, including indigenous peoples and communities”.

The most important part of the report was the working group’s attempt to isolate criteria that can be used to identify indigenous communities and to distinguish them from minorities.

The criteria identified by the working group include:

- the occupation and use of specific territory;
- the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- self-identification, as well as recognition by other groups, as a distinct collectivity;
- an experience of subjugation, marginalization, dispossession, exclusion or discrimination.

The report also acknowledged some good practices towards indigenous peoples in African countries such as South Africa, where the Constitution

provides for the restitution of rights in land to persons or communities who were dispossessed of property after June 1913; Morocco, where King Mohamed VI created the Royal Institute of the Amazigh Culture; or Mali, where a recent National Pact signed with the Tuareg created a special status for the north of the country and two special funds for the development of that community.

The working group stated that “the major and crucial difference between minority rights and indigenous rights is that minority rights are formulated as individual rights whereas indigenous rights are collective rights. The specific rights of persons belonging to national or ethnic, religious or linguistic minorities include the right to enjoy their own culture, to practice their own religion, to use their own language, to establish their own associations, to participate in national affairs ... These rights may be exercised by persons belonging to minorities individually as well as in community with other members of their group.”

The working group finally made the following recommendations to the ACHPR:

- establishment within the ACHPR of a “focal point on indigenous issues”;
- the creation, in the context of its sessions, of a forum which brings together indigenous experts on indigenous issues and other human rights experts in regular meetings;
- publication of the final report of the working group;
- continuation of the conceptualization of “peoples” in the light of the collective rights of indigenous populations;
- revision of the Rules of Procedure to insert provisions relating to specific information on indigenous populations for the purpose of Article 62 in States reports, the work of all special rapporteurs and the mission reports of members of the ACHPR.

The working group also adopted a comprehensive work programme which includes research on legal and constitutional issues and sensitization activities around the continent.

The contribution of the working group has been recognized by the United Nations special rapporteur on the situation of the human rights

and fundamental freedoms of indigenous peoples as a milestone for the protection of indigenous peoples' rights in the region (see **Report of the African Commission's working group of experts on indigenous populations/communities**, page 9).

NGOs can contribute to the promotional activities of the ACHPR by participating regularly in the Commission's sessions and working closely with its various mechanisms in order to accomplish its goals.

#### **Participating in the sessions of the ACHPR**

The sessions are open to NGOs and provide a special opportunity to fulfil the obligation imposed on the ACHPR by the African Charter to cooperate with these organizations.

NGOs take part in the Commission's public sessions only, since the private sessions are reserved for the consideration of the Commission's administrative issues and complaints/communications brought before it.

In order to participate actively in sessions of the ACHPR, NGOs should enjoy an observer status. However, the fact that they do not enjoy this status does not constitute an obstacle to their involvement in certain proceedings of the Commission's sessions.

#### **Observer status**

In order to encourage the effective participation of NGOs in its activities, and especially to ensure their multifaceted support, the ACHPR instituted the observer status, which can be granted to both African and international NGOs.<sup>15</sup>

This status enables the NGO which benefits from it to:

- be officially invited to participate in the proceedings of the ACHPR's sessions and to make declarations during these sessions, under certain conditions;
- have access to the official documents of the ACHPR which are not confidential and which directly interest them;
- participate, at the request of the ACHPR, in some of its private sessions;

- reply to questions raised by participants during public sessions;
- propose the inclusion of a specific item in the session's agenda.

To obtain observer status, the applicant NGO should fulfil the following criteria:

- be an organization active in the human rights field;
- have objectives and activities in keeping with the principles stipulated in the Constitutive Act of the African Union;
- provide information on its financial resources.

The written application, together with certain official documents, is addressed to the ACHPR Secretary and submitted, at least three months before the holding of the session that will render a decision on the request.

The organizations granted observer status should have “close” relations of cooperation with the ACHPR, which can be reviewed whenever necessary, and should present a complete report on their activities every two years.

In case the NGO does not comply with its “contractual” obligations, the ACHPR reserves the right to impose sanctions on it. These can range from simply refusing to allow it to participate in sessions to the suspension or withdrawal of observer status.

#### Raising important issues during public sessions

NGOs with observer status can participate in proceedings during sessions of the ACHPR by proposing the inclusion on the agenda of an item of special interest to them.

According to the ACHPR's Rules of Procedure, an NGO wishing to include an item on the agenda of a session should:

- formally address a request in this regard to the Secretary of the Commission, at least three months before the said session begins;
- attach to the request documents relative to the issue proposed for inclusion.



The Bureau of the Commission is thus formally requested by the Secretary to include the proposed item on the agenda. The request will only be granted after a vote of the ACHPR during its session devoted to the adoption of the agenda.

In practice, NGOs discuss their project with members of the ACHPR, preferably the most influential, and submit their application only after they are given assurance that it will not be turned down by the majority of commissioners present at the session.

#### **Contributing to the promotional activities of the ACHPR**

NGOs may also contribute to the Commission's work, before or after the sessions, by regularly informing it about the human rights situation in States Parties to the African Charter, through:

- shadow reports, as an alternative to periodic reports;
- contributing to the success of commissioners' promotional visits to States Parties and conferences organized under its sponsorship;
- publishing articles in the ACHPR Journals;
- taking an active part in the preparation and conduct of research which the Commission organizes periodically.

#### *Alternative reports and concluding observations*

Article 62 of the African Charter urges States Parties to present to the ACHPR, every two years, a report "on legislative or other measures [which they have] taken with a view to ensuring the effectiveness of the rights and freedoms recognized and guaranteed" by the regional treaty. The consideration of this report during an ordinary session provides the ACHPR with the opportunity to assess the States Parties' degree of commitment in the human rights field, examine with its officials the factors and difficulties which prevent them from fulfilling their treaty obligations fully and, if need be, provide States Parties with guidance to enable them to meet their obligations under the African Charter.<sup>17</sup>

Contrary to the treaty monitoring bodies of the United Nations system, the ACHPR does not publish the State report submitted to it. This reduces the possibility for discussions between the State Party and NGOs on the content of the report and the preparation of detailed comments before its consideration by the ACHPR.

NGOs can, however, participate in this report review procedure in two ways:

- at local level, by contributing, where possible, to the deliberations of the committee in charge of drafting the State report. This is often done by forwarding observations on the human rights situation to the said committee or directly participating in the report drafting process;
- at regional level, by submitting to the ACHPR a **shadow report** as an alternative to the State report, in which the NGO makes its observations, in light of the relevant provisions of the African Charter and the ACHPR's interpretation of them through its numerous resolutions.<sup>18</sup>

Such a report gives the ACHPR a better idea about the progress registered as well as the weaknesses of the national human rights protection system. It also enables it to formulate more specific and concrete recommendations and even define indicators to evaluate the progress accomplished by the State Party. For this reason, it is often suggested that NGOs come together to draft a shadow report in order to give greater credibility to the information the report conveys, but also to facilitate the broadest possible participation of civil society in this dialogue with the authorities of States Parties.

It is a tradition that after the drafting of the shadow report is complete and the report is adopted by NGOs, a copy is sent to the national authorities, the diplomatic representative of the State Party in Addis Ababa, the headquarters of the African Union, the commissioner designated as the rapporteur in charge of the country's report, and the Secretariat of the ACHPR.

The ACHPR used to report to the AU on an annual basis, but since 2004 this has been done every six months. Each year since its 27th ordinary session in May 2000, the Commission has published the final observations containing its comments and suggestions after consideration of the State report. This document is transmitted to the State authorities before being made public in the annual report.

NGOs participating in the State reporting review process could use the local media to ensure a wide dissemination of the ACHPR's conclusions to the people and the public and private institutions involved in the promotion and protection of human rights.

NGOs should also institute mechanisms or procedures to monitor the implementation of the ACHPR's recommendations in order to be able to inform the Commission about concrete measures taken by the State authorities to implement them.

#### Promotional visits of the ACHPR to a State Party to the Charter

Since 2000, the ACHPR has initiated visits, also referred to as missions, for the promotion of the African Charter. These are done in order to observe the human rights situation in particular countries, to exchange views on the promotion of the African Charter with national bodies, including NGOs dealing with human rights, and, especially, to advise the States on the best way to promote human rights. These visits thus take place in close cooperation with top authorities of the State Party.

These visits are prepared by the Secretariat of the Commission. NGOs with observer status with the ACHPR may be required to participate in the preparation of these visits, notably with respect to the mission preparation report, which will serve as a "roadmap" for commissioners involved in the visits.<sup>19</sup>

The programme and the terms of reference for the visit are addressed to the authorities of the State Party to be visited. According to the ACHPR's Directives, any State Party which gives its consent to the ACHPR also lends its support for the accomplishment of this.

The State Party undertakes, in writing, to ensure the security of members of the delegation of the ACHPR and to refrain from taking retaliatory measures against persons or organizations who cooperated with it, in one form or another, during the mission, notably by providing it with information or by simply giving a testimony of the human rights situation.<sup>20</sup> The programme and terms of reference may be sent to NGOs for information.

During the mission, the ACHPR's delegation is obliged to meet representatives of NGOs on the State Party to gather their views on the human rights situation and inform them about the progress of work at the level of the ACHPR. The delegation can even be accompanied, if necessary, by representatives of NGOs in some of the field visits. These missions provide special opportunities for in-depth exchanges with members of the ACHPR on the implementation of its recommendations and decisions and on real human rights problems encountered in the country.

Nothing prevents an NGO with observer status from coordinating meetings between the ACHPR delegation and local NGOs and, in particular, collecting, at the end of the visit, the conclusions of the mission, which could then be disseminated in the media.

If the report of the mission is adopted by the ACHPR, it is submitted to the Assembly of the Union for consideration, in accordance with Article 59 (2) of the African Charter. The president of the ACHPR publishes it as soon as it is approved by the Assembly of the Union (Article 59 (3)).

Thus, NGOs can play an important role in the framework of these promotional missions. In addition to their specific concerns, NGOs could systematically include the following issues in the list of those to be discussed with the ACHPR:

- the state of submission of the State Party's progress reports;
- the state of ratification of protocols to the African Charter and of other regional or sub-regional conventions relative to human rights;
- the state of implementation of decisions, recommendations and other final conclusions taken by the ACHPR against the State Party.

Organizing seminars/workshops with the ACHPR (standard-setting)

The ACHPR's promotional activities, which contribute most to promoting the African Charter, include conferences and seminars, which it organizes periodically to discuss the content of relevant provisions. The objectives of these meetings are that they enable the ACHPR to bring together actors involved in the promotion and protection of rights stipulated in the African Charter.<sup>21</sup> They also provide an opportunity to discuss the modalities for the effective application of the relevant provisions of the

African Charter. These meetings served as a starting point for the process which resulted in the formulation and adoption by the ACHPR of Principles and Directives developed to help States Parties fulfil their treaty obligations more effectively. In other words, these activities enhanced the ACHPR's ability to undertake its role of adviser to States Parties on the concrete measures to be taken so as to give effect to the Charter.

They also enabled NGOs, which in most cases initiated these processes, to contribute to the emergence in the African human rights protection system of more specific legal rules and principles and to pave the way for the enactment of laws more respectful of the spirit and letter of the African Charter.

Organizing such an event, in collaboration with or on behalf of the ACHPR, not only provides an opportunity to contribute to building up the African human rights protection system, but is also a concrete way for an NGO to develop its knowledge and its own intellectual capacities on human rights in Africa while furthering its relations with the Secretariat and the commissioners involved in the activity.

### **Protective activities of the ACHPR**

The second mandate assigned to the ACHPR by the African Charter is to “ensure the protection of human and peoples’ rights” under conditions outlined by the latter. With respect to this mission, the role of the ACHPR consists of consideration of any allegation of violation of rights and duties stipulated in the African Charter.

In accordance with Article 55 (1) of the African Charter, such allegations may be brought before the ACHPR by NGOs, in their own name or on behalf of a person who claims to be a victim of a violation of his/her rights.

In the standard practice of the ACHPR, complaints have resulted in fact-finding missions or a formal redress procedure against the State Party.

### **Requesting a fact-finding mission**

In the standard practice of the ACHPR, repeated complaints, or a single complaint revealing a pattern of massive and serious violations of human rights, as noted in Article 58 of the African Charter, have resulted in the

decision to send protection missions to the States in whose territory these violations took place.<sup>22</sup>

In 1996, a Senegalese NGO, Rencontre africaine pour la défense des droits de l'homme (RADDHO), filed before the ACHPR a case against the government of Senegal, accusing the security forces of that country of practising large-scale torture on members of an ethnic group in the southern part of the country on suspicion that they were collaborating with a so-called rebel group very active in the region. The case was never registered by the ACHPR Secretariat as a complaint but served as a pretext for the dispatching of a mission to Senegal, led by the chairperson of the ACHPR.<sup>23</sup> Following the mission, the Senegalese authorities took a series of measures, notably the adoption by Parliament of a law on torture, with a view to ending this practice.

In other words, nothing prevents an NGO from requesting, through a complaint, that an ACHPR mission be sent to the country in which the alleged violation took place, in order to meet the authorities of that State as well as the victims of the violation. Such a meeting can also serve as an opportunity for fruitful exchanges between the ACHPR and civil society on the general human rights situation.

#### **Filing a complaint before the ACHPR**

Article 55 (1) provides for the right of individuals and NGOs to submit complaints against States Parties to the Charter under the following procedure:

- The author of the complaint addresses a letter to the ACHPR Secretariat in which it expresses the desire to lodge a complaint against a State Party to the African Charter.
- The Secretariat takes up the complaint and acknowledges its receipt to its author. It then records the complaint in the official register of the ACHPR and registers it on the list of complaints whose submission should be decided by the latter. The Charter is silent on whether the decision of seizure is taken during the session, which follows the submission of the complaint or at the end of a consultation between the Bureau and members of the ACHPR. However, in practice, the decisions are taken during the private proceedings of the ordinary session devoted to the consideration of complaints.

Once a complaint is officially filed before the ACHPR, the Commission designates a rapporteur from among its members and a legal counsel from the Secretariat to take charge of the proceedings. The latter's role is to make arrangements for the consideration of the case and prepare a draft decision. A summary of the case is prepared and translated into the working languages of the AU for distribution to the other members of the ACHPR. At the end of the ordinary session, the parties are notified about the decision on the complaint. The Secretariat then requests the parties to forward it with their observations on the admissibility of the complaint, within three months following receipt of the notification.

#### Admissibility of a case

Article 56 of the African Charter stipulates that, to be admissible, a complaint should meet the following requirements:

- **The author's name and address should be indicated in his/her complaint even if he/she wishes to remain anonymous.**<sup>24</sup>

According to the ACHPR, it is important for the author of the complaint to mention his/her address not only because it facilitates contacts between him/her and the ACHPR, but because it makes it possible to authenticate his/her correspondence. However, the author of the complaint is not required to be the direct victim of the violation or to be a national of the country against which the complaint is lodged.<sup>25</sup>

Moreover, it is not necessary for the complaint to mention all the victims of the alleged violations;<sup>26</sup> however, the author of the complaint should be in touch with the real victim/s of the violation.<sup>27</sup>

- **The complaint should be in keeping with the Constitutive Act of the African Union and the African Charter.**<sup>28</sup>

In order to be compatible with the African Charter, a complaint must fall within the framework of the Commission's competence:

- complaints must allege prima facie violations of the Charter, or the matter complained of in the complaints should amount to violation of the provisions of the Charter;<sup>29</sup>

- complaints are brought only against States that have ratified both the African Charter and the Constitutive Act of the African Union;<sup>30</sup>
- Complaints are inadmissible if they request a remedy that is incompatible with the African Charter or the Constitutive Act;<sup>31</sup>
- Complaints must allege violation of rights enshrined in the African Charter.<sup>32</sup>
  
- **The complaint should not be written in disparaging, abusive or insulting language.**

The ACHPR is of the view that for a complaint to be considered abusive or insulting to the State Party accused of violating the African Charter, the language used by the author of a complaint should “aim to destroy the integrity and status of the institution and to discredit it”.<sup>33</sup> It further adds that “in an open democratic society, individuals should be able to express their views freely, but they should ensure that in expressing them, they do not bring the reputation of the State or its institutions into disrepute or impede the enjoyment of the rights of others”.<sup>34</sup>

- **The complaint should not be based only on documents disseminated by the media.**

This condition is self-evident, since a complaint should be well documented and based on conclusive evidence. The ACHPR recently stated that “it would be ... damaging if the Commission were to reject a complaint because some aspects of it are based on news disseminated through the mass media. This is borne out by the fact that the Charter makes use of the word “exclusively” ... There is doubt that the media remains the most important, if not the only source of information ... The issue therefore should not be whether information was gotten from the media but whether the information is correct.”<sup>35</sup>

- **The complaint should have been introduced after the exhaustion of local remedies, unless it is observed that the national procedures are abnormally prolonged.**

Definition of a local remedy by the ACHPR:



- “A local remedy is any domestic legal action that may lead to the resolution of the complaint at the local or national level.”
- “The local remedies, to which Article 56 (5) makes reference, cannot be limited to penal remedies. They include all the legal remedies, whether civil, penal or administrative.”

Basis of the rule:

- “The rule is founded on the premise that the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level. A government should have notice of a human right violation in order to have the opportunity to remedy such violation before being called before an international body.<sup>36</sup> Such an opportunity will enable the accused State to save its reputation, which would be inevitably tarnished if it were brought before an international jurisdiction.”<sup>37</sup>
- “The rule reinforces the subsidiary and complementarity of relationship of the international system to systems of internal protection ... **Access to an international organ should be available but only as a last resort after the domestic remedies have been exhausted and have failed.**”<sup>38</sup>

According to the African Charter, local remedies should be exhausted “unless it is obvious that this procedure is unduly prolonged”: the condition should not constitute an unjustifiable impediment to access to international remedies. Article 56 (5) must be applied concomitantly with Article 7, which establishes and protects the right to fair trial.<sup>39</sup>

“In interpreting the rule, the ACHPR takes into consideration the circumstances of each case, including the general context in which the formal remedies operate and the personal circumstances of the applicant.”<sup>40</sup>

#### Exhaustion of local remedies

According to the ACHPR’s guidelines on submission of complaints, applicants are expected to provide the ACHPR with “some prima facie evidence of an attempt to exhaust local remedies”.<sup>41</sup> They must indicate that they have had recourse to all domestic remedies to no avail and must

supply evidence to that effect. If they were unable to use such remedies, they must explain why. They could do so by submitting evidence derived from analogous situations or testifying to a state policy of denying such recourse.<sup>42</sup>

In normal circumstances

In the jurisprudence of the ACHPR, three major criteria can be deduced for determining the rule on the exhaustion of local remedies: the remedy must be available, effective and sufficient.<sup>43</sup>

A remedy is considered **available** if the petitioner can pursue it without impediments. “The word **available** means **readily obtainable, accessible or attainable, reachable on call, on hand, ready, present, convenient, at one’s service, at one’s command, at one’s disposal, at one’s beck and call**. Remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant.”<sup>44</sup> (Emphasis added.)

A remedy will be deemed to be **effective** if it offers a prospect of success. “The word **effective** has been defined to mean adequate to accomplish a purpose; producing the intended or expected result, or functioning, useful, serviceable, operative, in order; practical, current, actual, real, valid.”

A remedy will be found to be **sufficient** if it is capable of redressing the complaint. It will be deemed insufficient if, for example, the applicant cannot turn to the judiciary of his/her country because of a generalized fear for his/her life or even those of his/her relatives. A remedy is insufficient if it depends on extrajudicial considerations, such as discretion or some extraordinary power vested in an executive State official: “The word **sufficient** means adequate for the purpose; enough or ample, abundant ... satisfactory ... If a remedy has the slightest likelihood to be effective, the applicant must pursue it. Arguing that local remedies are not likely to be successful, without trying to avail oneself of them, will simply not sway this Commission.”

In a situation of massive violations of human rights

In a situation of massive violations of human rights, the State will be presumed to have notice of the violations within its territory, and the State is expected to act accordingly to deal with any human rights violations. The pervasiveness of these violations dispenses with the requirement of

exhaustion of local remedies, especially where the State took no steps to prevent or stop them:<sup>45</sup> “The Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual victim. Due to the seriousness of the human rights situation as well as the number of people involved, such remedies as might exist in the domestic courts are as a practical matter unavailable or, in the work of the Charter, unduly prolonged.”<sup>46</sup>

#### Onus of proof

“If a complainant wishes to argue that a particular remedy did not have to be exhausted because it is unavailable, ineffective or insufficient, the procedure is as follows:

- (a) The complainant states that the remedy did not have to be exhausted because it is ineffective (or unavailable or insufficient) – this does not yet have to be proven;
- (b) The Respondent State must then show that the remedy is available, effective and sufficient;
- (c) If the Respondent State is able to establish this, then the complainant must either demonstrate that he or she did exhaust the remedy, or that it could not have been effective in the specific case, even if it may be effective in general.”<sup>47</sup>

#### ■ **The complaint should have been brought up within a reasonable time.**

The standard practice of the ACHPR so far makes it difficult for us to determine with precision the duration of the normal period between the exhaustion of domestic remedies and the filing of the complaint before the Commission. In Communication 97/93, *John K. Modise v. Botswana*, the 16 years which elapsed between the filing of the complaint and the end of the recourse in Botswana did not constitute an obstacle to the declaration of the complaints admissibility by the ACHPR.<sup>48</sup>

#### ■ **The same complaint should not have been submitted to another body involved in monitoring the application of human rights treaties.**

The ACHPR applies this rule broadly: it considered that the submission of a complaint by Amnesty International on the basis of procedure 1503 of the United Nations Economic and Social Council (which does not have power of jurisdiction) did not allow it to examine the same complaint brought before it by this organization because in so doing, it would violate Article 56 (7) of the African Charter.<sup>49</sup> On the basis of the jurisprudence of the United Nations Committee on Human Rights, to which NGOs can refer before the ACHPR, a complaint already filed before another body may be examined by the Committee provided that the matter is not simultaneously being effectively examined by another organ.<sup>50</sup> The “same complaint” notion is understood as referring to the same remedy concerning the same person filed by him/her or a person representing him/her before an international body.<sup>51</sup>

During the filing of the complaint, the complaining party may request that the ACHPR inform the State against which the complaint is being lodged about protective measures to be taken to avoid the occurrence of an irreparable harm.

#### Provisional measures

The African Charter does not expressly provide for procedures enabling the ACHPR, following the filing of a complaint, to take measures likely to avoid the occurrence of irreparable harm, which could make the subsequent phase of the remedy useless. This oversight was corrected in the ACHPR’s 1988 and 1995 Rules of Procedure. The Commission may henceforth “take provisional measures to avoid the infliction of an irreparable harm on the victim of the alleged violation”.<sup>52</sup> These measures may be taken at any time, since the chairperson of the ACHPR has the power to take any measures required in case of emergency during the recess.<sup>53</sup> In practice, the ACHPR, for various reasons, has not been able to apply the protective measures it indicated to States Parties. NGOs defending the rights of minorities should be aware of the limits of this mechanism.

When the ACHPR declares a complaint admissible, the parties are notified by the Secretariat, which requests them to provide it with all their observations within a period of two months, effective from the date on which the notification is received.

#### Examination of a case on its merits

The parties produce their submissions on the substance of the complaint and send them to the ACHPR Secretariat, which organizes their exchange. After receiving the parties' responses to the case, the Secretary informs them of the date of the hearing during which they will be required to respond to questions raised by members of the ACHPR.

The nature of the procedures before the ACHPR is not clearly defined in the Rules of Procedure, but the practice is that in the course of this sitting, which takes place during private sessions, the parties may present their case openly before the Commission. The rapporteur of the complaint generally presides over the hearing, while the other members of the Commission participate in the proceedings by asking questions or requesting additional information.

At the end of the proceedings, the parties withdraw and the ACHPR is informed about the draft decision proposed by the rapporteur and gives its verdict on the complaint.

If the Commission establishes that the rights stipulated in the African Charter have been violated, it adopts recommendations relative to the appropriate remedial measures for the prejudice suffered by the victim.

The recommendations of the ACHPR are then sent to the parties and annexed to the Commission's annual report, publication of which is approved every year by the Assembly of the African Union.

#### Contributing to the implementation of the decisions

Strictly speaking, there is no policy for the systematic monitoring of recommendations made by the ACHPR. In practice, members of the Commission play a rather significant, albeit limited, role in the implementation of these recommendations, notably through promotional visits and, in particular, through review of State reports. The difficulty lies partially in the fact that States Parties have no mechanism which can be used by victims to ensure that the recommendations made or decisions taken by bodies in charge of monitoring the implementation of human rights treaties are applied by the Defendant State. The recent decision taken by Member States of ECOWAS to urge each Member State to notify the ECOWAS Court of Justice of the national authority empowered to receive

or implement its decisions<sup>54</sup> seems to be an approach which African States should emulate to fulfil the obligation they have under Article 1 of the African Charter, “to adopt legislative and other measures” in order to ensure that the Charter’s provisions are implemented.

Meanwhile, in their strategies for action before the ACHPR, NGOs should give priority to the implementation of recommendations made by the Commission, because it is through their implementation that States Parties can provide evidence of their commitment to the rights stipulated in the African Charter. The Commission itself has clearly stated, in its Directives and Principles on the right to a fair trial, that the right to an effective remedy encompasses the reparation, by the State Party, of harm suffered by victims of a violation of the stipulated rights.<sup>55</sup>

### **The African Committee of Experts on the Rights and Welfare of the Child**

Like the ACHPR, the ACERWC, also known as the Child Rights Committee, was created to “promote and protect the rights and welfare of the (African) child”(ACRWC, Article 32), notably by monitoring the application of rights established in the Charter on the Rights of the Child (ACRWC) and ensuring that they are respected (Article 42 (b)), by interpreting the provisions of that Charter (Article 42 (c)) and carrying out any other tasks that might be entrusted to it by the AU (Article 42 (d)).

The Committee is composed of 11 members elected by the Assembly of the Union (Article 34) for a non-renewable period of five years. They too are selected on the basis of their “high moral qualities, their integrity, impartiality and competence on all issues concerning the rights and welfare of the child” (Article 33 (1)). They participate in the ACERWC in their individual capacities.

Unlike the ACHPR, the ACERWC states in its Rules of Procedure that the functions of Committee members are incompatible with all other activities likely to affect the requirements of independence and impartiality and that a member may therefore not occupy the functions of official of a United Nations institution, cabinet minister, parliamentarian, or ambassador, or be involved in any form of political activities (ACERWC, Rules of Procedure, Article 11 (2)).

Content of a complaint

**To the Secretary of the ACHPR**  
**P O Box 673,**  
**Banjul, The Gambia**  
**Tel: 220 392962**  
**Fax: 220 390764**

**Re: Complaint against the Republic of...**

**Dear Mr/Mrs,**

- **Make reference to Articles 55 and 56 of the African Charter and Rule 102 of the Rules of Procedure of the ACHPR.**
- Indicate whether you are acting on your behalf or on behalf of someone else.
- Indicate whether you are an NGO and whether you wish to remain anonymous.
- Give the following information:

**1. Personal information:**

Name .....

Age .....

Nationality .....

Occupation and/or Profession .....

Address.....

Telephone/Fax no .....

**2. Government accused of the violation** (Please make sure it is a State Party to the African Charter)

**3. Facts constituting alleged violation** (Explain in as much factual detail as possible what happened, specifying place, time and dates of the violation)

**4. Urgency of the case** (Is it a case which could result in loss of life/lives or serious bodily harm if not addressed immediately? State the nature of the case and why you think it deserves immediate action from the Commission)

**5. Provisions of the Charter alleged to have been violated** (If you are unsure of the specific articles, please do not mention any)

**6. Names and titles of government authorities who committed the violation** (If it is a government institution, please give the name of the institution as well as that of the head)

**7. Witness to the violation** (Include addresses and if possible telephone numbers of witnesses)

**8. Documentary proofs of the violation** (Attach, for example, letters, legal documents, photos, autopsies, tape recordings etc., to show proof of the violation)

**9. Domestic legal remedies pursued** (Also indicate, for example, the courts you've been to, attach copies of court judgments, writs of habeas corpus etc.)

**10. Other international avenue** (Please state whether the case has already been decided or is being heard by some other international human rights body; specify this body and indicate the stage that the case has reached)

Every two years, members of the ACERWC elect a bureau composed of a president, three vice-presidents, a rapporteur and an assistant rapporteur. The Committee also has a secretariat which assists it in its daily activities (ACERWC, Rules of Procedure, Article 23). In connection with its activities, the Committee may consult NGOs directly or through its sub-committees. And, at the specific request of the Committee or the president of the Commission of the African Union, NGOs may present oral statements on important issues before the Committee (ACERWC, Rules of Procedure, Article 81).

Since the ACERWC is not yet completely operational, the following consideration of the promotional and protective activities described will essentially be based on the provisions of the Committee's Rules of Procedure.

### **Promotional activities of the ACERWC**

As a continental body in charge of promoting the rights of the child in Africa, the Committee convenes twice a year in ordinary session, each session not exceeding two weeks. It can also hold extraordinary sessions at the request of Committee members. When the Committee is not in session, the request for an extraordinary session can be made by the chairperson upon consultation with the Board, by a simple majority of members, or by a State Party to the Charter on the Rights of the Child.

The Secretary, in consultation with the chairperson, drafts the session's agenda. Unlike the ACHPR, the ACERWC does not allow NGOs to directly propose issues for discussion, as only the following entities are empowered to do so:

- the Committee chairperson;
- any Committee member;
- a State Party to the Charter on the Rights of the Child;
- the president of the African Union Commission;
- One of the AU organs.

According to the Rules of Procedure, the agenda of an ordinary session is sent to Committee members, States Parties and the Committee partners at least six weeks in advance of the session.



Before the opening of each ordinary session the Committee holds a private preparation session in which some partners may take part, but only upon the Committee's request. NGOs can certainly take advantage of this opportunity to comment on the agenda and possibly propose issues for inclusion in it.

NGOs, CSOs, RECs, specialized institutions, and UN and AU organs can send delegates to the Committee's ordinary sessions.

Unlike the ACHPR, participants in the Committee's ordinary sessions have access to all the documents distributed, unless the Committee decides otherwise. Even the initial and progress reports of States Parties can be distributed to the delegates representing NGOs and CSOs.

They can also take part in the activities of alternative mechanisms that the Committee might put in place.

The promotional activities generally organized by the Committee include:

- examination of States Parties' initial and progress reports;
- preparation of general recommendations sent to States Parties;
- drafting of general observations on the content of relevant provisions of the Charter on the Rights of the Child;
- conducting research on specific themes pertaining to the rights and welfare of the child.

#### **Examination of progress reports**

States Parties submit an initial report to the Committee two years after ratifying the Charter on the Rights of the Child, while a progress report is sent every three years on the state of the nation-wide application of the rights stated in the Charter. As stipulated in the Rules of Procedure, the Committee can request a State Party to provide a supplementary report.

Should the State Party fail to submit its initial or progress report at the prescribed date, the Committee then sends a reminder. In case the State Party fails to comply after this reminder, the Committee reserves the right, on the basis of the information in its possession, to examine the situation

of the rights of the child in the country concerned and subsequently make recommendations.

In general, after submitting its report, a State is invited to send delegates to defend the report before the Committee. The State Party is then informed of the dates, time and venue of the session during which its report is examined. It is not indicated in the Rules of Procedure whether NGOs and CSOs are allowed to send shadow reports to the Committee, but Article 42 (a) (i) of the Charter on the Rights of the Child and Article 71 of the Rules of Procedure seem to suggest this possibility in that they speak respectively of encouraging local organizations to participate in the activities of the Committee and of the likelihood of partners' contributions being used by the Committee. In any case, this should not pose any problem, since all the watchdogs monitoring the application of human rights treaties now accept shadow reports.

After examining the progress report, the Committee drafts general recommendations that are merely suggestions on how the rights of the child should be applied in the State Party in question. These recommendations are sent to the State Party for comments before being incorporated, along with the latter's responses, in the Committee's annual report tabled at the African Union's Assembly. NGOs and CSOs working on minority-related issues can usefully contribute to the Committee's work by taking an active part in the implementation of these recommendations at national level and by regularly briefing the Committee on the state of progress of their application.

#### **Preparation of general recommendations**

These are recommendations possibly made by the Committee aside from those made during the presentation of States Parties' progress reports. Unfortunately, the Rules of Procedure are not very explicit as to whether the recommendations facilitate the establishment of channels of action for NGOs and CSOs willing to contribute to their elaboration.

#### **Elaboration of general observations**

The general observations are very important documents produced by bodies monitoring the application of human rights treaties in order to clarify the content of the rights stipulated in the said treaties, but also to give indications on the nature of these rights and practical ways of enforcing them. This technique helped the UN Human Rights

Committee to explain clearly the gist of many provisions of the ICCPR, and determined the responsibilities of various local and international stakeholders responsible for their enforcement.

In the UN system, NGOs and CSOs play a key role in the production of these documents. NGOs and CSOs working with the Committee could build on these experiences and that of the collaboration between NGOs and the ACHPR in the development of landmark resolutions that contribute to the establishment of standards or norms deemed important for the promotion and protection of the rights of the child in Africa.

#### **Requests for studies on the rights of the child**

Requests to develop research on specific relevant themes are sent by the Committee to either the Assembly of the African Union or its partners. The Charter and Rules of Procedure are not explicit on the form of these studies, but in view of the ACHPR's experience, many pieces of research have been conducted through seminars and workshops aimed at examining specific themes relative to the ACHPR's activities. The same practice could be developed as part of the ACERWC's activities, whereby NGOs could provide a significant contribution to the Committee's work.

#### **General debates**

This is a practice borrowed from the UN Committee on the Rights of the Child. In this Committee, the general debate provides an opportunity to further the discussion in order to enhance understanding of the ACRWC and its practical implications for States Parties. Generally, in addition to Committee members, it is attended by delegates representing States Parties, UN specialized institutions, national human rights bodies, NGOs and people known for their expertise in the field of child rights. At the end of the meeting, recommendations are made and the Committee is often entrusted with their implementation. This is a practice that the ACERWC intends to promote in Africa. Hopefully, NGOs will seize this opportunity to state their viewpoints on the different provisions of the Charter, as well as all the points raised by its implementation.

#### **Protective activities of the ACERWC**

According to the ACRWC, the Committee can examine complaints from individuals and NGOs in relation to issues addressed by the relevant

provisions of the Charter (Article 44) and carry out investigations on the measures adopted by States Parties to enforce them (Article 45). However, these important aspects of the Committee's protection mandate have not been developed in the ACRWC, and the ACERWC has postponed the determination of the Rules of Procedure relative to the admissibility and in-depth examination of a complaint and has substituted those governing the Committee's investigations with directives to be formulated later. Therefore, NGOs will have to monitor the Committee's work in this field in order to contribute to the elaboration of these Rules.

## The judicial body: the African Court on Human and Peoples' Rights

The most recent pillar of the African human rights protection system is the African Court on Human and Peoples' Rights. Created by an additional protocol to the African Charter, the Court is expected to guarantee a better protection of human and people's rights, complement the ACHPR's efforts and, in particular, facilitate the attainment of the objectives defined in the African Charter on Human and Peoples' Rights.<sup>56</sup>

The Protocol came into force in January 2004 and the judges were elected in January 2006 by the Assembly of the African Union. The Court was officially installed in July 2006 and is headquartered in Arusha, Tanzania.

The Court comprises 11 judges, who must be African jurists of "a high moral authority, and a renowned legal or academic competence and experience in the field of Human and People's rights" (Protocol to the African Charter on the creation of the African Court on Human and Peoples' Rights, Article 11 (1)). They are elected for a period of six years, renewable once. By virtue of international law, they enjoy diplomatic immunity and their functions are incompatible with any other activity likely to affect their independence and impartiality.

The Court is chaired by a president and a vice-president elected for a period of two years, renewable once (Protocol, Article 21 (1)).

Access to the African Court is one of the most delicate issues raised by the Protocol. While the ACHPR, the States Parties and the African inter-governmental organizations have the right to file a case before the Court directly (Protocol, Article 5 (1)), this avenue is open to only those NGOs with observer status at the ACHPR, and to individuals (Protocol, Article 5 (3)), on condition that a State Party makes a declaration allowing individuals and NGOs to bring complaints before the Court (Protocol, Article 34 (6)). For the time being, only one country out of the 22 that have ratified the Protocol – Burkina Faso – has made this declaration.

In theory, the Court complements the ACHPR's protection functions (Protocol, Article 2) and is competent for all cases and litigation related to the interpretation and application of the African Charter, the Protocol on the creation of the African Court or any other human rights instrument ratified by the States concerned.

### **Procedure before the African Court**

Since access to the African Court by NGOs and individuals is contingent upon the consent of the State against which a complaint is lodged, the complainants shall go through the ACHPR to introduce their case in the Court. At present, the modalities of such a detour are not clearly established by the ACHPR.

Otherwise, the Court, once seized of a case brought by an individual or NGO, shall examine its admissibility in light of Article 56 of the African Charter (Protocol, Article 6 (2)). It can also request the State concerned to undertake provisional protective measures in cases of emergency and extreme seriousness (Protocol, Article 27 (2)).

Once a complaint is deemed admissible, the Court addresses the case by following the rules applicable to the legal procedures. Thus, the Court can receive all written or oral evidence (Protocol, Article 26 (2)) and its hearings are open to the public, except in certain circumstances provided for in the Rules of Procedure (Protocol, Article 10). A free legal representation can also be provided to the complainant when the interest of justice

so demands (Protocol, Article 10 (2)). The Court can, if need be, carry out field investigations, and the States are compelled to provide the required facilities in such cases (Protocol, Article 26 (1)).

The Court is given a 90-day deadline from the end of the hearing to make its decision (Protocol, Article 28 (1)), a measure probably aimed at preventing delays in the decision-making process, as has been the case with the Commission.<sup>57</sup>

The judgment is final without further right of appeal. However, any judge can attach a dissenting opinion to a ruling (Protocol, Article 28 (7)). When the Court acknowledges the existence of a violation, it orders appropriate remedies, including through the payment of fair compensation (Protocol, Article 27 (1)). Court rulings are communicated to the parties – the AU Member States, the Commission and the Executive Council – which monitor their execution (Protocol, Article 29).

# The Courts of Justice of the Regional Economic Communities

## ECOWAS Court of Justice

The Court of Justice of the Economic Community of West African States is established as an institution<sup>58</sup> and the principal legal organ of the Community.<sup>59</sup>

The Community Court is composed of seven independent judges selected and appointed by the Authority (name given to the Heads of State and Government of ECOWAS). They are “persons of high character, and possess the qualification required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law” (Protocol on the Community Court of Justice, Article 3 (1)). The judges are appointed to serve for a period of five years, renewable once (Protocol, Article 4 (1)).

The Community Court has competence to adjudicate on any dispute relating to the following (Protocol, Article 9 (1)):

- the interpretation and application of the Treaty, Conventions and Protocols of the Community;
- the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;
- the legality of regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS;
- failure by Member States to honour their obligations under the Treaty, Convention, and Protocols, regulations, directives or decisions of ECOWAS;
- the provisions of the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS Member States;
- the Community and its officials;
- action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions.

The Court also has the power to:

- determine the non-contractual liability of the Community; it may order the Community to pay damages or make reparation for official acts or omissions by any Community institutions or Community official in the performance of official duties or functions (Protocol, Article 9 (2));
- **determine cases of violation of human rights that occur in any Member State** (Article 9 (4));
- act as arbitration tribunal for the purpose of Article 16 of the treaty (Article 9 (5)).

The Court also has jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement (Article 9 (6)).

Finally, the Court has all the powers conferred upon it by the provisions of the Protocol as well as any other powers that may be conferred by subsequent Protocols and decisions of the Community (Article 9 (7)).

The Authority also has the power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in Article 9 of the Protocol related to the jurisdiction of the Court (Article 9 (8)).

According to Article 19 (1) of the Protocol, the Court shall examine disputes before it in accordance with the provisions of the Treaty and shall apply the body of principles as contained in Article 38 of the Statutes of the International Court of Justice.

The Court may, at the request of the Authority, Council, one or more Member States, the president of the Commission of ECOWAS, or other institutions of the Community, give an advisory legal opinion on questions of the Treaty (Protocol, Article 11 (1)).

Access to the Court is open to the following (Article 10):

- Member States and the president of the Commission of ECOWAS, where action is brought for failure by a Member State to fulfil an obligation;
- Member States, the Council of Ministers and the president of the Commission in proceedings for the determination of the legality of an action in relation to any Community instrument;
- individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;
- individuals applying for relief for violation of their human rights;
- staff of any Community institution, after the staff has exhausted all appeals processes available to the officer under ECOWAS Staff Rules and Regulations;
- the National Court, on its own or at the request of any of the parties to an action before them, where an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or regulations.

Actions by individuals for relief for violations of their human rights are within the competence of the Court, but the submissions/complaints shall not be anonymous and must not have been initiated for adjudication before another international court (Protocol, Article 9 (6)).



Parties to a dispute may be represented by a lawyer of their choice. The Court may also allow any Member State that considers itself to have “an interest that may be affected by the subject matter of a dispute before the Court” to join as a third party (Article 22).

The Court may also order any provisional measures or any provisional instructions “which it may consider necessary or desirable” (Article 21).

Judgements of the Court are binding and Member States shall determine the competent national authority for the purpose of receipt and processing of execution, and shall notify the Court accordingly (Article 24 (4)).

A decision of the Court may be revised “only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Court and also to the party claiming revision, provided also that such ignorance was not due to negligence” (Article 25 (1)).

Although the Protocol was adopted in 1991, the Court was established only in 2001 after the swearing in of the seven judges appointed in December 2000.

The Court examined its first case in 2004.<sup>60</sup> Following the amendment of the Protocol of the Community Court on 19 January 2005, the Court was seized of a dozen cases. In one of the cases the applicant alleged a violation of his rights under Article 13 of the African Charter on Human and Peoples’ Rights, which is cited as one the fundamental instruments of the Community.

### **The Court of Justice of the East African Community**

The Court of Justice of the East African Community is established as one of the organs of the EAC, and its major responsibility is to “ensure the adherence [by Member States] to law in the interpretation and application of and compliance with this Treaty” (Article 23 of the 1999 Treaty).

The Court is composed of six judges appointed by the Summit of Heads of State and Government of the EAC, from among sitting judges of any national court or from jurists of recognized competence (Article 24 (1)) for a maximum period of seven years. The Registrar is appointed by the Council of Ministers (Article 45).

The Court has jurisdiction to hear and determine disputes:

- on the interpretation and application of the Treaty (Treaty, Articles 27 (1) and 29);
- between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations (Article 31);
- between the Member States regarding the Treaty if the dispute is submitted to it under a special agreement (Article 28);
- arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the Court to which the Community or any of its institutions is a party (Article 32 (a)–(b));
- arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction to the Court (Article 32 (c)).

The Treaty also confers on the Court “such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a subsequent date” (Article 27 (2)). This provision, combined with Article 6 (2) of the Treaty, allows the Court to have jurisdiction over human rights issues.

The Court may also be requested by the Summit, the Council of Ministers or any Member State of the EAC to give an advisory opinion on any aspect of the Treaty affecting the Community.

Cases may be submitted by the following entities:

- Member States (Article 28);
- the Secretary General of the Community (Article 29);
- any legal or natural person resident in the Community (Article 30).

Parties to a dispute may be represented by a lawyer of their choice but who is competent to appear before a superior court in the Member State concerned (Article 37 (1)). The Court may also allow third parties, such as Member States, the Secretary General of the Community or a resident of a Member State, to participate in the proceedings as *amici curiae* (Article 40). In practice, CSOs may also be allowed to join as third parties before the Court.

The Court may also issue interim measures or “any directions which it considers necessary or desirable” (Article 39).

The judgements of the Court are directly implemented in the Member State concerned.

The Court may review its judgments upon discovery of any new and important matter or evidence which was not within its knowledge or could not be produced at the time when the judgment was passed, or on account of some mistake, fraud or error apparent on the face of the record, or because an injustice has been done (Article 35 (3)).

The Court concluded the hearing of its first ever case on 17 August 2006 in Arusha and its first human rights case in January 2007. The East African Law Society participated in the proceedings of the 17 August 2006 case as *amicus curiae*.

## The Tribunal of the Southern Africa Development Community

The Southern Africa Development Community (SADC) Tribunal was established in 2001<sup>61</sup> to “ensure adherence to and the proper interpretation of the provisions of the [SADC] Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it”.<sup>62</sup> The Tribunal has jurisdiction over disputes between:

- States Parties;
- States Parties and the Community;
- natural or legal persons and civil society organizations and States or the Community. without need for consent of other parties to the dispute.

No matter between natural or legal persons and States shall be determined by the Tribunal before domestic remedies have been exhausted (Protocol on the SADC Tribunal, Article 15). Disputes involving the Community are under the exclusive jurisdiction of the Tribunal.

The Tribunal is mandated to apply the SADC Treaty, Protocols and subsidiary instruments adopted by the Community.

The Tribunal is also mandated to develop its own jurisprudence “having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States” (Protocol on the SADC Tribunal, Article 21).

Article 32 of the Protocol on the Tribunal stipulates that the enforcement of its decisions shall be governed by “the law and rules of civil procedure for the registration and enforcement of foreign judgements” which are in force in the State where the decision is being enforced. It further provides that the Member States and institutions of the Community shall take “all measures necessary to ensure execution of decisions of the Tribunal”.

If a State does not comply with a decision of the Court, the Court may report to the Assembly Heads of State so that they may take appropriate action.

# Chapter 5

## The political organs

### Organs of the African Union

In a bid to fulfil the various missions entrusted to the AU by the Constitutive Act, but also with the aim of promoting the new values of transparency, good governance and a firm commitment to human rights, the AU has created new organs with political, economic and legal competence, entrusted with mandates and governed by specific operating rules which should enable them to undertake their responsibilities with efficiency, dynamism and creativity. For the purpose of this guide, the organs of the Union can be classified into three categories: the decision-making organs, the advisory organs and the executive organs.

#### The decision-making organs

These are four in number: the Assembly of the African Union, the Executive Council, the Peace and Security Council and the Court of Justice. Since the last of these is not yet operational, the operation of the other three will be examined here.

The “supreme organ” of the AU is the **Assembly** (Constitutive Act, Article 6. It comprises all the Heads of State and Government of the AU, and its key functions are to:

- define the policies of the Union (Constitutive Act, Article 9 (1) (a));
- take decisions on the reports and recommendations of the other organs (Article 9 (1) (b));
- monitor the implementation of policies and decisions and their application by Member States (Article 9 (1) (e));
- formulate directives for the management of emergency situations (conflicts and wars) and the restoration of peace on the continent (Article 9 (1) (g)).

It may, however, delegate some of its powers to any of the Union's organs (Article 9 (2)).

The **Executive Council** is the organ with which the Assembly of the Union collaborates most closely. It is composed of foreign affairs ministers of Member States. It is answerable to the Assembly of the Union and is in charge of the general coordination of Member States' policies in areas of common interest. It:

- prepares the meetings of Heads of State and Government, determines the issues to be submitted for their consideration and applies the decisions adopted by them;
- coordinates and harmonizes the policies, activities and other initiatives taken by the Union in the areas of common interest;
- takes decisions on issues submitted to it by the Heads of State and Government;
- examines the programmes and budget of the Union.

Concerning issues related to human rights, in particular, the Executive Council:

- elects the members of the ACHPR and the ACERWC;
- examines the activity reports of the ACHPR, the ACERWC and the African Court on Human and Peoples' Rights. In that capacity, it may be considered as the principal agent in charge of enforcing the authority of the organs responsible for the implementation of human rights treaties.

The **Peace and Security Council** (PSC) holds substantial powers both in the prevention, management and resolution of conflicts in Africa and

in the protection of human rights. For the latter reason, the African States have made it compulsory for it to establish “close collaboration with the ACHPR with respect to issues falling under its objectives and its mandate”. The PSC may, “every time it is necessary for the exercise of its responsibilities”, hold informal consultations with CSOs or invite them to speak before it “whenever necessary”.

### The advisory organs

The advisory organs of the Union are the Pan-African Parliament and the Economic, Social and Cultural Council.

To “provide a platform common to African peoples and their community organizations with a view to ensuring their greater participation in the discussions and decision-making concerning the problems and issues facing the continent”, the African States created a **Pan-African Parliament** (PAP) composed of representatives of parliaments of AU Member States.

The PAP is entrusted with the following duties:

- to facilitate the effective implementation of the policies and objectives of the AU;
- to promote the principles of human rights and democracy in Africa;
- to encourage good governance, transparency and accountability in the Member States;
- to promote peace, security and stability;
- to facilitate cooperation and development in Africa.

To that end, the PAP may, on its own initiative or at the request of other organs of the Union, examine, discuss or express an opinion on any issue, notably those relative to “the respect of human rights, the consolidation of democratic institutions and democratic culture as well as the promotion of good governance and the rule of law”, and make recommendations. It also examines the budget of the Union and seeks to harmonize or coordinate the laws of States Parties. All these provide perfect opportunities for CSOs to facilitate the consideration, by organs of the Union, of their proposals or the accommodation of their basic concerns as regards human rights.

To enable African peoples and civil society to make their voices heard and defend their interests before the African Union, and to build a reactive regional organization led by the peoples, the **Economic, Social and Cultural Council** (ECOSOCC) of the African Union has become the main (but not exclusive) institutional framework for the participation of civil society in all the processes instituted by the African Union.

It is also the mechanism that promotes the interface between the peoples, represented by civil society, and African governments, and facilitates the accomplishment of the AU mission through dialogue and partnerships.

According to the Constitutive Act of the African Union (Article 22), ECOSOCC is an advisory organ composed of the different socio-professional groups in Member States of the Union. Its objectives include:

- strengthening the partnership between the State and the different civil society segments, particularly women, young people, children, the Diaspora, labour organizations, the private sector and professional groups;
- promoting the participation of civil society in the implementation of policies and programmes of the AU;
- providing support to programmes and policies meant to promote peace, security and stability in Africa;
- promoting and defending the culture of good governance, democratic principles and institutions, peoples' participation, fundamental rights and liberties, and social justice;
- promoting advocacy in favour of, and the defence of, gender equality;
- promoting and strengthening the institutional, human and operational capacities of African civil society.

As an advisory organ, ECOSOCC may, through the views it provides, contribute to strengthening the values of proper public affairs management, transparency, accountability, gender equality, tolerance, shared responsibility and the culture of voluntarism. Thus, ECOSOCC provides CSOs with a perfect springboard to inject their values, expertise and ideas in the policies of the Union and monitor and evaluate the progress made by the Union.



## The executive organ

The **African Union Commission** is the organ of the Union in charge of:

- implementing, coordinating and controlling the implementation of decisions by the decision-making organs of the Union;
- representing and defending the interests of the Union;
- preparing the budget and programme of the Union and managing the budget and financial resources;
- preparing the Union's strategic plans and studies;
- on the basis of the authority delegated to it, taking measures in certain areas under the remit of the Assembly Heads of State and the Executive Council.

The current structure of the Commission comprises a chairperson, a vice-chairperson and eight commissioners elected by the Executive Council for a four-year period, renewable once. Apart from the chairperson and vice-chairperson, who have specific powers, each commissioner is responsible for the implementation of the programmes, policies and decisions of the Union concerning the portfolio for which he/she has been elected.

As a collegial body, the Commission functions on the basis of the principle of the distribution of duties between its chairperson and the commissioners. In the human rights sector, the chairperson shares his/her mandate with the commissioner in charge of political affairs, who administers the human rights portfolio.

Since the two African Charters on human and children's rights, the OAU and AU Ministerial Declarations of Grand Bay and Kigali establish a link between human rights and the problems of security, peace and development, the responsibility for human rights issues is extended to the commissioners in charge of peace, security, and social affairs respectively, handling conflict prevention, management and resolution, terrorism control, health, children's affairs, migration, labour and employment, sports and culture. At the AU, there is a Gender Directorate established within the Office of the Chairperson.

This is particularly relevant since the commissioner in charge of social affairs supervises the activities of the ACERWC and the commissioner dealing with peace and security has institutional links with the Peace and

Security Council, which is an important partner of bodies overseeing the application of human rights treaties.

In any case, the different commissioners work together within the legal framework of the African Union Commission and may, in case of disagreement on the way forward, seek the arbitration of the president of the Commission of the Union.

Civil society organizations can interact with these organs. That gives them an opportunity to play the role of agents of change and progress in this new environment created by the Constitutive Act of the African Union.

## Civil society organizations and regional economic communities

In two of the three regional economic communities considered here, ECOWAS and SADC, the organizations representing minorities or indigenous people/communities have appropriate organizational frameworks enabling them to undertake advocacy activities within the political bodies of these community structures. Whereas in SADC the involvement of civil society is allowed for and organized by the regional treaty, in West Africa only the vigorous interaction of CSOs with regional political organizations has enabled civil society to take part effectively in the statutory meetings of ECOWAS bodies.

### SADC

For an organization aiming to “strengthen and consolidate the long standing historical, social and cultural affinities and links among the peoples of the region” (Declaration and Treaty of SADC, Articles 4 & 5), the introduction in SADC’s constitutive treaty of a clause urging the bodies of the Community to “involve fully the people of the Region and non-governmental organizations in the process of regional integration ... [and]

to co-operate with, and support initiatives of the peoples of the Region and non-governmental organizations ... in order to foster closer relations among the communities, associations and peoples of the Region” (Article 23), is hardly a surprise.

However, the SADC Council of Non-Governmental Organizations (SADC-CNGO) was created only in 2002. The objective of this organization is to give effect to the commitments of regional governments and coordinate the actions of its civil society with SADC bodies.

The SADC-CNGO consists of various types of CSO across the region. It has a three-fold relationship with SADC:

1. Since 2005 it has been organizing a Civil Society Forum prior to SADC’s annual Summits with a view to having some influence on the Summit, which is the “supreme policy-making institution of the SADC”. During the 2005 Gaborone Summit, for example, members of the SADC-CNGO examined the overall situation of the region and tried to raise the awareness of the participants in the Summit with regard to the situation in Zimbabwe.
2. It maintains sustained relationships with the four Directorates recently created by SADC.
3. It takes part in the activities of the SADC National Committees, whose role is “to formulate a regional agenda and provide a forum for discussion with government, the private sector, civil society organizations on SADC policies”. Taking part in the activities of these National Committees enables CSOs to engage in and monitor the implementation of SADC policies.

These organs give to the organizations representing minorities and indigenous communities or people significant awareness-raising possibilities with regard to their problems.

## **ECOWAS**

The idea of a permanent consultation and coordination body between ECOWAS and civil society was first expressed during a consultation

meeting on the question of human security held in June 2003 in Abuja (Nigeria) between ECOWAS and West African and international organizations.

This meeting resulted in:

- the creation of a civil society unit in the Executive Secretariat (now the Commission) of ECOWAS;
- the installation of an autonomous Secretariat of West African civil society aimed at facilitating the dialogue with ECOWAS bodies;
- an annual meeting of West African civil society coinciding with the main statutory meeting of the bodies of ECOWAS.

The West African Civil Society Forum (WACSOF), which consists of representatives from the region's civil society, aims primarily at promoting a permanent dialogue and partnership between civil society, ECOWAS and the Member States. It also aims at supporting the process of political, economic, social and cultural integration proposed by ECOWAS. WACSOF is based in Abuja (Nigeria) and has national sections in eight of the 15 Member States of ECOWAS.<sup>63</sup>

As of its creation in December 2003 in Accra (Ghana), WACSOF has benefited from the support of the bodies of ECOWAS. Since then it has organized an annual forum every December, the recommendations of which are examined by the Council of Ministers of ECOWAS before their submission to the authorities of the adjudicative body of ECOWAS. The recommendations relate to various issues such as regional integration, human rights, corruption, gender, slavery and good governance.

In addition, WACSOF takes part officially in nearly all activities organized by ECOWAS.

The participation of the organizations representing minorities and indigenous communities or people in the activities of WACSOF could provide these organizations with the resources they need to promote their cause within the organs of ECOWAS.

# The NEPAD Peer Review Mechanism

The New Partnership for Africa's Development (NEPAD) is an initiative of the AU in the form of an economic development programme whose originality lies in the fact that it calls on African States to conduct, on a voluntary basis, an objective diagnosis of the problems of their underdevelopment in order to be able to define priority areas and clear development objectives.

The main purpose of NEPAD is to foster the adoption of appropriate laws, policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration. This is to be done through sharing experiences and reinforcing successful and best practices.

NEPAD is both a vision and a strategic framework for the renaissance of Africa and a fresh intervention of Member States. It aims to:

- eradicate poverty;
- usher the States into the path of growth and sustainable development;
- put an end to the marginalization of Africa in the context of globalization;
- accelerate women's capacity building in order to promote their role in economic and social development.

To that end, an **African Peer Review Mechanism (APRM)** has been established. It is designed as a self-assessment tool for States and seeks to ensure that the policies and practices of Member States of the AU comply with the values, codes and standards contained in the NEPAD Declaration on democratic, political, economic and business governance and the key legal instruments of the AU. Experiences, best practices and achievements are shared; this enables the identification of loopholes and needs evaluation in the field of capacity building.

The following principles govern the evaluation process and serve as directives for the mechanism:

- the Committee of participating Heads of State and Government (APR Forum) is vested with the overall responsibility for the mechanism;
- the Panel of Eminent Persons oversees the conduct of the APRM process and ensures its integrity;
- the APRM Secretariat provides secretarial, technical, coordinating and administrative support services for the APRM;
- the process entails periodic reviews of the policies and practices of participating States to ascertain the progress being made;
- a country is assessed and a timetable for effective progress towards achieving the agreed standards and goals is drawn up by the State in question;
- national ownership and leadership by the participating country are factors of success;
- the APRM is designed to be an open, participatory, accountable and transparent process.

All Member States may participate in the process provided the president of the Committee of Heads and State and Government in charge of implementing NEPAD is informed. Through this process, they undertake to:

- submit to periodic peer reviewing;
- facilitate these evaluations;
- be guided, to that effect, by the parameters adopted for good political, economic and business governance.

The activities of the APRM are managed by a group of five to seven eminent persons chosen from among Africans who have proven experience in the APRM areas and great moral integrity, and who share the ideals of pan-Africanism.

The group monitors the evaluation process and ensures its reliability. Its independence, objectivity and integrity are guaranteed by a Charter which also stipulates the conditions for submission of reports to Heads of State and Government of States Parties to the process.

The group is supported by a Secretariat endowed with appropriate technical capacities to accomplish the work required for the evaluation process and comply with the principles of the APRM. It is also in charge of:

- establishing a database on the political and economic situation of the States being monitored;
- preparing the basic documents for the evaluation teams;
- proposing the performance indicators and monitoring the performance of each assessed country.

Once a country joins the process, it prepares a programme of action with a precise schedule for the accomplishment of the different evaluations. These include:

- a basic evaluation, conducted within 18 months following the country's adhesion to the process;
- periodic evaluations conducted every two or four years;
- an evaluation which does not fall within the framework of normal evaluations and is conducted at the request of the State Party;
- an evaluation conducted at the initiative of the Heads of State and Government with the aim of assisting the government of a Member State when the latter shows signs of a persistent political and economic crisis.

The process itself makes it possible for Member States to analyse the impact of national policies on political stability and economic growth. After the basic evaluation is conducted, a programme of action will be prepared to monitor the progress registered in the achievement of the standards and objectives targeted, by taking into account the specificities of each country.

The process comprises the following phases:

- A study of political, economic and business governance and of the level of development in the country is conducted on the basis of documents prepared by the APRM Secretariat and by the national, sub-regional, regional and international institutions.
- The evaluation team visits the country concerned to carry out its activities in order of priority, through consultations with the government, top officials, political parties, parliamentarians and representatives of CSOs (including the media, intellectuals, labour organizations, businesses, women's organizations and professional associations).

- The team prepares a report on the basis of elements of information from the APRM Secretariat and information collected locally from official and non-official sources during comprehensive consultations and interaction with all the concerned parties.
- The **draft report** is first discussed with the government concerned, in order to ascertain the accuracy of the information and provide the government with the opportunity to react to the team's investigations and express its own views on the way in which the identified gaps could be closed. The government's observations are attached to the team's report.
- The **report** should clarify a certain number of aspects concerning the problems identified.
- The report is submitted for the attention of the Heads of State and Government by the Secretariat. The consideration and adoption of the final report by the Heads of State and Government marks the end of this phase.

After this phase, two situations may arise:

1. The government of the country concerned manifests its desire to close the loopholes identified. In this case, the Member States should provide it with the required assistance, within the limits of their means, and urge donor institutions to also provide them with assistance.
2. The government concerned does not show the required political will. The States Parties should first try to **establish a constructive dialogue with it**. If the dialogue does not succeed, the Heads of State and Government shall inform the government concerned about their **collective intention to take the appropriate measures** at the expiry of a fixed time frame. In any case, these measures should be used only as a last resort.

Six months after the consideration of the report by the Heads of State and Government, it is officially and publicly presented to the regional and sub-regional structures, such as the PAP, the ACHPR, the PSC, and ECOSOCC.

This process provides NGOs, persons belonging to minorities and indigenous peoples or communities with a good opportunity to share their



concerns with the evaluation team and, especially, to introduce the issue of minorities or indigenous peoples or communities on the list of concerns emerging from the APRM process, and those of the concerned African institutions.

# Conclusion

# Conclusion

At the end of this journey into the heart of the African system of human rights protection and promotion, the following conclusions can be drawn about the promotion and protection of the rights of minorities and indigenous communities or people:

1. The absence of a direct reference by the African Charter and other African human rights treaties to minorities and indigenous communities or people is not an obstacle to the promotion and protection of their fundamental rights and freedoms within African States. The people interested or involved in these actions can duly combine international human rights law and regional African law (on human rights and regional economic communities) in order to help effectively promote and protect minorities and indigenous communities or people.
2. To ensure that the rights of minorities and indigenous communities or people are scrupulously respected, these people can also have recourse to the current legal and jurisdictional protection mechanisms, whether they are regional or sub-regional.
3. Regional and sub-regional political bodies such as the deliberative and executive bodies of the African Union and the regional economic communities also represent important frameworks that organizations working on the issue of minorities and indigenous communities or people can use to plead in their favour.

4. The flexibility of the regional system of promotion and protection, in particular with regard to the production of new standards, can help improve the legal framework designed to protect the rights of minorities and indigenous communities or people.<sup>64</sup> The reservations expressed at the African Union's Conference on important aspects of the Declaration on the rights of autochthonous populations adopted by the United Nations Human Rights Council on 29 June 2006, in particular those relating to the definition, rights to ownership of land and resources, and maintenance of different political and economic institutions for indigenous communities or people, must be used to initiate a reflection on whether or not a regional treaty on the rights of minorities and indigenous communities or people is needed.<sup>65</sup>
5. In any case, it is necessary for the organizations working on the issue of minorities and indigenous communities or people to set up programmes to educate Africans consistently on the rights of minorities and indigenous communities or people, in order not only to get the rights of these legal categories recognized but also to contribute to the emergence of legal frameworks reconciling the rights of minorities and those of the other layers of the populations of African countries. This handbook is an important step in this direction.

# Further reading

# Further reading

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1. In particular, the African Charter on the Rights and Welfare of the Child, the Additional Protocol to the African Charter on Women's Rights, and the African Charter on Democracy, Elections and Governance.
2. See Commission of the African Union, *Vision and missions of the African Union*, February 2004, p. 11.
3. Speech read by President Léopold Sédar Snghor at the opening ceremony of the committee of African experts who were assigned the duty of writing the draft of the African Charter on Human and Peoples' Rights; quoted by Kéba Mbaye in *Les droits de l'homme en Afrique*, 2nd edition (Paris: Pedone, 2002), p. 174.
4. On this issue see Mbaye, op. cit., p. 183.
5. See Mbaye, op. cit., p. 198.
6. See also African Charter, Article 20, para. 2.
7. See also *Vision de l'Union africaine et mission de la Commission de l'Union africaine Projet final*, p. 23
8. Para. 6.2 of General Observation No. 23 related to Article 27 of the ICCPR.
9. Para. 9 of General observation No. 23 related to Article 27 of the Pact.
10. *Draft Report of the Rapporteur of the meeting of African experts on the Draft African Charter on Human and Peoples' Rights*, p. 2, OAU/DOC CAB/LEG/Draft/Rapt.Rpt.
11. See Communications 105/93, 128/94, 130/94, and 152/96, *Media Rights Agenda, Constitutional Rights Project v. Nigeria*, paras 68 to 70. ('Communication' here means 'case'.)
12. See *Report of the experts working group of the ACHPR on the native populations/communities*, 2005, p. 108.

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13. Article 3(1) of the revised treaty of the Economic Community of West African States. Also see Article 5 of the treaty establishing the East African Community and Article 5 of the treaty of the Southern African Development Community.
14. See African Charter, Articles 30 and 45.
15. Article 75 of the ACHPR's Rules of Procedure.
16. According to the resolution on the revision of the criteria for the granting and enjoyment of the status to non-governmental organizations active in the defence of human rights, any declaration should be addressed, beforehand, to the president of the ACHPR.
17. The periodic State reports are presented in two forms. The **initial report** contains only information on the historical and legal context of the country, while the **progress report** describes the development of the human rights situation in the State Party.
18. See, in this regard, the resolutions adopted by the ACHPR on the content of some provisions of the African Charter.
19. The Directives on missions of the ACHPR (p. 4) mention the ACHPR's documentation centre, the United Nations institutions based in the State Party to be visited, and specialized international bodies with expertise on the country, such as the United Nations working group on arbitrary detention and enforced or involuntary disappearance.
20. See the Directives, p. 3.
21. A major seminar organized by the ACHPR on economic, social and cultural rights in Africa, held in Pretoria (South Africa) in September 2004, brought together delegates of 12 States Parties and representatives of CSOs, national human rights institutions, university institutions, United Nations organizations and African regional communities.
22. For instance, missions of the ACHPR to Nigeria (7–14 December 1997), Mauritania (16–26 June 1996) and Sudan (1–7 December 1996).
23. Commissioners Isaac Nguema and Vera Duarte conducted this mission, 1–7 June 1996.
24. African Charter, Article 56 (1).
25. See Communication 31/89, *Maria Baes v. Zaïre*.
26. In Communications 25/89, 47/90, 56/91 and 100/93, *Free legal assistance group, Lawyers' Committee for Human Rights, Inter-African Union of Human Rights, Jehovah's Witnesses v. Zaire*, the ACHPR states that "when the author of a communication is a non-governmental organization ... and the situation is one of serious or massive violations, it may simply be impossible for the author to collect the names of each individual victim. Article 56 (1)

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- requires only that the complaints indicate their authors, not the names of all the victims, and the more massive the violation, the greater likelihood that the victims will be numerous.”
27. See Communication 304/2005, *FIDH, ONDH and RADDHO v. Senegal*.
  28. In Communication 75/92, *Congrès du peuple Katangais v. Zaire*, the ACHPR dismissed the action on the basis that “the demand for the independence of Katanga had no basis in view of article 56 (2) of the African Charter on human and peoples’ rights”
  29. See Communication 1/88, *Frederick Korvah v. Liberia*, para 6
  30. See Communications 12/88, *Mohamed El-Nekheily v. OAU*; 05/88 *Prince J.N. Makoge v. USA*.
  31. Communication 75/92, *Katangese Peoples’ Congress v. Zaïre*, para. 26.
  32. Communication 1/88, para 6.
  33. Communication 268/2003, *Ilesanmi v. Nigeria*, para. 39.
  34. Communication 268/2003, para. 40.
  35. Communications 147/95 and 149/95, *Sir Dawda K. Jawara v. The Gambia*, paras 24–6.
  36. Communications 25/89, 47/90, 56/91 and 100/93, para. 45; Communication 71/92, *Rencontre africaine pour la Defense des Droits de l’Homme v. Zambia*, para. 11.
  37. Communication 299/05, *Anuak Justice Council v. Ethiopia*, para. 47.
  38. In Communication 48/90, *Amnesty International v. Sudan*, para. 32, the ACHPR stated that “one of the justifications for this requirement is that a government should be aware of a human rights violation in order to have the chance to remedy such violation, thus protecting its reputation, which would inevitably be tarnished by being called to plead its case before an international body. This condition also precludes the African Commission from becoming a tribunal of first instance, a function that it cannot, either as a legal or practical matter, fulfil.”
  39. Communication 48/90, para. 31.
  40. Communication No 299/05, para. 49.
  41. Communication 86/93, *M.S. Ceesay v. the Gambia*, para. 20.
  42. Communication 299/05, para. 50.
  43. Communications 147/95 and 149/96, para. 31.
  44. Communication 299/05, para. 51.
  45. Communication 299/05, para. 60. See also Communications 27/89, 49/91, 49/91 and 99/93, *OMCT, AIJD, ICJ & UIDH v. Rwanda*, para. 18.
  46. Communication 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria*, para. 28.

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47. Communication 268/2003, para. 46.
48. Communication 97/93, para. 20.
49. See Communication 69/92, *Amnesty International v. Tunisia*, para. 4.
50. See Communication of the Human Rights Committee, *Victor Alfredo Polay de Campos v. Peru* No 577/1994
51. See Communication of the Human Rights Committee 75/80, *Fanaly v. Italia*, para. 7.2
52. Rules of Procedure, Article 111 (1).
53. Rules of Procedure, Article 111 (3).
54. See additional Protocol (A/SP.1/01/05) relative to the amendment of the Protocol (A/P.1/7/91) relative to the Court of Justice of the Community.
55. See Directives on the right to a fair trial and to legal assistance in Africa, Chapter C (b) (2). Doc/OS/(XXX) 247, p. 5.
56. *Report on the progress made concerning the creation of an African Court on Human and People's Rights*, OAU MIN/CONF/HRA/4(1) p. 2.
57. For example, it took eight years for the ACHPR to decide Communication 73/92, *Diakite v. Gabon*.
58. Article 6, para. 1 (e), ECOWAS revised Treaty.
59. See Preamble of the Protocol A/P.1/7/91 on the Court of Justice, which states that “the essential role of the Community Court of Justice is to ensure the observance of law and justice in the interpretation and application of the Treaty and Protocols and conventions annexed thereto and to be seized with responsibility for settling such disputes as may referred to it in accordance with the Provision of Article 76(2) of the Treaty in respect of disputes between States and the institutions of the Community.”
60. Case no. ECW/CCJ/04?2004, *Afolabi Olajide v. Federal Republic of Nigeria*.
61. The Protocol on the SADC Tribunal came into force on 21 August 2001 with the adoption of the Agreement amending the Treaty of SADC. However, the Tribunal is yet to become operational.
62. Article 16 of the Treaty of SADC as amended in 1992. All references in this document to the SADC Treaty are to the Amended Treaty unless indicated otherwise.
63. These are Burkina Faso, Guinée-Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone and Togo.
64. See Article 66 of the African Charter, which provides that “special protocols or agreements may, if necessary, supplement the provisions of the present charter”.
65. See Decision [Assembly]/AU/Dec.141(VIII)] of the Union's Conference, adopted in January 2007 in Addis Ababa.





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minorities in Africa:**  
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**ISBN 978-1-904584-69-8**

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rights  
group  
international**

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