



**ANALYTICAL OVERVIEW of  
46<sup>TH</sup> SESSION OF THE AFRICAN COMMISSION  
ON HUMAN AND PEOPLES' RIGHTS**  
*11-25 November 2009, Banjul, the Gambia*

**I. Introduction and Overview .....2**

**II. Highlights of the NGO Forum prior to 46<sup>th</sup> Session of ACHPR (7-9 November 2009) .....4**

    Overview of the NGO Forum .....4

    Working group on human rights defenders .....5

    Panel on freedom of expression in Africa.....7

    Resolutions and recommendations adopted by the NGO Forum.....8

**III. Highlights of 46<sup>th</sup> Ordinary Session of ACHPR (11-25 November 2009).....9**

    Overview of the session .....9

    Activity Reports of Members of the Commission & Special Mechanisms (Item 9 of the 46<sup>th</sup> session of the ACHPR).....9

    Consideration of State Reports .....13

    Item 8 of the 46<sup>th</sup> session of the ACHPR.....13

# Bringing defenders closer to the African Human Rights System

## I. INTRODUCTION AND OVERVIEW

### ACHPR and NGO Forum: How does it work?

The African Commission on Human and Peoples' Rights (ACHPR or the Commission) convenes its ordinary sessions twice a year, in May and in November. Each session is preceded by a three-day Forum for the Participation of Non-governmental Organisations (the NGO Forum), organised by the African Centre for Democracy and Human Rights Studies (ACDHRS), and attended by the UN Office of the High Commissioner for Human Rights (OHCHR) and NGOs from all over Africa. ISHR has been attending and actively participating in the NGO Forum as well as the ACHPR as an accredited observer since 2000.

The 46<sup>th</sup> session of the ACHPR, held in Banjul, the Gambia (11-25 November 2009), was convened amid much speculation that the session might be moved to another African country given the alleged statements made by President Yahya Jammeh against human rights defenders in the Gambia.<sup>1</sup> Amidst rumours of a boycott of the NGO Forum by a number of NGOs in order to draw attention to the situation of human rights defenders in the Gambia and the resolution<sup>2</sup> passed by the ACHPR at its 7<sup>th</sup> extra-ordinary session in Dakar, Senegal (5-11 October 2009) calling for President Jammeh to withdraw his statements, the session was eventually convened in Banjul, and attended by a smaller but still significant number of NGOs. The controversy with the President was widely discussed among NGOs throughout the Forum, including suggestions of moving the secretariat of the ACHPR out of the Gambia.

During the Forum great attention was given to the human rights situation in the Gambia, Guinea Conakry, Niger, Ethiopia and Zimbabwe, among others. The subject of the violation of rights of lesbian, gay, bisexual, trans-gender and inter-sex persons (LGBTI persons) was also repeatedly raised during the course of the forum, including with reference to the application of the Coalition of African Lesbians for observer status with the ACHPR, which had been deferred for consideration from the previous session. Both Zimbabwean and international NGOs mentioned the government of Zimbabwe denying entry to the UN Special Rapporteur on torture, Mr. Manfred Nowak.

### Participation of NGOs to the 46<sup>th</sup> session of the ACHPR

All in all, while there were approximately 100 or so representatives of the NGO community present at the NGO Forum prior to the ACHPR session, the number dwindled significantly after the opening of the main session to less than 50 during the review of Congo Brazzaville. The lack of investment of NGOs in the main session of the ACHPR remains of serious concern, and demonstrates the need for improving NGO participation in this process both in terms of the NGO Forum's engagement in country reviews, but also in terms of ensuring the predictability of when country reviews will take place, so as to allow for NGOs to plan their participation.

### Contribution of the NGO Forum to the work of the ACHPR

The NGO Forum forwarded 12 resolutions (five country-specific and seven thematic) and seven recommendations for consideration by the ACHPR. The 46<sup>th</sup> ACHPR saw the adoption of 4 resolutions/recommendations out of 19 initiatives from the NGO forum. A resolution on the general human rights situation on the African continent highlighted the specific situations in Guinea, Kenya, Eritrea, Somalia, the Sudan, Chad and the Democratic Republic of Congo and called on member States to take

<sup>1</sup> Amnesty International press release. Available at: <http://www.amnesty.org/en/library/info/AFR27/007/2009/en>.

<sup>2</sup> Full text of the resolution can be found at: [http://www.achpr.org/english/info/news\\_en.html](http://www.achpr.org/english/info/news_en.html).

legislative, and other measures to end impunity for human rights violations in the country. Another resolution addressed the need to study the impact of climate change on human rights in Africa. The resolution called on the Assembly of Heads of State and governments to include the ACHPR in the African Union's negotiating team on climate change. A third resolution focussed on the need to conduct a study on the implementation of the right to freedom of association in Africa. The last resolution of the NGO forum to be passed by the ACHPR urged member States to take appropriate measures to monitor the impact of the global financial crises on vulnerable groups like the poor, women, children, refugees and displaced persons, indigenous peoples, the disabled and persons living with HIV/AIDS. In comparison with the 45<sup>th</sup> ACHPR, during which the ACHPR adopted 3 resolutions focusing on institutional issues out of a total of twenty-five submitted by the NGO Forum, the 46<sup>th</sup> ACHPR saw the adoption of resolutions on more substantive human rights issues proposed by the NGO forum. In addition to the relative increase in the total number of NGO resolutions adopted, the themes of the adopted resolutions reflect the growing concern of the ACHPR in taking up emerging human rights issues on the continent.

## **Election of the new members of the ACHPR**

The main session of the ACHPR saw the end of term of Mr. Bahame Tom Mukirya Nyanduga as a commissioner and as interim Chair, and the election of a new Chairperson of the ACHPR, Ms. Reine Alapini-Gansou, whose mandate as Special Rapporteur on human rights defenders in Africa also came to an end at the 46<sup>th</sup> session. Two new Commissioners were appointed to the Commission, Mr Bechir Khalfallah (Tunisia), and Mr Mohamed Fayek (Egypt). Mr Khalfallah took over from Ms. Reine Alapini-Gansou as the new Special Rapporteur on human rights defenders. Mr. Fayek was appointed as the new Special Rapporteur on refugees, asylum seekers and internally displaced persons in Africa, taking over from Mr. Nyanduga. NGOs highlighted the need for these mandates to be implemented with independence by the new Commissioners, taking into account the well-established working methods and commitment of their predecessors.

During the session a new bureau was also elected. Compared to the composition of the previous bureau, the new bureau was more respectful of gender balance, a concern raised by NGOs, which the ACHPR has taken into consideration. The appointment of two new commissioners from North Africa has also ensured equitable representation of all sub-regions of the continent within the ACHPR.

## **Outcomes of the 46th session of the ACHPR**

The main session also saw the examination of the country reports of Ethiopia, Botswana and Congo Brazzaville, with a somewhat expected 'no-show' by the delegations of the Democratic Republic of Congo and Cameroon, who were also scheduled to report. Besides the specific concerns that were raised in relation to each review, some of the common issues in relation to reporting that were raised by Commissioners were: the lack or insufficient use of statistics in State reports allowing Commissioners to measure the progress of implementation of provisions of the African Charter; the need for the State report to follow the guidelines set up by the ACHPR; and the involvement of civil society in the drafting and elaboration of the State report. Although there have been improvements in the way that States' report to the ACHPR, in particular by making these reports reflect the human rights situation in the country more accurately, efforts clearly still need to be made to make these reports fully compliant with the ACHPR reporting guidelines. The ACHPR adopted concluding observations on the Congo but deferred adoption of concluding observations on Botswana and Ethiopia until after receipt of further information from these States.

The ACHPR adopted resolutions on the establishment of a working group on extractive industries, the environment and human rights violations in Africa; on climate change and human rights and the need to study the impact in Africa; on the need for a study on freedom of association in Africa; and on the impact of the global financial crisis on the enjoyment of social and economic rights in Africa.<sup>3</sup>

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<sup>3</sup> For full list, please refer to the final communique available at : [http://www.achpr.org/english/info/news\\_en.html](http://www.achpr.org/english/info/news_en.html).

One of the key challenges at this session was the adoption of the ACHPR's position paper on LGBTI issues, which was again postponed to the 47<sup>th</sup> ACHPR for further consideration. This has had the effect of further delaying the decision of whether to grant observer status to the Coalition of African Lesbians (CAL), who work on LGBTI issues. The question of whether the position paper will be adopted at the 47<sup>th</sup> ACHPR remains to be seen.

Although the 46<sup>th</sup> ACHPR had a difficult start, amid speculation that the session would have to move to another country given the statements made by the President of the Gambia against defenders working in the country, it concluded with several positive outcomes and no major incidents with the government of the Gambia.

The 46th session of the ACHPR ended on 25 November 2009 in Banjul with a **final communique** that summarised the main outcomes of this session.<sup>4</sup> The ACHPR will hold its next ordinary session from 12 to 26 May 2010 in Banjul, the Gambia.

## II. HIGHLIGHTS THE OF NGO FORUM PRIOR TO 46<sup>TH</sup> SESSION OF ACHPR (7-9 NOVEMBER 2009)

### Overview of the NGO Forum

The NGO Forum (7-9 November 2009) was attended by over 100 participants, roughly half the usual amount of attendees – the absence of many NGOs could be directly attributed to the comments made by the President of the Gambia, although the proportion of absentees due to safety concerns or in support of a boycott, is unclear. Human rights defenders networks, international NGOs and representatives of OHCHR were present, in addition to national and regional NGOs from Africa.

#### Day 1

The opening ceremony began with a speech by Ms Hannah Forster, Executive Director of the African Centre for Democracy and Human Rights Studies (ACDHRS), the main coordinator of the NGO Forum, who mentioned that the Commission should be in a position to review and investigate the root causes of the 'press releases and other communications' that endangered the holding of the Forum in the Gambia, referring to the alleged statements made by President Jammeh against human rights defenders in the country. She was followed by Mr Robert Kotchani, representing OHCHR, who conveyed the High Commissioner for Human Rights, Ms Navinetham Pillay's support for human rights defenders working in Africa and the importance of the UN Declaration on human rights defenders, and also called for NGOs from Africa to engage more with the Committee on Economic, Social, and Cultural Rights (CESCR) in particular and the UN human rights system in general.

Commissioner Bahame Tom Nyanduga, whose term of office expired at the current session, touched on several major developments since the last session of the ACHPR, such as the joint session of ACHPR and the African Court of Human Rights (the African Court) on the complementary rules of procedure which will allow the Commission to bring cases to the Court,<sup>5</sup> and also called on African Union (AU) member States to ratify the protocol establishing the African Court of Human Rights.<sup>6</sup> Commissioner Nyanduga also drew attention to the recent adoption of African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, also known as the Kampala Convention (October 2009),<sup>7</sup> and encouraged NGOs to advocate for its ratification. He also expressed his hope that the current session will take place in

<sup>4</sup> Available at: [http://www.achpr.org/english/communiques/Final%20Communique\\_46\\_OS.pdf](http://www.achpr.org/english/communiques/Final%20Communique_46_OS.pdf).

<sup>5</sup> For more information, see press release on joint meeting between ACHPR and the African Court, available at: [http://www.achpr.org/english/Press%20Release/JointMeeting\\_ACHPR\\_AfricanCourt.htm](http://www.achpr.org/english/Press%20Release/JointMeeting_ACHPR_AfricanCourt.htm).

<sup>6</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on human and peoples' rights. Text available at: [http://www.achpr.org/english/info/court\\_en.html](http://www.achpr.org/english/info/court_en.html).

<sup>7</sup> Further information available at: [http://www.achpr.org/english/Press%20Release/KAMPALA%20CONVENTION\\_IDPs.pdf](http://www.achpr.org/english/Press%20Release/KAMPALA%20CONVENTION_IDPs.pdf).

conditions of security, given recent events, and also that the ACHPR will be in a position to investigate the causes. He assured, however, that any steps taken would be in cooperation with and with the willingness of the government of Gambia. Ms Isatou Alwar Graham, Senior State Counsel of the Ministry of Justice of the Gambia also attended the opening of the NGO Forum and highlighted the ‘crucial nature of the Forum’ and also the indispensable role of NGOs in documenting human rights violations and supporting the implementation of international human rights standards. She mentioned that NGOs were being undermined by ‘authoritarian and paternalistic governments’ and that a lot remained to be done on the continent to protect human rights. Speakers mentioned the human rights situations in Zimbabwe, Sudan, Guinea-Conakry, Mauritania, Niger and the Gambia.

Day 1 of the NGO Forum began with an overview of the situation of human rights and democracy in Africa, followed by regional updates on human rights situations in Central, East, North, South and West Africa. The end of the day was reserved for updates from countries of concern such as Guinea Conakry, Kenya, Niger, Sudan, Zimbabwe and the Gambia.

## **Day 2**

Day 2 began with a panel on the situation of human rights defenders in Africa, including a presentation from Commissioner Reine Alapini-Gansou, Special Rapporteur on human rights defenders in Africa, providing an overview of her work. The panel highlighted the continuing challenges facing human rights defenders on the African continent. This was followed by a session on the background and implementation of the Durban Review Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, presented by Mr Robert Kotchani (OHCHR).

The afternoon session was reserved for discussions in the ‘special interest’ working groups, which covered the following topics: prevention of torture, and prisons and penal reform in Africa; situation of refugees, asylum seekers, internally-displaced persons and migrants in Africa (focussing on Democratic Republic of Congo, Congo Brazzaville and Angola); the African Court on Human and Peoples’ Rights and the International Criminal Court; indigenous populations and communities in Africa; the death penalty; human rights defenders (see below for full summary of the proceedings of the working group); freedom of expression in Africa; situation of women and girls in Africa and the AU Women’s Protocol; economic, social and cultural rights; children’s rights in Africa; gay, rights of lesbian, transgendered, bisexual and inter-sex persons; election monitoring in Africa.

### Working group on human rights defenders

#### **Countries of study and thematic issues**

The special interest working group on human rights defenders, chaired by ISHR, discussed the serious situation of defenders in **countries of concern** such as the Gambia, the Democratic Republic of Congo, the Sudan, Burundi, Swaziland and Liberia, in addition to a number of cross-cutting concerns.

- In the **Gambia**, participants expressed serious concern at indefinite detention, torture and disappearances of journalists in the country, in addition to a number of serious violations of the right to freedom of expression.
- In the **Democratic Republic of Congo**, issues of concern raised were violations of freedom of expression, assembly/protest and association and attacks aimed at repressing the work of human rights defenders, including journalists and those who have influence over public opinion to freely express their views. It was also expressed that defenders who denounce irregularities of the electoral process or other controversial issues face torture or exile, and that preparations needed to be made in order to protect defenders in the run-up to the general elections in the country in 2011.

- In the **Sudan**, concern was expressed that defenders face restrictions on their work imposed by emergency and security laws in the country, and that due to this there is a clear gap in Darfur for protection of internally displaced persons as defenders working on this issue are forced to stay away from their work. It was observed that this places internally displaced persons at additional risk of attack by militants.
- In **Burundi**, the environment for human rights defenders remains precarious according to defenders in the country. The perpetrators of the murder of an activist in April 2008 are still unknown.<sup>8</sup> It was expressed that the Government of Burundi continues to make attempts to control the activities of human rights defenders, for example, by requiring permission from the authorities for human rights defenders to carry out particular events; it was also raised that the government had refused permission to hold two demonstrations by civil society. It was also expressed that these restrictions have led to defenders restricting their own movement abroad due to fear of Government retaliation. The arrest of journalists who denounce corruption among State officials, and the arrest of trade union activists who raise corruption issues, were also of concern.
- As no NGO delegation from **Swaziland** was able to attend the NGO Forum, their concerns were passed on through their South African counter-parts. Some key issues highlighted were the passage of an anti-terrorism law (2008)<sup>9</sup> which has been used to suppress, harass, torture and detain human rights lawyers, media persons and opposition leaders (whose party has allegedly been banned). Also highlighted was another new law that allows extraction of electronically stored information which can be used against defenders in a court of law, and another bill in 2009 which will regulate the funding of NGOs and also place limitations on what activities are permissible in Swaziland. There are only two NGOs from the country who have observer status so the need for the NGO Forum to take forward their issues was also emphasised.
- **Liberian activists** highlighted the potential of the new freedom of information bill in parliament<sup>10</sup> for the work of human rights defenders and also called for support for a code of conduct for Government officials that could enable the anti-corruption commission to monitor the performance of the Government. The need for the national human rights commission to be reconstituted in order to fulfill the outcomes of the truth and reconciliation commission in Liberia was also mentioned.
- The working group on human rights defenders also discussed several **thematic issues** of concern, including the serious situation of lesbian, gay, bisexual, trans-gender and inter-sex (LGBTI) defenders in various countries in Africa; the dangers encountered by human rights defenders before, during and after elections, and the specific risks faced by women human rights defenders.

## Best practices and recommendations

The second part of the discussion focused on discussing and exchanging **best practices and strategies** for addressing some of the issues affecting human rights defenders in Africa. Members of human rights defenders networks highlighted the value of networks in transmitting information, protecting defenders at risk and also in resettling defenders in third countries where they can continue to carry out their human rights work. The potential of using European Union (EU) missions to raise the visibility of human rights defenders at risk and in developing security plans in order to react quickly and efficiently to risks was also raised. Other strategies mentioned include the need for States to make specific reference to the protection of human rights defenders in national legislation; collaboration with the ACHPR and UN Special Rapporteur on human rights defenders and the need for specific strategies to respond to the different risks faced by

<sup>8</sup> See UN Press release 'Human Rights Expert condemns killing of Burundian anti-corruption activist', 16 April 2008. Available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/0/BC404890045976D0C125759A0050C4E0?opendocument>.

<sup>9</sup> For more information, see: <http://www.article19.org/pdfs/press/swaziland-counter-terrorism-not-a-pretext-for-repression.pdf>.

<sup>10</sup> For more information, see: <http://www.pambazuka.org/en/category/media/48145>.

different groups of human rights defenders, among other issues. The need to address the risks and challenges faced by different groups of human rights defenders such as women human rights defenders, LGBTI defenders and activists working on specific issues such as the rights of indigenous persons or the death penalty, was also raised, and gave rise to the call for a resolution to draw the attention of the ACHPR to this issue. In this regard, the status of the position paper on LGBTI issues, pending since the 45<sup>th</sup> session of the ACHPR, was also questioned, and it was proposed that NGOs seek clarification from the ACHPR on the status of this paper at the current session. A proposal to publicise international human rights instruments, especially the UN Declaration on human rights defenders, both at the NGO Forum and at the national level, was also put forward.

A number of **recommendations** were also discussed during the working group, including the following:

- Maintaining the resolution on human rights defenders from the 45th session of the ACHPR which called for an African protocol on human rights defenders and also called for the ACHPR Special Rapporteur on human rights defenders to form a committee to work on strategy and lobbying activities for the adoption of a protocol;
- Adopting a general resolution on the need for protection of human rights defenders in Africa, highlighting thematic issues and also the needs of specific groups of defenders such as LGBTI defenders, women human rights defenders, defenders working on economic, social and cultural rights, risks faced by human rights defenders during election periods, etc. It was proposed that this general resolution would mention countries where defenders are under specific threat, such as Uganda and Burundi for LGBTI defenders.
- Mainstreaming concerns regarding human rights defenders in specific countries into the respective country resolutions (Guinea Conakry, the Gambia, Niger and Darfur).

### Panel on freedom of expression in Africa

ISHR, ACDHRS and the office of the ACHPR Special Rapporteur on human rights defenders hosted a panel discussion on freedom of expression in Africa, on 10 November 2009. Panellists included Ms Reine Alapini-Gansou, the Special Rapporteur on human rights defenders; Mr Halifa Sallah, publisher of *Forayaa* newspaper; Mr Hassan Shire, East & Horn of Africa Human Rights Defenders Network (EHAHRDN); and Ms Estelle Nkounkou, West Africa Human Rights Defenders Network (WAHRDN); it was chaired by Mr Clement Voule (ISHR). The Special Rapporteur launched her biannual publication, the *Rapporteur's Newsletter*,<sup>11</sup> whose focus at the current session was on freedom of expression. ISHR also launched the fourth issue of its *Human Rights Defenders Briefing Papers Series* on freedom of expression,<sup>12</sup> focusing on international standards for the protection of freedom of expression as elaborated by the UN treaty bodies and the UN Special Rapporteur on human rights defenders.

The panel began with an overview of international standards by Mr Voule, followed by an overview of the protection of freedom of expression in Africa by Ms Reine. Mr Sallah touched on the general obligations of States to actively protect freedom of expression and on the challenges to this right in the Gambia. Mr Hassan Shire's presentation covered the main issues relating to freedom of expression in East Africa, and was supplemented by two testimonials of defenders from Sudan and Somalia of their personal experiences of threats and attacks for exercising their right to freedom of expression in these countries. Ms Nkounkou touched on the difficult situation of human rights defenders in Guinea Conakry, Benin, the Gambia and Senegal, and addressed institutional and legislative restrictions on freedom of expression in addition to physical attacks on journalists and media-persons. In discussions following the panellists' presentations, there were many interventions from the floor, particularly highlighting the precarious situation of journalists in the Gambia, and the lack of independent information and news due to fear of retaliation or arrest for publishing sensitive material. Representatives of the Gambian press also highlighted the need for an independent and autonomous media body that could set professional standards for journalism in the country and also provide much-needed training to Gambian journalists.

<sup>11</sup> Available at: <http://srhrdafrica.org/news/official-launching-rapporteurs-newsletter-n%C2%B05>.

<sup>12</sup> Available at <http://www.ishr.ch/briefing-papers>.

The panel discussion was well-attended by NGOs and journalists, and also by the ACHPR Special Rapporteur on the rights of women in Africa, who joined the panel and highlighted the difficulties particularly faced by women journalists.

## Resolutions and recommendations adopted by the NGO Forum

The NGO Forum adopted 12 resolutions (five country-specific and seven thematic) and seven recommendations.

**Resolutions<sup>13</sup>** adopted were as follows:

- **Country resolutions:** the Gambia, Niger, Guinea Conakry, Darfur, and Zimbabwe
  - **The Gambia:** This resolution called for a fact-finding mission to inquire into human rights abuses in the country, release of all prisoners of conscience, protection of human rights defenders, and also called upon the ACHPR to ‘evaluate the possibility’ of moving its head-quarters from Banjul to a ‘country where the human rights environment is conducive for the protection and promotion of peoples’ rights’.
  - **Niger:** This resolution called upon Niger to protect freedom of expression of the media and also to respect the rights of human rights defenders in the country, including their rights to freedom of association, expression, and freedom of movement in accordance with international and regional instruments.
  - **Guinea:** This resolution called upon Guinea to carry out an independent and international inquiry into human rights abuses in the country, hold free and fair elections in accordance with regional standards, and condemned massive violations during suppression of a peaceful protest by the military junta on 28 September.
  - **Darfur:** This resolution called for an end to attacks against civilians; immediate and unconditional return of international relief organisations, cooperation with the ICC, and for the ACHPR to examine and follow-up to the recommendations contained in the report of the AU High-level panel on Darfur.
  - **Zimbabwe:** This resolution called for acceleration of the constitutional reform process and to ensure security of all persons, especially human rights defenders in the country.
- **Thematic resolutions:** Human rights defenders in Africa, strengthening international justice in Africa, ending all forms of discrimination based on sexual orientation and gender identity in Africa, strengthening implementation of the responsibility to protect, follow-up to the Durban Review, effects of climate change and its impact on human rights in Africa and forced evictions.

**Recommendations** adopted were as follows:

- **LGBTI issues:** Concerning granting of observer status to LGBTI organisations without discrimination.
- **Refugees and internally displaced people:** Concerning addressing root causes of internal displacement and the situation of refugees, asylum seekers and migrants in Africa; follow-up to situation of Mauritanian refugees and advocacy for ratification of Kampala Convention.
- **Torture:** Concerning prevention of torture in Africa; condemnation of denial of entry to the UN Special Rapporteur on Torture from Zimbabwe; urges ratification of the UN *Convention Against Torture* (CAT).
- **Women and children’s rights in Africa:** Concerning monitoring of implementation of instruments for the protection of women in armed conflict, harmful traditional practices, maternal mortality, persecution of women and children accused of witchcraft, etc.
- **Indigenous peoples:** Concerning situation of indigenous peoples in Africa.
- **Freedom of expression:** Concerning attacks on journalists and restrictions of freedom of expression in Africa, including in the Gambia, Zimbabwe, Sierra Leone and Tanzania.
- **Follow-up:** General recommendation to ACHPR to implement recommendations made at the 45<sup>th</sup> session of ACHPR, including resolutions on human rights defenders, and elections and good governance in Africa, and the situation of human rights in Somalia.

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<sup>13</sup> All resolutions available at: <http://www.ishr.ch/in-africa/african-commission>.

### III. HIGHLIGHTS OF 46<sup>TH</sup> ORDINARY SESSION OF ACHPR (11-25 NOVEMBER 2009)

#### Overview of the session

The 46<sup>th</sup> ordinary session of the ACHPR, which was held from 11 to 25 November 2009 in Banjul, the Gambia, began with a public opening ceremony and swearing in of officers followed by private sessions for the adoption of the agenda and the organisation of work for the session.

The session began with an opening speech by Commissioner Tom Nyanduga, acting Chair of the ACHPR, who faced the end of his term of office. Commissioner Nyanduga highlighted human rights situations in Guinea, Niger, the DRC, freedom of expression in the Gambia, and the conflicts in Darfur and Somalia. He also highlighted importance of freedom of expression, association and assembly in African democracies, the impact of climate change in Africa; and the upcoming adoption of the interim rules of procedure of the African Court of Human Rights. Commissioner Nyanduga also highlighted the importance of the NGO Forum prior to the sessions of the ACHPR and repeated his recommendation to the steering committee of the NGO forum to raise the visibility of the outcomes of the NGO Forum, irrespective of whether they are taken up by the ACHPR. He also called on member States to submit the required declaration in order to accept the authority of the African Court, and that to fail to do so would 'send the wrong signal' regarding their commitments to protect and promote human rights in their countries.

This was followed by a statement made by Ms Hanah Forster, representing the views of the NGO Forum, who raised the 28 September massacre in Guinea, and the situation of human rights in the Gambia, Niger, Zimbabwe and Sudan. She also drew the attention of the ACHPR to how the banning of NGOs lead to increased risks to human rights defenders. Ms. Forster also highlighted the denial of entry of UN Special Rapporteur on torture from Zimbabwe, and homophobic attacks against LGBTI persons in Uganda.

This was followed by the election of Madame Reine Alapini Gansou as new Chair of the ACHPR, and also the new members of the ACHPR, Mr Bechir Khalfallah (Tunisia), and Mr Mohamed Fayek (Egypt).

This was followed by deliberations on the human rights situation in Africa (Item 5, public session), followed by relationship with NHRIs and NGOs (Item 6, public session). The Female Lawyers Association of the Gambia, African in Democracy and Good Governance (NGO, the Gambia), and Front Line were granted observer status at the ACHPR. The application of the Coalition of African Lesbians was pending discussions by Commissioners in private session on a position paper on sexual orientation. It was decided that the ACHPR should finalise its discussions on this position paper at the current session and consider the application of CAL at the 47<sup>th</sup> session.

The periodic reports of Ethiopia, Botswana and Congo (Brazzaville) were examined under Item 7 (see below), in addition to the presentation of the activity reports of the Commissioners and special mechanisms (also see below).

The ACHPR went into private session on 17 November and reopened for a public closing ceremony and presentation of the Final Communiqué on 25 November 2009.

#### Activity Reports of Members of the Commission & Special Mechanisms (Item 9 of the 46<sup>th</sup> session of the ACHPR)

The ACHPR is composed of eleven members elected by secret ballot by the Assembly of Heads of State and Government for a six year renewable term.

Commissioners of the ACHPR present three types of reports at the sessions of the ACHPR. Each Commissioner presents a report on their activities as a Commissioner; a report on four countries where they have been mandated to promote the African Charter, and a report on the specific thematic mandates (one or more) that they have been allotted. The presentations of the Commissioners usually begin with introductory remarks on activities undertaken in the inter-sessional period since the last session (in this case, the 45<sup>th</sup> session of ACHPR in May 2009). The inter-sessional activities are highlighted firstly in their capacities as commissioners and followed by their activities as thematic rapporteurs. This is followed by a brief overview of their thematic reports. Commissioners tend to end their presentations by making some general observations about the situation in Africa with respect to their particular mandates.

At the time of the 46<sup>th</sup> session, mandate holders were as follows:

- Special Rapporteur on prisons and conditions of detention in Africa, Mr Mumba Malila
- Special Rapporteur on the rights of women in Africa, Ms Soyata Maiga
- Special Rapporteur on refugees, asylum seekers, internally displaced persons and migrants in Africa, Mr Tom Nyanduga
- Special Rapporteur on human rights defenders in Africa, Ms Reine Alapini Gansou (end of mandate)
- Special Rapporteur on freedom of expression and access to information in Africa, Ms Faith Pansy Tlakula
- Chairperson of the Working Group on the implementation of the Robben Island Guidelines (torture), Ms Catherine Dupe Atoki
- Chairperson of the Working Group on the situation of indigenous peoples/communities in Africa, Mr Musa Ngary Bitaye
- Chairperson of the Working Group on the death penalty, Ms Zainabo Sylvie Kayitesi
- Chairperson of the Working Group on specific issues relevant to the work of the African Commission, Ms Pansy Tlakula (Acting Chair)
- Chairperson of the Working Group on rights of older persons and people with disabilities, Mr Yeung Kam John Yeung Sik Yuen
- Chairperson of the Working Group on economic, social and cultural rights, Ms Catherine Dupe Atoki.

### **Report of the Special Rapporteur on situation of human rights defenders**

Commissioner Reine Alapini Gansou, as Special Rapporteur on human rights defenders in Africa, began her presentation of her inter-sessional report by highlighting her promotional activities which included meetings with civil society, followed by an overview of country visits and note verbales sent to States parties. The Special Rapporteurs' activities included a number of activities with civil society on issues such as capacity building of human rights defenders; human rights, sexual orientation and gender identity; women human rights defenders, and role of human rights defenders in peace-building, among many others. The Special Rapporteur also highlighted her joint visit to the Sudan with the Special Rapporteurs on freedom of expression and on the situation of women in Africa.

Note verbales were sent to Algeria, Cote D'Ivoire, Congo Brazzavile, Liberia and Ethiopia. The Special Rapporteur also highlighted that the Republic of Congo has agreed to a promotional mission, and also offered her apologies to Liberia for being unable to carry out a promotional mission.

The Special Rapporteur highlighted in her report that the 'state of human rights defenders has worsened considerably',<sup>14</sup> and also emphasised that repression of the rights to freedom of association and freedom of

<sup>14</sup> See Intersession Report of Mme Reine Alapini-Gansou, available at: <http://www.achpr.org/english/Commissioner%27s%20Activity/46th%20OS/Special%20Mechanisms/hrd.pdf>.

expression were particularly disturbing. In this context, she also mentioned that the terms of reference for a study on freedom of association were currently being drafted. She mentioned that 23 communications had been sent out to seven countries regarding cases of human rights defenders, and also that press releases had been issued by the mandate in relation to human rights defenders in Kenya, Libya, the Democratic Republic of Congo, the Gambia and Guinea.

Some of the key conclusions and recommendations made in the report are as follows:

- States parties need to protect human rights defenders during election periods.
- Terms of reference for a study of human rights defenders working in conflict situation are currently being explored.
- Website of the Special Rapporteur, at [www.srhrda.org](http://www.srhrda.org) has been launched to encourage visibility and engagement with the mandate.
- ACHPR needs to take preventive measures to protect human rights defenders in Africa.
- Situation of human rights defenders in the Gambia and in Guinea is ‘unacceptable’.
- ACHPR should to adopt a resolution on respect for freedom of association of human rights defenders in Africa.
- States parties need to respond more to the requests of the mandate, in accordance with their obligations under the African Charter.

In her presentation, the Special Rapporteur also highlighted the need for an appropriate structure to monitor cases brought to the mandate and the need for resources for carrying out the mandate’s functions such as country visits. She also recommended to the African Union (AU) that it should obtain permission from States for her to visit countries where human rights defenders are at risk and also called upon the AU to better monitor the situation in the Sudan and in the Gambia. She also called on all States to adopt favourable legislation that legitimises the role of human rights defenders in their countries.

Several NGO<sup>15</sup> speakers took the floor and addressed a number of issues such as: restrictions on funding of human rights defenders and their organisations in Ethiopia and the Sudan;<sup>16</sup> the use of vague definitions of terrorism to clamp down on legitimate activities of human rights defenders;<sup>17</sup> the use of security legislation and protection of public order to clamp down on freedom of assembly, movement and association of defenders in Zimbabwe;<sup>18</sup> threats to freedom of association, expression and the right to receive funding for human rights defenders;<sup>19</sup> situation of human rights defenders in Niger, Togo, Guinea Conakry and the Gambia;<sup>20</sup> and the need for the ACHPR to conduct independent investigations into allegations of violations against human rights defenders.<sup>21</sup> ISHR asked Ms Reine what strategies the mandate was using to encourage States to domesticate the provisions of the UN Declaration on human rights defenders, and also whether she thought it was a useful strategy to mainstream the issue of human rights defenders into the work of other relevant mandates of the ACHPR.

The only State to comment on the report was the delegation of Zimbabwe, who questioned the Special Rapporteur on the ‘definition’ of human rights defenders, and also asked how they were ‘any different from ordinary law-breakers’. Zimbabwe also claimed that human rights defenders in the country only carry out their activities for money. The delegation ended by advising NGO speakers from Zimbabwe to input their concerns regarding protection of human rights defenders in the country to the drafters of the new constitution.

In her concluding remarks, the Special Rapporteur replied that some of the strategies she was employing to encourage States to domesticate the UN Declaration on human rights defenders were as follows: capacity

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<sup>15</sup> East and Horn of Africa Human Rights Defenders Network, Zimbabwe Lawyers for Human Rights, International Service for Human Rights, West Africa Human Rights Defenders Network. For full ISHR statement, please refer to: <http://www.ishr.ch/in-africa/african-commission>.

<sup>16</sup> East and Horn of Africa Human Rights Defenders Network.

<sup>17</sup> East and Horn of Africa Human Rights Defenders Network.

<sup>18</sup> Zimbabwe Lawyers for Human Rights.

<sup>19</sup> International Service for Human Rights.

<sup>20</sup> West Africa Human Rights Defenders Network.

<sup>21</sup> West Africa Human Rights Defenders Network.

building for all stake holders on the provisions of the Declaration on human rights defenders and on relevant mandates; constant contact between the mandate and States parties; workshops and meetings on the topic, and country missions. The Special Rapporteur also highlighted the importance of joint visits by special procedures of the ACHPR, such as the visit to the Sudan,<sup>22</sup> and stated that the ACHPR was already mainstreaming the issue of human rights defenders into different aspects of its work. She also emphasised that freedom of association and freedom of expression were inseparable and important rights for the work of human rights defenders.

## **Report of the Special Rapporteur on freedom of expression**

Commissioner Pansy Tlakula, as Special Rapporteur on freedom of expression in Africa, began her presentation by highlighting activities undertaken in the period under review, followed by planned activities, an overview of the status of freedom of expression on the continent, issues brought to the attention of the Special Rapporteur and ending with conclusions and recommendations.<sup>23</sup>

Regarding the status of freedom of expression and access to information in Africa, the Commissioner sent urgent appeals regarding attacks on media practitioners and journalists in the following countries: Sierra Leone, Kenya, Gabon, Niger, Cameroon, Cote d'Ivoire, Senegal, the Gambia, Eritrea, and Namibia. Her report also provides an analysis of national media laws in Kenya, Swaziland and Zimbabwe. Commissioner Tlakula also highlighted her hope that Tanzania accepts her request to carry out a promotional visit in that country.

Some of the key conclusions and recommendations made in the report include the following:

- The report highlighted the contribution of NGOs, networks and journalists in providing information on abuse of freedom of expression on the continent.
- Bodies with regulatory authority over media should be independent of the government.
- State parties should end use of imprisonment for authors of publications critical of the government and abstain on imposing penal sanctions on journalists for published material.
- Criminal defamation laws should be revoked or amended in conformity with international and regional standards.
- State parties should take effective measures to prevent harassment or intimidation of journalists and human rights defenders exercising their freedom of expression.
- States parties should revoke any existing bans on newspapers, television stations or channels to guarantee the right to freedom of expression.
- States parties which are expecting to hold elections in 2010 should ensure that journalists and media practitioners are allowed to disseminate information freely without facing harassment or intimidation.
- States parties who have received communications from the mandate should provide responses and clarifications regarding concerns raised and support the work of the mandate.

Kenya and Zimbabwe were the only two States who took the floor following the presentation of the Special Rapporteur. Of note was Zimbabwe's acknowledgement of the weaknesses of the Zimbabwe Media Commission, regarding which the Special Rapporteur had expressed her concern in the report.

NGO speakers<sup>24</sup> highlighted violations of freedom of expression in Somalia, the Sudan, Rwanda, Ethiopia, Zambia, Zimbabwe, Botswana, Swaziland, Niger, the Gambia and Guinea Conakry.

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<sup>22</sup> Joint visit by ACHPR Special Rapporteurs on torture, freedom of expression, women in Africa and human rights defenders.

<sup>23</sup> Full report is available at: [http://www.achpr.org/english/info/46th\\_Com%20Activity.html](http://www.achpr.org/english/info/46th_Com%20Activity.html).

<sup>24</sup> East and Horn of Africa Human Rights Defenders Network, Media Institute of Southern Africa, Media Monitoring Project (Zimbabwe), West Africa Human Rights Defenders Network, HURISA.

Commissioner Soyata Maiga, in her capacity as Special Rapporteur on the rights of women in Africa, presented her activities for the period under review, beginning with activities organised with civil society, independent bodies and inter-governmental organisations; followed by collaboration with partners for the promotion of women's rights; collaboration with States parties; issuing of reminder letters to States parties; issuing of a press release on the protection of women against sexual exploitation (31 July 2009); completing a study on discriminatory provisions in the national legislations of ECOWAS States, and ending with conclusions and recommendations.

Reminder letters to States parties included a request to Niger for a promotional visit; a request to the Gabon, Central African Republic and the Republic of Guinea for dates for promotional visits which have already been agreed in principle and reminders to States to ratify the *Protocol to the African Charter on Human And Peoples' Rights on the Rights Of Women in Africa* (also known as the 'Maputo Protocol'). Also of note was that the Special Rapporteur sent a letter jointly with the Special Rapportuer on freedom of expression in Africa to President Yahya Jammeh of the Gambia, requesting him to use his discretionary powers to pardon a female journalist accused of slander and libel.<sup>25</sup>

Recommendations made by the Special Rapporteur on women include the following:

- States parties should ratify the Maputo Protocol and include relevant statistical data on the situation of women and girls in subsequent periodic reports under this instrument.
- States should strengthen educational and sensitisation programmes for traditional and religious leaders in order to accelerate change of cultural patterns.
- The ACHPR should adopt the new guidelines on periodic reporting by States under the Maputo Protocol.
- The ACHPR should support the work of the mandate, especially in countries of conflict.

No States engaged the Special Rapporteur on her report. NGOs raised the following issues: effects of climate change on the rights of women and girls,<sup>26</sup> situation of women in the Sudan,<sup>27</sup> protection of the girl child,<sup>28</sup> an advocacy tool for promotion of the Maputo Protocol,<sup>29</sup> and concerns of pastoralist women in Tanzania.

Commissioner Maiga ended by highlighting her hope that the new reporting guidelines would be adopted at the current session in order to assist state reporting; the need for training to address violence against women and also the plight of indigenous women who she dubbed a 'doubly marginalised' community.

### Consideration of State Reports Item 8 of the 46<sup>th</sup> session of the ACHPR

#### State reporting under the African Charter: How does it work?

States parties to the African Charter on Human and Peoples' Rights are required to submit periodic reports on the measures undertaken to give effect to the provisions of the Charter every two years, in accordance with Article 62 of the Charter. Much like the UN treaty bodies, the presentation of the State report is undertaken by a delegation of representatives from the concerned State, followed by questions posed by the commissioners. Commissioners, however, unlike treaty body members, ask questions in their capacities as special rapporteurs on specific thematic issues (although their questions may not be limited to these). Therefore, in addition to introductory questions posed by

<sup>25</sup> The journalist was subsequently released.

<sup>26</sup> Nord Sud XX1.

<sup>27</sup> East and Horn of Africa Human Rights Defenders Network.

<sup>28</sup> Plan International.

<sup>29</sup> Centre for Human Rights.

the country rapporteur (the Commissioner designated to take the lead for each country being examined), there are several rounds of questions from each Commissioner. After questions have been posed to the delegation, they are given the opportunity to respond either immediately, or the following day. Delegations may also take the opportunity to submit answers to questions in writing to the ACHPR, if time does not permit responses to all questions asked.

## Examination of Ethiopia

### Overview

The review of the obligations of Ethiopia under the African Charter took place on 13 November 2009 and was chaired by country rapporteur, Commissioner Catherine Atoki Dupe. The review consisted of a particularly lengthy round of questions by the country rapporteur followed by questions by other commissioners. The delegation of Ethiopia barely had enough time and knowledge to respond to less than half the questions put to it. The delegation assured the Commission that it would not be ‘another ten years’ before the submission of the next report, and committed to responding to unanswered questions through a written submission to Commissioners at a later date. Commissioners, particularly the country rapporteur, appeared very dissatisfied with the quality of the review and urged the delegation to provide clear responses to questions through its written submission.

### Report of Ethiopia

The delegation of Ethiopia presented its initial to fourth periodic reports under the African Charter, and it explained that its late report should not be viewed as a lack of commitment to human rights, but was a result of multiple reporting obligations to international and regional bodies in 2009 including the universal periodic review mechanism (UPR) and the UN treaty bodies. While States are required to report every two years under the African Charter, Ethiopia was presented its first report 10 years after the Charter had entered into force in the country. The delegation covered a number of issues in its presentation, including: measures to ensure gender equality, including a gender sensitive approach to female prisoners; measures to protect freedom of religion; press and media laws to protect freedom of expression; regulation of freedom of assembly; rights to join and form trade unions; establishment of a national human rights institution in 2000; and the problems of Ethiopia’s dependence on foreign aid and chronic under-nourishment of the general population.

### Key questions

Commissioner Catherine Atoki, the country rapporteur for Ethiopia put an extensive list of questions to the delegation, stating at the outset that her main concern was that Ethiopia submit its periodic reports on time. Commissioner Atoki went on to praise the report for being ‘well-composed, detailed and easy-to-understand’, that it adhered well to the prescribed reporting guidelines, and that it had been translated into Amharic. She added, however, that the report needed more information to ‘support assertions of compliance’ with the African Charter. For example, the report stated that Ethiopia had taken steps to ‘empower women’, but was unsubstantiated by quantitative data. Some of the key questions asked by Commissioner Atoki were as follows:

- In compiling the report, the delegation had stated that a wide consultative process had been employed – what role did civil society play in the drafting of the report, how many organisations were present and what were their areas of competence?
- When was the last execution carried out in the country and what plans are in place to abolish the death penalty?
- What punishment is meted out to those accused of practicing torture and under which law? Have there been any instances of courts refusing to accept evidence that was extracted under torture?

- Given the prevalence of rape, violence against women, and harmful traditional practices such as female genital mutilation, what steps has the State taken to address these issues and to prosecute perpetrators of violence against women?
- Regarding the new press and media bill which allows for impounding materials and therefore censorship of the press, how does it facilitate access to information and freedom of expression?
- Has the civil society and charities bill banning human rights organisations for receiving more than 10% of their funding from foreign donors been passed and how does the State guarantee freedom of association in this context?
- What were the conclusions reached by the commission of inquiry to investigate the 2005 elections in Ethiopia? Can the State provide an explanation of why two judges from the commission have fled the country to seek asylum in Europe even before the completion of the report of the commission of inquiry?

Commissioner Atoki also posed a number of questions regarding independence of the judiciary, need for ratification of regional instruments, current prison conditions,<sup>30</sup> unemployment, corruption in public service, need for criminalisation of child trafficking and child labour, and several other issues. She ended by asking the delegation what challenges Ethiopia faces in implementing its obligations under the African Charter since the report does not highlight any factors that hamper implementation.

Commissioner Tlakula asked a number of questions in relation to freedom of expression. She asked what Ethiopia was doing to repeal criminal defamation laws. She also asked the delegation what the requirements were for registration of journalists, in order for them to operate legally, and if they were commensurate with freedom of expression, and also what the requirements for the registration of foreign press in the country were. She also asked whether it was true that no foreign news outlets or blogs were available to journalists in Ethiopia. She ended by questioning the delegation on the financial and functional independence of the national electoral board.

Commissioner Maiga posed many questions on the situation of women's rights in Ethiopia, including: measures for protection from gender-based violence; protection from early marriage; status of a law criminalising violence against women; budget for health services for women; sensitisation programmes to eradicate female genital mutilation; condition of women in prison; prevalence of high maternal mortality; trafficking and prostitution of girl children; and also the need for gender disaggregated data on women and girls. Commissioner Maiga also echoed concerns expressed by other Commissioners on the civil society and charities bill which would threaten financing of women's rights NGOs.

Commissioner Kayitesi asked whether the national human rights commission of Ethiopia functioned in line with international standards and if it was independent in the exercise of its functions. Commissioner Kayitesi also asked whether the dual system of having Sharia courts as well as a parallel secular judicial system had led to discrimination in treatment of citizens of the country.

Commissioner Bitaye focussed his questions on the protection of pastoralist communities in Ethiopia and asked about what measures were being taken to ensure protection of their way of life, including protection of their rights to health and education.

Commissioner Yeung asked the delegation what measures were being taken to protect the rights of older people and persons with disabilities.

Commissioner Malila stated that the State report did not provide sufficient information on the state of prisons in the country and expressed concern at the length of incarcerations, especially of political prisoners.

Commissioner Alapini-Gansou again raised the role of civil society in the preparation of the State report and also directly asked the delegation how Ethiopia could say that it was protecting freedom of association when

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<sup>30</sup> Commissioner Atoki requested more information on this issue as she was denied permission to enter prisons on a country mission to Ethiopia.

the legislation restricting foreign funding to human rights NGOs was a violation of human rights. She also asked the delegation to provide further information on the law governing funding of NGOs, the electoral law and anti-terrorism laws, and asked what steps Ethiopia was taking to review such legislation.

### Replies of Ethiopia

Due to the relatively long list of questions, the delegation of Ethiopia had limited time to respond to most questions.

It stated that there was ‘nothing personal’ behind the decision not to allow Commissioner Atoki to visit prisons in the country, and that it was more a question of ‘practical difficulties’ in arranging the visits.

Regarding Commissioner Bitaye’s questions on the status of pastoralist communities, the delegation stated that this was a serious issue which ‘impacted on [the] country’s sovereignty and that they did not accept the classification of pastoralists as indigenous peoples and that this was the State’s consistent position even under examination by the UN Committee on the Elimination of all forms of Racial Discrimination (CERD committee). The delegation stated that it objected to using terms such as ‘indigenous peoples’ which went against the Constitution of the country by creating a ‘new category of people’. Having said this, the delegation stated that it was willing to discuss the situation of pastoralists and stated that they had been duly compensated where their land had been taken from them for the purpose of cultivating sugar plantations.

The delegation stated that couples could go to either Sharia or civil courts to resolve disputes so the question of discrimination ‘did not apply’ in relation to Commissioner Kayitesi’s question.

The delegation also responded to Commissioner Malila’s concern regarding incarceration of political prisoners by stating that indefinite detention did not occur, and also that there were prisoners who ‘held political positions’ but were not necessarily ‘political prisoners’.

The delegation stated that it would address questions not responded to in the dialogue in written form to commissioners at a later date.

In conclusion, Commissioner Atoki stated that the delegation had not answered most questions put to it, and said that by deferring its replies to written responses that this would prevent the ACHPR from engaging with the Government of Ethiopia on its human rights issues. She called on Ethiopia to put in ‘more effort’ to providing responses in its reports in the future. She insisted once more that responses must be made available by the State party, and also said that the delegation needed to be prepared to answer certain questions such as regarding the conclusions of the commission of inquiry into the elections.

Commissioner Bitaye expressed his wish that Ethiopia would extend an invitation to the working group on indigenous populations to visit the country.

Commissioner Tlakula also expressed her concern regarding the use of criminal defamation laws against journalists in the country to curtail freedom of expression and reiterated that defamation should be a civil and not criminal offence.

## Examination of Botswana

### Overview

The review of the obligations of Botswana under the African Charter took place from 15 to 16 November 2009 and was chaired by country rapporteur, Commissioner Yeung. The review consisted of a large number of questions from the country rapporteur, followed by questions from various other Commissioners from the perspectives of their special mandates. The delegation answered a number of questions put to it by the

country rapporteur regarding judicial and parliamentary institutions but steered clear of what they referred to as ‘supplementary questions’ from other rapporteurs on key issues such as freedom of expression, torture, the rights of women under customary law applicable in the country and the situation of human rights defenders in Botswana. The delegation assured the Commission that it was committed to responding to all questions even if time did not permit and that they would submit written responses to unanswered questions.

## Report of Botswana

The delegation of Botswana consisted of representatives from the Ministry of Defense, Justice and Security, the organ that was introduced as being in charge of human rights in the country. The delegation provided an overview of its first periodic report under the African Charter,<sup>31</sup> touching on issues including the creation of an inter-ministerial committee to address backlog of reports to the UN treaty bodies. The delegation highlighted that the current report was prepared after consulting NGOs, academia, media, political parties and all relevant stakeholders, thereby ensuring the ‘comprehensiveness’ of the report, and also highlighted that the delegation hoped to continue to involve NGOs in the preparation of future reports. The delegation highlighted that they had been unable to legislate on the topic of lesbian, gay, bisexual and transgender rights as they were ‘against the culture’ and ‘against the will’ of the peoples of Botswana. It also highlighted the December 2006 court ruling allowing indigenous communities to return to their ancestral land. It also mentioned that the Government of Botswana is currently considering a variety of options for a national human rights mechanism, such as by expanding the mandate of the existing Ombudsman to cover human rights issues.<sup>32</sup>

## Key questions

Commissioner Yeung, the country rapporteur, put a long list of questions to the delegation covering a number of topics including: corporal punishment in schools, the independence of the judiciary, composition and process of appointments of various members of the judiciary, child labour, sexual harassment in the work place, mechanisms for the protection of the rights of indigenous peoples, time-limits for pre-trial detention, and education of children, among many others. A key issue highlighted by Commissioner Yeung and later by other Commissioners was the compatibility of Botswana’s customary law, which is ‘unwritten and subject to variation’ with national legislation and provisions of the constitution. The potentially discriminatory effect of customary law on women in the country was also questioned. Other questions put to the delegation included:

- Which body is in charge of receiving complaints of human rights violations?
- What steps is the government of Botswana taking to give legal effect to economic, social and cultural rights as it has not ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)?
- Why has domestication of international human rights conventions to which Botswana is a party not occurred to date and what steps is the State taking to do this?
- Has Botswana applied a moratorium on application of the death penalty and when did the last execution take place?

Commissioner Yeung also commended Botswana for recently amending its legislation punishing rape, by adopting a new definition that criminalises a broader range of activities.

Commissioner Atoki raised the issue that Botswana has entered a reservation to the definition of torture contained in Article 1 of the UN *Convention Against Torture* and questioned why the State had ratified the instrument when it had entered a reservation to this key article.

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<sup>31</sup> Available in full at [www.achpr.org](http://www.achpr.org).

<sup>32</sup> Recommendation of the ACHPR from country visit to Botswana in 2005.

Commissioner Bitaye questioned the delegation regarding Botswana's position on indigenous persons and asked if there were any affirmative action programmes in place to address the disadvantages affecting indigenous persons in the country.

Commissioner Tlakula asked the delegation to explain for why the chief of the electoral commission had resigned a few years ago, citing Government interference with the independence of the commission as the reason for his departure. She then also asked the delegation whether the legal provision penalising anyone who publishes material insulting the President (subject to a fine) had been used to prosecute journalists in the country.<sup>33</sup> She reminded the delegation of the provisions of the *Declaration of Principles on Freedom of Expression in Africa*.<sup>34</sup> She also asked the delegation about the criticism of the Media Practitioners Bill in Botswana by the media<sup>35</sup> and also expressed her own concern regarding specific elements of the Bill such as the functions of the media council, requirement of registration of media practitioners and the transparency of the appointment of members of the complaints committee. She stated that she would like to provide substantive written comments to advise the Government of Botswana on the Bill if it had not yet passed into law, and asked to whom she should direct her comments.

Commissioner Maiga expressed her concern that while Botswana had ratified both the *Convention on the elimination of all forms of discrimination against women* (CEDAW) and the Optional Protocol to the same (OP-CEDAW), it had not yet ratified the *Protocol on the rights of women in Africa*<sup>36</sup> and asked what steps were being taken to do so. She also reiterated Commissioner Yeung's concern about potential discrimination against women due to the application of customary law. She also posed questions regarding the following topics: divorce; women's inheritance under customary law; protection of widows from harmful religious practices; access of women to credit and land; and the need for gender disaggregated data on education of girls and political representation of women. She also questioned the delegation on support for women who were victims of domestic violence and need for gender sensitisation and training of investigative officer so that they could deal with such cases in a gender-sensitive manner.

In addition to a number of questions on the state of Botswana's roads, distribution of electricity and unequal distribution of income, Commissioner Khalfallah also asked the delegation why Botswana had not yet ratified the *International Covenant on Economic, Social and Cultural Rights*.

Commissioner Malila asked if the only two offences punishable with the death penalty in Botswana were treason and murder, and asked if the delegation would like to share any 'special circumstances' that prevented Botswana from maintaining a moratorium on the death penalty. He also commented that the report provided insufficient information on the state of prisons in the country.

Commissioner Gansou expressed her concern that the law governing freedom of association in Botswana provides a deadline for applications and also that organisations can be penalised if they are not registered. She also highlighted that international standards for the protection of freedom of association recommend that a regime of declaration is preferable to the compulsory regime currently used in the country.<sup>37</sup> She also commented that the State report did not indicate the number of associations operating in Botswana, and that she had not seen any NGOs from Botswana at the NGO Forum. She also highlighted the need for NGOs to be able to operate in an enabling environment in the country.

## Replies of Botswana

The delegation of Botswana began its replies by stating that human rights were a part of 'everyday culture' in Botswana, so even though they do not have legal protection of human rights, that it is a 'part of life'.

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<sup>33</sup> Para 289, periodic report of Botswana.

<sup>34</sup> Available at: [http://www.achpr.org/english/doc\\_target/documentation.html?../declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html).

<sup>35</sup> Para 298-304, periodic report of Botswana.

<sup>36</sup> Available at: [http://www.achpr.org/english/info/women\\_en.html](http://www.achpr.org/english/info/women_en.html).

<sup>37</sup> A regime of declaration is one whereby a group can declare its intention to be an association without waiting for a decision by a regulatory authority, whereas a 'compulsory' regime is one where an association can be penalised (with often severe results such as being shut down) for not registering with a formal authority.

The delegation explained that Botswana has not domesticated treaties that it has ratified due to problems of internal coordination and that a coordinating unit had been set up to better achieve this.

As the issue of customary law had been raised by several Commissioners, the delegation of Botswana spent some time answering this question. It stated that customary law that is contrary to the constitution is unenforceable. It also stated that even though customary law is unwritten, it is 'known' as it has been developed over a period of time. The delegation also clarified that customary law was only used to address 'simple' crimes such as petty theft, and not more complex issues such as rape or murder.

In relation to the death penalty, the delegation of Botswana stated that it had noted calls for abolition and for a moratorium, but that it had 'informally' consulted with the people of Botswana and found that they 'still believe in the death penalty'.

The delegation of Botswana also provided responses to questions on: removal of judges from court; corporal punishment; children's right to education; political representation of women; and indigenous peoples. The delegation stated that it would submit written responses to what it referred to as 'supplementary questions', such as those on torture and freedom of expression.

Commissioner Yeung thanked the delegation for answering the questions, and also remarked that even if the people of Botswana wanted to maintain the death penalty, that it was a 'question of leadership as well', and asked if there was not some consensus among higher officials about the need to abolish the death penalty. He also called on the delegation to answer a question on whether sexual harassment was a punishable offence.

The delegation of Botswana took the floor once more to state that sexual harassment was not a criminal offence, but that the public sector had a 'code of conduct' while the private sector was left to self-regulate this issue.

## **Examination of the Republic of Congo**

### **Overview**

The review of the obligations of the Republic of Congo under the African Charter took place from 16-17 November 2009 and was chaired by country rapporteur, Commissioner Soyata Maiga. The delegation answered a number of questions put to them by the country rapporteur regarding the access to the justice, women's rights, Congo beach disappearances, refugees but failed to answer other rapporteurs on key issues such as freedom of expression, torture, the economic and social rights and the situation of human rights defenders in the country. The delegation head by the director of the minister of justice cabinet assured that he would provide replies to unanswered questions.

### **Report of Congo**

The delegation of the Republic of Congo started the presentation by highlighting its obligations under international human rights law. The constitution of 1992 and 2000 integrate all instruments ratified by the State and recognises all human rights. The State delegation stated that Congo is up to date on its ratifications.

The delegation recognised that there are weaknesses in terms of effective protection of human rights and gave the example of the deterioration of prison infrastructure. They also spoke of the problems encountered in the implementation and the full integration of certain instruments into national legislation such as CAT. To ensure compliance with its obligations under this instrument, the delegation reassured the commissioners that the penal code was in the process of being revised.

The delegation ended its presentation by replying to written questions such as the compliance of the state report with the guidelines set up by the Commission, the involvement of civil society organisations in drafting the State report, and the setting-up of an NHRI in accordance with Paris Principles.

### Key questions

Questions from commissioners focused on the lack of quantitative information such as statistics and information on the implementation of rights, access to justice, refugees, women's rights and the representation of women in decision-making, disappearances, reparations for victims of human rights abuses and the relationship between state actors and the civil society.

The general observations raised by the country rapporteur related to the structure of the state report which did not follow the guidelines set up by the ACHPR and mentioned only a few articles of the African Charter. Commissioners also noted the lack of statistics indicating progress in the implementation of Charter provisions.

Other specific questions put to the delegation included:

- What are the measures taken by the government to facilitate access to the justice by citizens?
- What measures are being put in place by the State to ensure the reform of prisons and places of detention?
- How many NGOs were consulted in the drafting of the State report?
- How has Congo planned to operationalise the newly established NHRI, including by supplying resources such as office space, in order to allow the institution to fulfil its mandate?
- How does Congo intend to implement the UN Declaration on human rights defenders and other relevant regional instruments that recognise the right to protect human rights? What concrete measures is the State putting in place to help human rights defenders carry out their work?
- How is the right to freedom of expression protected? Do political parties also have access to the public media?
- Most of the State's extraction activities are conducted in forest areas, with implications for indigenous peoples. What measures is the State party putting in place to protect the rights of these peoples?

### Replies of Congo

The Congolese delegation began its replies by mentioning that its laws protect all of its citizens, and that it has made many efforts to improve the human rights situation in the country, while recognising that more efforts still needed to be made. The delegation recalled that Congo is a post-conflict country and that the Government has made efforts towards the protection of human rights, peacebuilding and reconciliation. The delegation highlighted some examples of this such as the establishment of an NHRI, which it is currently trying to equip with adequate resources, and the creation of a Human Rights Division within the Ministry of Justice.

Relating to civil society participation, the delegation explained that it had invited organisations to be consulted in the drafting process of the national report to the ACHPR, but that these organisations had refused to participate.

On indigenous issues, the delegation highlighted that it had started registration of children from minority groups, with 400 indigenous children registered to date. It also highlighted that 12,500 indigenous children are currently enrolled in schools.

The delegation also stated that detainee's rights are respected, and that the State provides lawyers when detainees cannot afford legal representation. It also highlighted that preventive detention can only last 48 – 72 hours.

Regarding access to justice, the delegation informed the Commission that Congo is currently implementing a justice reform project funded by European Union, for five years. This project will also help victims with scarce resources to access the judicial system by reducing the costs of accessing courts. In its 2010 budget, Congo also plans to provide more resources for the professional training of lawyers. The State party highlighted that in order to ensure the independence of the judiciary the government has established a magistrate council that includes a representative of NGOs.

The delegation informed commissioners that the Constitution guarantees the right to freedom of expression for all its citizens. It stated that there are 55 newspapers and several radio and television broadcasters that operate in the country. Political parties are not allowed to own media outlets. The delegation also pointed out that the state has created a body to regulate the media, and sanctions are limited to fines.

On the effectiveness of the NHRI, the delegation informed the Commissioners that the President recently appointed the Chairperson of this institution after his election by other members of the Commission. The delegation assured that the Government would provide enough resources to this institution to allow it to fulfill its mandate.

The delegation mentioned that the constitution prohibits discrimination against women. According to the delegation, the Government is taking concrete steps to put this into practice, such as through the creation of a research centre on the development of women's rights. The delegation also said that according to domestic legislation, at least 15% of elected parliamentarians should be women, with the percentage being higher for senate elections. Out of the 36 ministers in the government, 5 are women.

On reconciliation, the parliament is debating an amnesty law applicable to former President Lisouba. It is hoped that this law will encourage refugees to return safely to their country. The Government pointed out that the 'Congo beach disappearances' occurred during the civil war in 1999. The national enquiry established the death or disappearance of only 83 persons, not 383 as has been claimed by NGOs. The judiciary condemned the State for its failure to protect the victims and required that it compensate all of them. Today, all victims have been compensated.

To reiterate its commitment to the protection and promotion of human rights, the delegation announced that it had decided to commemorate the African Charter every year. During the upcoming Human Rights day (10 December), the State will inaugurate a public human rights garden. The delegation ended its presentation by highlighting the challenges that it faced in implementing its human rights obligations, such as the integration of human rights learning in schools in a country where only 65% of children are enrolled in schools.

The African Commission Appointed or Reappointed the following Commissioners to serve as Special Rapporteurs of the following mechanisms, effective from 25 November 2009

### **Special Rapporteurs**

- Commissioner **Soyata Maiga** - Special Rapporteur on the Rights of Women in Africa (Reappointment);
- Commissioner Catherine **Dupe Atoki** – Special Rapporteur, Prisons and Conditions of Detention in Africa (Appointment);

- Commissioner **Pansy Tlakula** - Special Rapporteur, Freedom Of Expression and Access to Information in Africa (Reappointment);
- Commissioner **Mohamed Bechir Khalfallah**, Special Rapporteur, Human Rights Defenders in Africa (Appointment);
- Commissioner **Mohmed Fayek**, Special Rapporteur, Refugees, Asylum Seekers and IDP's in Africa (Appointment)

#### **Chairpersons of the working groups**

- Committee for the Prevention of Torture in Africa- Commissioner **Catherine Dupe Atoki**
- Working Group on Economic, Social and Cultural Rights- Commissioner **Mohamed Bechir Khalfallah**
- Working Group on the Death Penalty- Commissioner **Zainabo Sylvie Kayitesi**
- Working Group on Specific Issues Relevant to the Work of the Commission- Commissioner **Pansy Tlakula**
- Working Group on Extractive Industries and Human Rights Violations- **Commissioner Mumba Malila**

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## **ABOUT THIS PUBLICATION**

The *Analytical Overviews of the ACHPR* are a new series of reports aiming to provide information and analysis of the sessions of the African Commission on Human and People's Rights (ACHPR), and the NGO Forum prior to the sessions of the ACHPR from the perspective of human rights defenders. These reports aim to provide critical information to human rights defenders from within Africa and outside, in order to enable them to engage more strategically and effectively with this important regional forum.

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