The Special Mechanisms of the African Commission on Human and Peoples’ Rights and the role of NGOs in Africa

Introduction

The establishment and work of the African Commission on Human and Peoples’ Rights’ (Commission) special mechanisms has largely contributed to the success of its human rights promotion mandate. The special mechanisms are not unique to the African human rights system. The UN system has appointed and utilised special rapporteurs to explore the human rights situation in specific countries or consider a particular human rights theme. Although the initial establishment of the Commission’s special mechanisms experienced a number of challenges, these have been addressed over time. This paper will examine the legal basis for the establishment of special mechanisms; the mandate and work of some of the special mechanisms; assessment of their achievements and failures and the role of NGOs in ensuring the effectiveness of the special mechanisms.

The Commission was set up in terms of article 30 of the African Charter on Human and Peoples’ Rights (African Charter) and its secretariat is located in Banjul, the Gambia. It has 11 part-time commissioners who are elected by the African Union. The Commission has both a protection and promotion mandate as provided in article 45 of the African Charter. Its protection mandate is achieved through the consideration of communications filed by NGOs under article 55 of the African Charter, while the promotional mandate has largely been achieved through the work of its special mechanisms as alluded to above.

Legal Basis

There is no specific article in the African Charter providing for the establishment of special mechanisms under the Commission. The question one may ask therefore is whether the creation of special mechanisms was a creation of the Commission’s secretariat. Upon further perusal one finds that the legal basis for the establishment of the special mechanisms seems to be located in article 45 of the African Charter. Article 45(1) provides for the promotional mandate of the Commission. The mandate to promote human and people’s rights is further elaborated as follows under article 45(1):
a. To collect documents, undertake studies and research on African problems in the field of human and peoples’ rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and people’s rights and... give its views or make recommendations to governments;
b. To formulate and lay down principles and rules aimed at solving legal problems relating to human rights and fundamental freedoms upon which African governments may base their legislations;
c. Cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.

This provision resonates with the terms of reference, mandates and working methods of most of the special mechanisms under the Commission. In that regard it is reasonable to accept article 45(1) as a legal basis for the setting up of special mechanisms of the Commission. The work that the special mechanisms do is promotional in nature as provided in article 45(1). If this provision lacks clarity then rule 23 of the African Commission rules of procedure seems to cure the defect as it specifically provides for the setting up of special mechanisms.

The specific provision on the establishment of special mechanisms is found in rule 23 of the rules of procedure of the Commission which states as follows:

1. The Commission may create subsidiary mechanisms such as special rapporteurs, committees and working groups.
2. The creation and membership of such subsidiary mechanisms may be determined by consensus, failing which, the decision shall be taken by voting.
3. The Commission shall determine the mandate and terms of reference of each subsidiary mechanism. Each subsidiary mechanism shall present a report on its work to the Commission at each ordinary session of the Commission.

Working groups such as the one on Communications have been set up pursuant to the provisions of rule 97 of the Commission’s rules of procedure and provides that:
1. The Commission shall appoint a rapporteur for each Communication from among its members.

2. The Commission may also establish one or more working groups to consider questions of seizure, admissibility and the merits of any Communication(s) and to make recommendations to the Commission.

3. The Commission shall consider the recommendations of the Rapporteur and or the working group and make a decision.

The working group on communications is one of the few working groups which is composed of members of the Commission only.

In terms of this rules 23 and 97 of the rules of procedure and article 45(1) African Charter, the following special rapporteurs, committees and working groups have been set up by the Commission:

10. Working group on the death penalty, extra-judicial, summary or arbitrary killings in Africa(2005)
13. Advisory Committee on Budgetary and Staff Matters(2009)
14. Committee on the protection of the rights of people living with HIV and those at risk, vulnerable to and affected by HIV(2010)
15. Working group on communications (2011)

Examination of mandates of special mechanisms

Currently the Commission is operating with 7 working groups, 5 special rapporteurs and 3 committees. It is pertinent to consider the first special mechanism established by the Commission before discussing the function or mandate of selected special rapporters and working groups.

The first special mechanism set up by the Commission was the mandate of the Special Rapporteur (SR) on extra-judicial killings, summary and arbitrary executions set up at the 15th ordinary session in 1994. It came as a response to the genocide in Rwanda. It is important to note however the role of Amnesty International in proposing the establishment of this mechanism in 1993. In 1995 Dr Ben Salem was appointed SR on extra-judicial killings. It is now generally agreed that this special mechanism was a huge disappointment and generally embarrassed the Commission. Firstly Ben Salem did not have the requisite experience and was not fit for purpose, being the Tunisian ambassador to Senegal. There were no clear terms of reference or guidance on what the mandate of this special mechanism was and an explanation of the working methods. Even though it had support from the Institute of Human Rights and Development in Africa, Ben Salem failed to implement the mandate and over a period of 6 years only one report had been submitted to the Commission. After Ben Salem’s resignation, the mandate became defunct.

The SR on Prison conditions is perhaps one of the best performing special mechanisms of the Commission. This special mechanism was set up in 1996 and Professor Victor Dankwa became the first rapporteur. As it was being set up the debate on whether it would be prudent to appoint external experts was resurrected. There was however resistance based on the fact that it would be difficult to monitor and control the activities of external experts. The genesis of this special mechanism can be traced to Uganda when the Penal Reform Institute (PRI), in conjunction with the Commission, Ugandan NGOs and other supranational NGOs organised a pan African seminar on prison conditions in Africa. At the end of this

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A declaration calling for the establishment of the SR on prisons was adopted. The PRI made an undertaking to provide financial, technical and institutional support for the operationalisation and effective functioning of the SR on prisons. The PRI also helped the SR in the drafting of reports and having them published. Commissioner Chirwa replaced Dankwa at the 20th session of the Commission in 2000. In summary the terms of reference mandated the SR to examine the situation of persons deprived of their freedom within the territories of states parties to the African Charter. The mandate of the SR is defined in a resolution adopted by the Commission at its sessions. Although proposals for the setting up of special mechanisms may come from NGOs, it is ultimately the Commission which decides the nature and composition of the special mandate.

In order to discharge that mandate the SR on prisons would among other things examine the state of prisons and conditions of detention and make recommendations for improvements, examine national laws against international standards and make recommendations and propose to states to take urgent action where required. These tasks would be achieved through receiving information from states parties, individuals and their families and NGOs; elicit the cooperation of states parties when conducting on-site visits and publishing an annual report. The first country where the first mission visit was conducted by the SR on prisons is Zimbabwe in 1997. Other countries visited include Mozambique, Madagascar, Mali, Gambia, South Africa and Benin. In Mali there was some progress in that some of the recommendations of the SR were implemented by the state. A total of 16 country missions were conducted in 13 countries as at 30 October 2013.²

On the country missions the SR meets with state officials, NGOs and prisoners. At the end of the visit a report is drafted and recommendations to the state will be made. The mandate of Dankwa and Chirwa has been hailed as a success. This was due perhaps to their commitment, passion, expertise and innovation. The support rendered by NGOs was also critical in ensuring the effectiveness of the SR on prisons. This mechanism also benefitted from a clear mandate and terms of reference. The current SR on prisons, Commissioner Kagwa, has also worked closely with NGOs who have assisted in the drafting of guidelines on pre-trial detentions. The overcrowded and unduly prolonged detention of prisoners awaiting trial has been one of the disturbing features of African prisons. Some of the

challenges met by the SR on prisons include blanket denials by states; the success of the visit is precariously dependent on the state’s invitation, consent and cooperation as well as the limitations of open confrontation. The states are given an opportunity to respond in that their comments are taken on board and attached to the recommendation section of the final report of the SR.

The mandate of the SR on women’s rights was directed more to development of guidelines to assist states in improving their reporting on the human rights situation of women and the drafting of the Protocol to the African Charter on the Rights of women in Africa (women’s protocol). The women’s protocol was adopted in Maputo in July 2003. Dr Angela Melo’s mandate also focused on promotion of the speedy ratification of the women’s protocol, examination of state party reports, urgent appeals in response to specific situations affecting women and adoption of a resolution on the situation of women in the DRC.

The other active special rapporteurs are for human rights defenders as well as freedom of expression and access to information. These mandate holders have achieved their mandate through fact-finding investigative missions, assisting states parties to develop appropriate legal and policy frameworks, public interventions through urgent appeals and press releases. The SR on freedom of expression and access to information, Commissioner Faith Pansy Tlakula has worked closely with NGOs and special mechanisms from the UN and the Inter-American system in the discharge of her mandate. She has issued joint declarations on freedom of expression with her counterparts from the other regional human rights systems. She has attended seminars and workshops organised by NGOs to discuss issues relevant to her thematic mandate. The SR on refugees, asylum seekers and IDPs in Africa Advocate Tom Nyanduga was not did not always find states forthcoming in the discharge of his mandate. In 2005 he had to abort his fact finding mission to Zimbabwe after Operation Murambatsvina when he was asked to leave the territory.

A number of factors have constrained the effectiveness of the special mechanisms of the Commission. These may be summarised as follows:

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3 The SR on freedom of expression and access to information, finalised and officially launched the model law on access to information in April 2013 with NGO support.
1. Lack of financial and human resources. Although the Commission allocates a budget to facilitate the work of the special mechanism, the funds are inadequate. Some NGOs have sponsored interns and legal officers to assist the SR to discharge their mandate, but this is however limited in that the staffing levels still remain low.

2. Absence of state consent and cooperation.

3. Lack of external experts as SR or chairpersons of working groups.

4. Lack of visibility

5. Lack of clear mandate and terms of reference.

6. The workload may also be rather high considering that the mandate-holders work part-time and they have to cover the whole continent to discharge country-specific mandates with limited institutional support. The support from NGOs has often made the work of special mechanisms manageable.

*Other special mechanisms*

Besides the SR, the Commission has seen it fit to establish working groups and committees. There are some differences between the SR and the working groups especially regarding their mandate and composition. The working groups have room for the appointment of external experts, whereas all the SRs are members of the Commission. Whilst the mandate of the SR is specific, working groups often have a broad mandate to study, research, raise awareness and publish reports on emerging human rights issues. The first working group is on indigenous peoples and it was established at the 28th session of the Commission in 2000. It currently consists of 3 commissioners and 6 external experts. In 2003 the working group finished drafting the comprehensive “Report of the African Commission’s working group of experts on indigenous populations/communities on the human rights situation of indigenous peoples and communities in Africa. The working group conducted 14 fact-finding visits to countries such as Botswana, Namibia, DRC and Uganda. It has received a lot of support from the International Working Group for Indigenous Affairs (IWGIA). They have made crucial contributions to the work of the Commission. One of the critical emerging special mechanisms in Africa is the working group on extractive industries, environment and human rights violations which is examining the role of non state actors in the extraction of mineral resources and how this has impacted on the environment and human rights. It comprises four members who are all commissioners of the African Commission. This
working group deserves the support of NGOs in Africa to effectively monitor mineral resource extraction and its impact on the environment and human rights. NGOs should obtain funding to assist in organising seminars, investigative missions and production of reports highlighting the work of special mechanisms.

**Conclusion**

Although the establishment of special mechanisms of the Commission met with some obstacles, there is still great potential to be exploited by all concerned in ensuring that the Commission’s special rapporteurs, committees and working groups discharge their mandates effectively. If this is to be realised a number of reforms must be implemented as summarised below:

1. The Commission must consider the appointment of independent experts as special rapporteurs. The Commissioners who are appointed as special rapporteurs or chairpersons of committees and working groups will be already loaded with communications to consider and country-specific mandates.
2. The Commission must appoint rapporteurs with relevant experience, commitment and expertise.
3. The mandates of the special rapporteurs must be clear, achievable and practical.
4. States parties should cooperate with special mechanisms and send invitations to enable mandate-holders to conduct country and fact-finding missions. Mandate-holders should be allowed unfettered access to situations of human rights violations and any fair recommendations by special rapporteurs should be complied with.
5. The states parties which do not cooperate with mandate-holders must be reported to the AU Assembly of Heads of State and Government for appropriate action to be taken, including voting sanctions.
6. The Commission should allocate adequate budgets to facilitate the work of the special mechanisms.
7. There should be greater collaboration with NGOs who should publicise the work of the special rapporteurs to enhance visibility.