

Refugees and the African Commission on Human and Peoples' Rights

by Monette Zard in collaboration with
Chaloka Beyani and Chidi Anselm Odinkalu

On paper, African refugees benefit from one of the world's most progressive protection regimes. In reality, however, they face endless human rights hurdles involving forced return, discrimination, arbitrary arrest and detention, restricted freedom of movement and expression, and violations of social and economic rights.

Faced with an ongoing struggle to bridge the gap between theory and reality, advocates for refugees have the option of using Africa's human rights mechanisms innovatively to argue the case for refugee rights.

It is not that Africa is short of norms. Far from it; in many respects the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa puts the continent ahead of other regions. In addition to introducing an expanded notion of who is a refugee,¹ the Convention reinforces key refugee protection standards, including the closely linked principles of *non-refoulement* and voluntary repatriation. The Convention is an important regional complement to the 1951 Convention. Together, these instruments articulate an important set of standards regarding the treatment that refugees should expect to receive in exile.

The crisis facing refugees on the continent reflects rather a failure of implementation. A major weakness of the current international legal framework to protect refugees – one that was recognised during the ambitious UNHCR Global Consultations process – is the absence of any meaningful system of supervision, such as a court or treaty body, to ensure that States

abide by the letter and spirit of international refugee conventions.² International and regional human rights mechanisms – and in particular the African human rights system – may go some way towards making up for this lacuna by providing advocates with a complementary means to help refugees and asylum seekers actually benefit from rights they have on paper.

The centrepiece of the African human rights system is the 1981 African Charter on Human and Peoples' Rights³ and its principal overseer, the African Commission on Human and Peoples' Rights (ACHPR)⁴, which was established in 1987. Apart from Morocco all 53 African States have accepted the provisions of the Charter as formally binding. The legal framework established under the Charter offers refugees and asylum seekers (as well as the NGOs that represent them) the possibility of individually petitioning the ACHPR to seek protection of violated rights. This includes specific rights by virtue of being refugees and asylum seekers as well as more general human rights guarantees set out in the Charter. In fulfilling its central oversight role, the ACHPR takes into account the UN and OAU Conventions as well as other regional arrangements in which refugees have freedom of movement and residence in regions such as

ECOWAS under the Community of West African States.

Recourse to the ACHPR enables refugees and asylum seekers to bring claims against the host country where refugee law is deficient or inadequate, and opens up the prospect of claims against countries of origin on the basis of **continuing** violations of their rights based on the fact of persecution and flight to other States. Moreover African governments are required to ensure that the protection of the Charter is available to all persons within their jurisdiction, whether they are nationals or non-nationals. Governments are thus accountable before this system for how they treat not only refugees but also IDPs and migrants generally.

John D Ouko, a Kenyan student leader, was arrested and detained without trial for ten months in the basement cells of the Secret Service headquarters in Nairobi. Held in a two by three metre cell, he was subjected to physical and mental torture. Fleeing the country, he lodged a complaint against Kenya whilst residing as a refugee in the Democratic Republic of the Congo, alleging violations of certain rights under the African Charter. The Commission found that his persecution and flight from his country of origin had violated the African Charter's Article 5 (on respect for human dignity, protection from torture, inhuman and degrading treatment), Article 6 (on liberty and security of the person), Article 9 (on freedom of expression) and Article 10 (on freedom of association).

The African Charter is the gateway to the ACHPR and understanding how the rights articulated in the Charter can be put to work for refugees is the starting point for any advocate. Two general guarantees - the principles of non-discrimination and equality in Articles 2 and 3 - can be used to protect any rights that refugees or other individuals are entitled to. Responding to a complaint brought by the Organisation Mondiale Contre La Torture and others against Rwanda, the ACHPR found that the expulsion of Burundian Hutu refugees from Rwanda was a breach of non-discrimination under the Charter. The guarantee of non-discrimination can thus be used to protect refugees from discrimination on a wide variety of grounds including their status as refugees, their race, ethnic group, colour or gender. The principle of

equality and equal protection of the law offers refugees additional protection against mistreatment by the legal and institutional system of the State. When combined with the duty of States under Article 1 to take steps to implement the rights contained in the Charter, these provisions may provide advocates with an avenue by which to address problems commonly encountered by African refugees - the lack of national refugee legislation and appropriate documentation of their status - which in turn inhibit the enjoyment of many other Charter rights

Of the specific Charter rights that can be of use to refugees and asylum-seekers, the right to seek and obtain asylum has a number of elements that

advocates can seek to assert and develop before the ACHPR. The first and most important is that of gaining entry and access to the territory of the host State, including its status determination procedures, for the purpose of seeking asylum. The OAU Convention strengthens this principle by prohibiting States from rejecting asy-

lum seekers at the frontier or border. The 1951 Convention underlies the same principle under Article 31 by stating that asylum seekers should not be penalised for making direct illegal entry.

A second element of the right to seek and obtain asylum concerns lawful admission through obtaining or enjoying asylum in accordance with the laws of those countries and international conventions. This element depends on whether the asylum seeker meets the criteria for refuge as set out in domestic law and international conventions. One area of potential inquiry for advocates is whether state practice complies with both the Charter and international law on the issue of persecution. ACHPR decisions show that persecution is established by

reference to violated rights and subsequent flight.

Implied in the right to seek and obtain asylum is an obligation on States parties to the African Charter to establish institutions and fair procedures for status determination. Although the ACHPR has yet to rule on whether the due process guarantees contained in Article 7 would extend to status determination procedures, one can speculate that this would indeed be the case. This conclusion is fortified by the provision of Article 26 that requires States parties to "allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter." Fair procedures in this context would include extending legal assistance to refugees in status determination processes.

Article 5 of the Charter, which notes that every individual shall have the right to "respect of the dignity inherent in a human being and to the recognition of his legal status" and which prohibits "all forms of exploitation and degradation particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment", is also of particular importance to refugees. The Article prohibits States from expelling or returning anyone to a place where



For political reasons John K Modise was rendered stateless, stripped of his Botswanan nationality and deported to South Africa. South Africa in turn deported him to the then Homeland of Bophuthatswana which deported him back to Botswana. Unable to resolve the question of where to keep him, the authorities of Botswana kept Modise over a long period of time on a specially created strip of 'no-man's land' along the South African border. The ACHPR found that such enforced homelessness was inhuman and degrading treatment that offended "the dignity of human beings" and thus violated Article 5.

they are likely to be subjected to such treatment. Moreover, a violation of Article 5 (which clearly encompasses victims of rape and sexual abuse) also entitles the victim to the right to seek and obtain asylum.

Of particular note is the ACHPR's willingness to interpret Article 5 to include violations of social and economic rights. For instance, in the absence of an express guarantee of a right to housing in the Charter, ACHPR has based protection for such rights on the guarantee of human dignity, and the prohibition of torture, cruel, inhuman and degrading treatment.

Article 16 of the Charter articulates the right of every individual to enjoy the best attainable state of physical and mental health and the duty of States to take necessary measures to ensure this. Five related cases in

then confiscated by the government. At issue (at least in part) were the conditions of detention which some of these individuals encountered. In finding violations of Article 16, the ACHPR noted the lack of food, blankets, adequate hygiene and medical attention, the latter having led to the deaths of a number of prisoners. The Charter may thus provide an important avenue through which to raise a host of social and economic rights questions including the issue of sub-standard camp conditions.

Finally, the Charter might also be helpful in addressing restrictions on freedom of movement and residence within host states, which are an all too regular aspect of the lives of refugees and asylum seekers in Africa. Both the UN and OAU Conventions do allow for restrictions on the freedom of movement and residence of

refugees in the receiving States in order to ensure the safe location of refugees as well as to ascertain the identity of the refugee or asylum seeker. Such restrictions may be challenged before the ACHPR if they are so excessive as to deprive refugees of their freedom of movement within or outside the settlements and where they do not achieve the objective of safely locating refugees away from the border of their country of origin. In any hearing of this issue before the ACHPR, the receiving State would bear the burden of proving that restrictions on the movement and residence of refugees are necessary, justified and reasonable on acceptable grounds stipulated in human rights law, namely public order, public security and public health. Utilising the ACHPR to clarify where and when restrictions on freedom of movement are proportionate and justified under the law would render a significant

Mauritania alleged that between 1986 and 1992 black Mauritians were enslaved, arbitrarily detained and routinely evicted or displaced from lands that were

contribution to the protection of refugees in Africa.

In conclusion, the African human rights system has much to offer those advocating better implementation of refugee rights. It is not, however, a panacea for all the ills facing Africa's refugees and asylum seekers. The ACHPR should be seen as a complementary source of protection for refugees. Taking a case to the Commission can be a lengthy and time-consuming process and can only be pursued when other domestic remedies have been exhausted. Success is not always guaranteed.

Prospects of success could be considerably enhanced where advocates work together nationally, regionally and internationally to research, compile and sustain a case before the ACHPR. Similar cooperation is necessary to maximise the advocacy impact of the eventual decision, whether positive or negative. Making use of institutions and mechanisms which African states have themselves established, and nurturing their ability to address the plight of refugees, would add an important weapon to the refugee advocacy arsenal in Africa.

Monette Zard is a Policy Analyst at the Migration Policy Institute (www.migrationpolicy.org), Washington, DC.

Email: mzard@migrationpolicy.org.

Chaloka Beyani is Senior Lecturer in Law, London School of Economics.

Email: c.beyani@lse.ac.uk.

Chidi Anselm Odinkalu is a Senior Legal Officer at Interights (www.interights.org).

Email: codinkalu@interights.org.

The authors are finalising a step-by-step advocates' guide on how to access and use the African Commission on Human and Peoples' Rights.

For a fuller development of the arguments in this article and wider discussion of Commission judgments see the authors' full unedited article at: www.fmreview.org/FMRpdfs/FMR16/fmr16Commission.pdf

1. To include those fleeing external aggression, occupation, foreign domination or events seriously disturbing public order (Article 1A).
2. UNHCR's limited supervisory function is articulated in Article 35 of the 1951 Convention.
3. For the full text of the Charter, see: www1.umn.edu/humanrts/instree/z1afchar.htm.
4. The Commission's website is: www.achpr.org.



Nangweshi camp for Angolan refugees, Zambia.