freedom of movement within the
country is finally being restored, there
is concern over the return to areas
which are heavily mined or lack infra-
structure to accommodate returnees.
Recent figures suggest that since the
end of the war only 30% of the IDP
returns have been compliant with the
Normas.

Angola faces many challenges in
respecting and implementing the
Normas and the Guiding Principles.
There is an urgent need for the donor
community and the Angolan govern-
ment to finance rebuilding and
resettlement programmes. If peace is
to be sustained it is essential that ex-
UNITA soldiers receive vocational
training and social assistance. Of
equal importance, as quartering
camps close and resettlement begins,
is to ensure greater respect for the
principles set out in the Normas.
Shrugging off criticisms for its early
closure of camps, MINARS maintains
that it is on course to reintegrate sol-
diers and their families before
commencement of the new school
year in early 2003. MINARS is follow-
ing a plan which focuses on
emergency and rehabilitation work
until 2005 when reconstruction is set
to become the policy priority.

However, the fluid political situation
makes it impossible to predict when
the humanitarian crises faced by IDPs
and ex-UNITA soldiers will be ade-
quately addressed and resolved.

Compliance with the Normas should
remain the barometer for measuring
the success of resettlement pro-
grames. Despite a good start, Angola
still has a long way to go. Ensuring
respect for the Normas requires
strengthening of effective institutional
structures. Above all else, there must
be political will to ensure respect for
the law.

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The most comprehensive source of information on
IDP issues is provided by the Global IDP project at:
www.db.idpproject.org/Sites/idpSurvey.asf/wCount
tries/ Angola

1. The Guiding Principles are online at:
2. See www.reliefweb.int/appeals/2002/presskit/2
3. United Nations: Protect the Displaced in
Angola, Human Rights Watch, Tuesday 5 March
2002.

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 introduc-
ing an expanded notion of who is a
refugee,2 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 treat-
ment that refugees should expect to
receive in exile.

The crisis facing refugees on the con-
tinent reflects rather a failure of
implementation. A major weakness of
the current international legal frame-
work 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 inter-
national 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’
Rights1 and its principal overseer, the
African Commission on Human and
Peoples’ Rights (ACHPR), 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 asylum 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 refugee 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 fortifed 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

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

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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/FMReview/FM16/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.