Refugees and the
African Commission on Human and Peoples’ Rights

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On paper, African refugees benefit from one of the most progressive protection regimes in the world. In reality, however, they face seemingly endless human rights hurdles including forced return, discrimination, arbitrary arrest and detention, restricted freedom of movement and expression, and a level of economic deprivation synonymous with violations of social and economic rights. Faced with an ongoing struggle to bridge this gap between theory and reality, advocates for refugees have the option of innovatively using Africa’s general human rights mechanisms to make the more specific case for refugee rights.

It is not that Africa is short on norms. Far from it; in many respects the 1969 OAU Convention Governing 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, 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 UN Refugee Convention Relating to the Status of Refugees. 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 not a paucity of norms, but rather a failure to implement them. A major weakness of the current international legal framework to protect refugees – one that was recognized during the ambitious UNHCR Global Consultations process of 2000 - 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. International and regional human rights mechanisms – and in particular the African human rights system - may go some way towards making up for this lacuna, providing advocates with an important complementary means by which to ensure that refugees and asylum seekers benefit in reality from those rights that they have on paper. Certainly the potential of such mechanisms to both develop the content of refugee rights and police their implementation warrants their being an important element of any comprehensive advocacy strategy on the continent.

The foundation of the African human rights system includes the 1981 African Charter on Human and Peoples’ Rights, and its principal overseer, the African Commission on Human and Peoples’ Rights, established under Article 30 of the Charter. 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 African Commission to seek protection of their rights where these have
been violated. This includes their specific rights by virtue of being refugees and asylum seekers as well as their more general claim to human rights protection under the Charter. In fulfilling its central oversight role, the Commission 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. iv

Recourse to the African Commission 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. v Moreover, in the case of Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) v. Zambia, vi the Commission required African States ‘to secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals.’ Thus African States can be held accountable before this system for how they treat not only refugees but also those who are internally displaced and other nationals and non-nationals.

The African Charter is the gateway to the African Commission 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 of the Charter respectively - can be used to protect any rights that refugees or other individuals are entitled to under the African Charter. In the complaint brought by Organisation Mondiale Contre La Torture and Others against Rwanda, vii for example the Commission found that the expulsion of Burundian refugees of a Hutu identity 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 because of sex, language, religion, political or any other opinion, with respect to the enjoyment of all the rights guaranteed under the Charter. viii 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. ix When combined with the duty of States under Article 1 to take steps to give effect to the rights contained in the Charter, these provisions may provide advocates with an avenue by which to address a number of problems commonly encountered by African refugees - a lack of appropriate national refugee legislation and related to that, a lack of appropriate documentation of their status - which in turn inhibit their enjoyment of many other Charter rights.

Specific Charter provisions which can be of use to refugees include the rights to freedom of movement and residence and the right to seek and enjoy asylum (both of which are articulated in Article 12), respect for life in Article 4, human dignity, including the prohibition of all forms of torture, cruel, inhuman and degrading treatment in Article 5, personal liberty in Article 6, fair trial and due process under Article 7, and family reunion in Article 18. Space precludes an in-depth examination of each; however, this article will highlight a number of particularly important provisions.
The right to seek and obtain asylum in Article 12(3) clearly establishes the principal basis for the protection of refugees under the African Charter. The African Commission has stated that ‘this provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another State.’ This approach by the Commission is strengthened by Article II(1) of the OAU Convention which obliges member States to use their best efforts to receive refugees from other African countries.

The right to seek and obtain asylum has a number of elements that advocates can seek to assert and develop before the Commission. 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 in Article II(3) 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 penalized for making direct illegal entry. The decision of the Inter-American Commission, which found that the interdiction of Haitian refugees on the High Seas by the United States of America was a breach of the right to seek asylum, may also be instructive in this regard and would certainly be considered by the Commission.

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 (both the individual and group definitions of the 1951 Convention and OAU Conventions, respectively). One area of potential inquiry for advocates is whether state practice complies with both the Charter and international law on the issue of persecution. Decisions of the Commission show that persecution is established by reference to violated rights and subsequent flight. International law has several bases for constructing persecution as an international legal concept. Of particular importance in recent years have been developments in international criminal law. In the case of Tadic, the Yugoslav Tribunal decided that a necessary element of persecution is some form of discrimination that is intended to be, and results in, an infringement of an individual's fundamental rights on specific grounds such as race, religion or politics. Under Article 7(2)(g) of the Statute of the International Criminal Court adopted by the Diplomatic Conference in Rome on 17 July 1998, persecution is defined for the first time in an international instrument as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity,” including “political, racial, national, ethnic, cultural, religious, gender….or other grounds that are universally recognized as impermissible under international law.”

Implied in the right to seek and obtain asylum is an obligation on States parties to the Charter to establish institutions and fair procedures for status determination. Although the Commission has yet to rule on whether the due process guarantees contained in Article 7 of the Charter 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 any one to a place where 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 willingness of the Commission 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, the Commission has based protection for such rights on the guarantee of human dignity, and the prohibition of torture, cruel, inhuman and degrading treatment. In John K. Modise v. Botswana, Modise was rendered stateless by the respondent State, which cancelled his Botswana nationality and deported him to South Africa for political reasons. South Africa in turn deported him to the then Homeland of Bophuthatswana, which in turn 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 territory called “no-man’s land” along the South African border. The Commission found that such enforced homelessness was inhuman and degrading treatment that offended “the dignity of human beings” and thus violated Article 5.

Article 16 of the Charter also articulates the right of every individual to enjoy the best attainable state of physical and mental health and the duty of States who are party to the Charter to take necessary measures to ensure this. The Mauritania cases comprised five consolidated communications arising from developments in Mauritania between 1986-1992. Briefly, these cases alleged that black Mauritanians 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 Commission noted the lack of food, blankets, adequate hygiene and finally the lack of medical attention, which had 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 host 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 African Commission 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 from the border of their country of origin. In any hearing of this issue before the Commission, 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. Utilizing the Commission 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 refugees on the continent and indeed globally, in terms of the evolution and better implementation of refugee rights. Nevertheless, it would be folly to suggest that it is a panacea for all the ills which refugees and asylum seekers face daily. Rather, proceedings before a regional body such as the African Commission are properly viewed as an important “complementary” source of protection for refugees. They can be lengthy and time consuming and can only be pursued when other domestic remedies have been exhausted. Success is not always guaranteed, although its prospects can be considerably enhanced where advocates work together nationally, regionally and internationally to research, compile and sustain a case before the Commission. Similar cooperation is necessary to maximize the advocacy impact of the eventual decision, whether positive or negative. Developing those institutions and mechanisms which African states themselves have established, and nurturing their ability to address the plight of refugees, would add an important weapon to the advocacy arsenal on behalf of refugees and asylum seekers in Africa.

Post script:
The authors are currently collaborating in the production of a step by step guide for advocates on how to access and use the African Commission for Human Rights. This will be published in January 2003.

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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 United Nations Convention Relating to the Status of Refugees.
4 The Commission has taken the view that in the task of interpreting and applying the Charter, it is guided by Articles 60 and 61 to “draw inspiration from international law on human and peoples’ rights” as reflected in the instruments of the OAU and the UN as well as other international standard setting principles. The Commission is also required to take into consideration other international conventions and African practices consistent with international norms etc.
This was the case in John D. Ouko against Kenya, communication 232/99, summarized at p. 144 of the "Compilation of Decisions on Communications of the African Commission on Human and Peoples’ Rights," Institute for Human Rights and Development, Dakar 2002 [hereafter “the Compilation”]. Ouko, a Student’s Union leader at the University of Nairobi alleged that he was forced to flee Kenya due to his political opinions. Prior to fleeing the country, he was arrested and detained without trial for 10 months in the basement cells of the Secret Service headquarters in Nairobi. The detention facility was a two by three meter cell that was constantly lit and he was subjected to both physical and mental torture. He fled the country and lodged a complaint against Kenya whilst a refugee residing in the Democratic Republic of the Congo, alleging violations of certain rights under the African Charter. The Commission found that the persecution and subsequent flight of Ouko from Kenya, the country of origin, had violated 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, Article 10 on freedom of association, and Article 12 of the African Charter.

Communication 71/92 at para 52 on page 380 of “The Compilation” ibid.
Communication 27/89 at page 320 of “The Compilation” op cit at note v.
International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
Art. 7(1)(h) and Art. 7(2)(g) of the Rome Statute ibid.
The Mauritanie cases: Communications 54/91, 61/91, 98/93, 164/97-196-97 and 210/98 at page 161 of “The Compilation” op cit at note v.