



## The Rights of the Forcibly Displaced and the Stateless

### The work of the African Commission on Human and Peoples Rights

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Déirdre Clancy analyses refugee human rights, statelessness and the African commission.

Despite diverse stories of exile and exclusion, refugees, internally displaced persons and the stateless all have one core experience in common: they have been removed from their communities as a result of a severe breakdown in the relationship with the State authorities charged with protecting their rights. In Africa, the severing of state protection and the exclusion of individuals and groups is widespread.

According to the United Nations High Commissioner for Refugees (UNHCR) 2.4 million refugees in Africa are compelled to seek protection outside their country of nationality or residence. An even greater number are also displaced from their homes but unable to cross an international border—over 11 million Africans are classified as internally displaced persons (IDPs). Quantifying those who are stateless in Africa—whether through denationalisation, expulsion, or the imposition of barriers to proving membership of the community—is a more difficult task. It is estimated that worldwide the number of stateless persons is 11 million, but many believe that this is a gross underestimation.

The Open Society Justice Initiative's multi-year research on citizenship and discrimination in Africa found that statelessness was a complex spectrum of experience, from *de jure* statelessness at one end, to those who are *de facto* stateless, or whose citizenship is under threat, at the other. Some victims are high profile politicians or activists who have been declared individually *de-nationalised*, such as Zambia's founding President Kenneth Kaunda. In other cases, entire populations have been excluded from full and equal citizenship, such as 1.5 million Zimbabweans whose parents were born elsewhere. Using this approach, at the very least, 10 million persons can be qualified as stateless in Africa.

While international law recognizes that national governments have the primary responsibility for protecting the rights of those within their borders, individuals who are unable to create a strong link with the state are often left in a vacuum. Stripped of the protection of their own governments, these groups—refugees, IDPs and the stateless—constitute a millions strong population of disenfranchised persons who are increasingly looking to regional mechanisms to address their urgent needs. As the premier human rights institution on the continent, the African Commission on Human and Peoples Rights (the Commission) has been at the forefront of the effort to carve out a new layer of protection for these African citizens.

#### The African Commission on Human and Peoples' Rights

Since it first started operating in 1987 the Commission has been the principle mechanism charged with promoting and protecting the human rights of all those on the continent of Africa. In its stewardship of the

African Charter on Human and Peoples Rights (the African Charter), the Commission has both a human rights monitoring role (which includes the examination of periodic State reports) and direct protection functions.

As a promoter of human rights, the Commission has identified the situation of refugees and displaced on the continent as a priority. In 2003 the Commission signed a Memorandum of Understanding with UNHCR dedicated to strengthening collaboration between the institutions [1] and in June 2004 the Commission confirmed the appointment of a new Special Rapporteur on Refugees and Internally Displaced Persons (Special Rapporteur) [2].

It is perhaps, however, through the Commission's direct protection functions that it has contributed most to the strengthening of the rights of the excluded on the continent. The Commission has the power both to launch investigations in special circumstances and, most importantly, to consider specific complaints, or 'communications', alleging rights violations, brought to its attention by individuals or organisations. Through a developing jurisprudence, the Commission's consideration of the situation of the excluded has allowed for the elaboration of standards relating to their rights, a particularly vital function in a context where it is rare that that refugees or the stateless can seek protection at national level, due to practical and legal obstacles.

The role of the Commission as adjudicator: carving out a basic set of protections [3]

The Commission confirmed early on in its decision-making history that the rights protections granted by the African Charter were not limited to nationals should be secured to "all persons" within the jurisdiction of State parties to the treaty. The case of *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia* concerned the detention, ill treatment and eventual mass expulsion of 517 West Africans from Zambia. Since then the non-discrimination and equality protections in Article 2 and 3 of the Charter have been used by the Commission as the foundation stones for its construction of a folder of protection for the excluded. In *Organisation Mondiale Contre la Torture and Others v Rwanda* the Commission later explicitly confirmed that refugees were among the categories of persons protected from discrimination on grounds of their status.

Unlike many international human rights treaties, the African Charter specifically guarantees the right of the individual "when persecuted, to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions [...]". In *Organisation Mondiale Contre la Torture (OMCT) and Others* the Commission ruled that the expulsion of Burundian Hutu refugees from Rwanda constituted a violation of the right to seek and enjoy asylum, but also of the protections in the Charter against the expulsion of legally admitted persons and mass expulsion. In the same case the Commission also demonstrated how the due process provisions of the Charter could provide additional protection to the excluded, declaring that the manner of the expulsion of the refugees had violated Article 7 (1) – the right of every individual "to have his cause heard". The Commission has yet to give guidance, however, on whether the right to have a "cause heard" could be interpreted to encompass the right of access by an asylum seeker to a fair refugee determination status procedure—in the OMCT case the persons concerned were already recognised as refugees.

The situation of the stateless has been tackled by the Commission in a number of cases, using a variety of provisions, particularly centred around extrapolating a right to protection against arbitrary denationalisation. Although the Charter does not specifically protect the right to nationality, the communitarian aspects of the rights regime established by the Charter affirm the principle of the "right to belong," through protection of the rights of "peoples" to self-determination, development, a satisfactory environment and "existence" (Article 20).

In the Mauritania cases the Government of Mauritania was accused of harassing, detaining, and eventually forcefully expelling thousands of 'Black' Mauritians, its own citizens. The Commission ruled that the expelled Mauritians had been stripped of their citizenship in a discriminatory—and therefore illegal—way and that the government should take appropriate steps to facilitate their return. In the case of *John K. Modise v. Botswana* it was both the act of denationalisation and the treatment of Mr Modise that resulted which attracted the censure

of the Commission. Mr Modise had been rendered stateless by the Government of Botswana and deported to South Africa. Further to his ultimate removal back to Botswana Mr Modise was confined by the authorities to a strip of no man's land between Botswana and South Africa and rendered homeless. The Commission found that the treatment of Mr Modise taken as a whole violated his basic dignity—and Article 5 of the Charter. It will be interesting to see to what extent in the future the Commission will continue to interpret the types of conditions suffered by those forced into statelessness as amounting to a violation of Article 5.

The Charter and the findings of the Commission have also provided a context within which solutions to the breakdown of State protection can be sought. The Commission has tackled, for example, the root causes of exclusion, examining the human rights violations suffered by those who have lost the protection of their State. In the leading case of *John D. Ouko v. Kenya* the Commission showed itself as a forum where state responsibility for the creation of the refugee phenomenon could be analysed – an issue often neglected by refugee advocates where the focus is on the urgent need for States to provide refuge. The Ouko communication concerned a Kenyan citizen who had been recognised as a refugee in the Democratic Republic of Congo further to fleeing persecution and detention by Kenyan authorities. The Commission found that the persecution and forced flight of Mr Ouko had violated a number of articles in the Charter, including Article 12 which protected Mr Ouko's right to leave, and return (voluntarily) to, Kenya.

The responsibility of the state which provides asylum has also come under scrutiny at the Commission. In the case of *African Institute for Human Rights and Development v Guinea* the communication centred on a spate of abuses, including rape, detention, and killing which were suffered by Sierra Leonean refugees, in the wake of a speech by the President of Guinea urging all foreigners “searched and arrested”. The Commission ruled that the President's speech, as an incitement and de facto authorization for the resultant attacks and expulsions, violated article 12(5) of the Charter. The Commission also found that there had been violations of the right to life, property and dignity of the refugees in addition to noting that the targeting of Sierra Leonean refugees violated Article 4 of the OAU Refugee Convention on the Specific Problems of Refugees in Africa.

In the Mauritania cases the Commission not only focussed on the arbitrary denationalisation of the complainants' but also on the deplorable conditions in which the deportees had been held, finding a violation of Article 16 – the right of every individual “to enjoy the best attainable state of physical and mental health”. It is hoped that this approach will be followed in future cases relating to the standards of treatment in refugee or IDP camps, especially where freedom of movement is restricted by the authorities and people are confined to the settlements in contravention of international law.

### The role of NGOs

All of the key cases considered to date by the Commission which touch on extrapolating the rights of the forcibly displaced and the stateless have been brought to the attention of the Commission by human rights and civil society organizations on the continent. It is not just in the realm of moving forward the Commission's jurisprudence, however, that NGOs have been active. At the bi-annual meetings of the Commission it is usual for one of the statements to the Commission by NGOs to be dedicated to a review of the situation of refugees and IDPs on the continent, contributing to the overall monitoring function of the Commission.

It is acknowledged also that the work of NGOs dedicated to advocacy on refugee and IDP rights was critical to encouraging the Commission to create the position of Special Rapporteur. Since his appointment, first as focal point, and then as Special Rapporteur, Commissioner Nyanduga has been very active, conducting a series of missions which have done much to highlight the plight of the displaced (see article in this issue). The work of the Special Rapporteur, however, does need to be better supported to increase its effectiveness—resources at the Commission are highly stretched. NGOs can assist through seeking observer status before the Commission to play a more active advocacy role, and helping to mobilise funds for the functioning of the Rapporteur system.

## Challenges

As an independent rights arbitrator the Commission suffers from a number of defects, the greatest perhaps being the non-binding nature of its rulings. It is also fair to say that as a deliberative body of State appointed experts, the Commission can find itself subject to political pressure. Despite this, the Commission can point to a history of courageous position-taking which has belied many of the predictions of politicisation. In recent years, however, it has been suggested that, the progressive stance which marked the evolution of the Commission is suffering a backlash. Some point, for example, to the fluctuating approach of the Commission's jurisprudence to "exhaustion of domestic remedies"—a threshold consideration for admissibility of communications. In the past the Commission demonstrated a rather liberal attitude to interpreting this concept, particularly where asylum seekers, refugees and the stateless were involved, but it is now building a more elaborate set of hurdles.

Others note the difficulties encountered by the Commission in conducting its broader monitoring functions, particularly in reaching consensus on response to the humanitarian and human rights crisis in Darfur. The official report of the Commission of its mission to Darfur, presented at the third extra-ordinary session of the Commission in Pretoria in September 2004, has still not been published. This report was the first comprehensive African Union assessment of the human rights situation in Darfur, including focussing on the plight of IDPs. Although adopted officially by the AU, publication remains hostage to political manoeuvring, as the text awaits the comments of the Government of Sudan. [4]

What next for the Commission and for the excluded?

The foundation of the African Union in 2002 expressed a regional commitment to creating a more effective, integrated political and economic union with human rights situated at the heart of its principles and objectives. There are a number of areas where the Commission can be encouraged to use its position in the new African Union human rights firmament to promote the rights of the excluded. The new AU institutions, from the African Court to the AU Economic, Social and Cultural Council (ECOSOC) all present opportunities for the Commission to contribute to the setting of human rights benchmarks. The Commission has already been explicitly assigned functions, for example, with respect to the peer review mechanism under NEPAD and the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA). A

The Commission, however, is the human rights touchstone, not just for the new AU frame but for other continental processes which address human rights concerns—the International Conference on the Great Lakes is just one process comprising a series of new laws relating to the rights of the excluded. The Commission can ensure complementary efforts and exchange of jurisprudence with such mechanisms. It will be essential, also, for the Commission to act as a guide to regional courts as they are increasingly called upon to adjudicate on the rights of the excluded who may also claim rights from a sub-regional organisation—the East African Community is currently, for example, adopting a Bill of Rights where freedom of movement and protection of the regions "citizens" will be paramount. Attention also needs to be paid to the promotion of the Charter and its jurisprudence at national level where the potential for the case law of the Commission to be cited in domestic proceedings is ripe but rarely exploited. National human rights commissions might be mobilised by the Commission in this regard.

Finally, the Commission can be a forum for the promotion of the new norms and standards which will certainly be required to respond to the changing nature of displacement and exclusion on the continent. Among the areas requiring particular elaboration include access to citizenship and the reduction of statelessness, the right of freedom of movement for IDPs and refugees, due process guarantees in asylum proceedings, rights of access to domestic courts (often restricted for refugees), the social and economic rights of the displaced and their hosts, and the implications for State responsibility of delegating protection of the excluded to international organisations. NGOs of course must play a role in identifying the strategic opportunities for litigation that will facilitate this work. They may also need to explore, alongside the Commission, where normative

developments—new protocols to the Charter (such as perhaps on the right to a nationality)—may be required.

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\* For notes, please click here

1) See Resolution on the Adoption of the Memorandum of Understanding between the African Commission on Human and Peoples' Rights and the United Nations High Commissioner for Refugees, 33rd Ordinary Session, Niamey, Niger, 15- 29 May 2003.

2) The mandate of the Special Rapporteur includes: Seeking and receiving information about refugees; undertaking studies, research and other related activities; conducting fact-finding missions; Assisting AU member states to develop progressive policies; Raising awareness and promoting implementation of the 1951 and 1969 Refugee Conventions.

3) For a detailed exploration of the Commission's jurisprudence with respect to the forcibly displaced see A Guide to the Use of the African Human Rights System in the Protection of Refugees, by Chaloka Beyani, available from the International Refugee Rights Initiative.

4) In addition to Commissioner Nyanduga, the ACHPR delegation to Sudan included the Chairperson of the ACHPR, Salamata Sawadogo, the Special Rapporteur on Women's Rights in Africa, Angela Mero and Mohamed Abdellahi Ould Babana, Commissioner in charge of promotional activities in the Republic of Sudan.