

**THE JURISDICTION OF THE AFRICAN COMMISSION ON  
HUMAN AND PEOPLES' RIGHTS TO ENSURE COMPLIANCE  
AGAINST VIOLATION BY MEMBER STATES**

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THE JURISDICTION OF THE AFRICAN COMMISSION ON HUMAN  
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VIOLATION BY MEMBER STATES**

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The Jurisdiction of the African Commission on Human and  
Peoples' Rights to Ensure Compliance Against Violation by Member  
States

A Thesis Submitted to School of Graduate Studies, Faculty of Law,  
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## **Abstract**

This research has addressed the African regional human rights system within the ambit of the jurisdiction conferred upon the Commission on Human and Peoples' Rights. Historically speaking, the very fact that OAU/AU member countries came to accept uniform obligations to observe provisions enshrined in the Charter is a significant step towards the right direction. But given the poor human rights records of virtually most of the member states, the Commission might have not found it easy to act as much as what the Charter seems to anticipate. The research has, therefore, investigated the different circumstances in which member states seemed to comply with the recommendations of the Commission. When they did that, it is found out that they did it only as a mark of good faith and freely granted consent.

On the other hand, member states have shown their resistance whenever they found the recommendation of the Commission contrary to their interests and even prejudices. Thus, the Commission appeared to be handicapped to do as much as possible. The need to have a supplementary mechanism in order to follow up implementation of recommendations has been suggested in these reasons. Further, the Commission needs to reconsider the existing systems in which it determines what should be the appropriate remedial measures in human rights related cases. These suggestions are remedy-based, among other things, on the lessons derived from the workings of other multilateral organizations which are considered very briefly. However, due to the novelty of the theme addressed in this research, my research effort is initiated to be only on modest contribution to the on-going discourse on the subject.

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## Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHSG	General Assembly of Heads of State and Government of AU
AHRLJ	African Human Right Law Journal
AHRLR	African Human Rights Law Review
APSC	African Peace and Security Council
AU	African Union
AU Act	Constitutive Act of the African Union
CRP	The Constitutional Right Project
Court	African Court on Human and Peoples' Rights
DRC	Democratic Republic of Congo
ECOSOCC	Economic, Social and Cultural Council
ECHR	European Convention on Human Rights
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
MUSOP	Movement for the Survival of Ogoni People
NGOs	Non Governmental Organizations
NHRIs	National Human Rights Institutions
OAU	Organization of the African Unity
PAP	Pan African Parliament
UDHR	Universal Declaration of Human Rights
UN	United Nations



## List of Cases

- Abd Eldayem A.E. Sanussi V Ethiopia, Communication 14/88
- Ammensty International (on Behalf of Banda and Chinula) V Zambia, Communication 212/98
- Anuak Justice Council V Ethiopia, Communication 299/05
- Baes V Zaire, Communication 31/89
- B V Kenya, Communication 283/2003
- Centre Haitien des Libertes Publiques V Ethiopia, Communication 21/88
- Center for Free Speech V Nigeria, Communication 206/97
- Constitutional Rights Project V Nigeria, Communication 153/93
- Constitution Rights Project, Civil Liberties Organization and Media Rights Agenda V Nigeria, Communications 140/94,145/95
- Sir Dawda K. Jawara V The Gambia, Communications 147/95 and 149/96
- Forum of Conscience V Sierra Leone, Communication 223/98
- Getachew Abebe V Ethiopia, Communication 10/88
- Hadjali Mohammed V Algeria, Communication 13/88
- INTERRIGHTS (on Behalf of the Pan African Movement and Citizens for Peace in Eritrea) V Ethiopia, Communications 233/95
- INTERRIGHTS (on Behalf of the Pan African Movement and the Inter African Group) V Eritrea, Communication 234/99
- International PEN and Others (on Behalf of Saro-Wiwa) V Nigeria , Communication 239/2001
- International PEN V Malawi, Ethiopia, Cameroon, Kenya , Communication 19/88
- International Lawyers Committee for Family Reunification V Ethiopia, Communication 9/88
- John Modise V Botswana, Communication 97/93
- Katangese Peoples' Congress V Zaire, Communication 75/92
- Kenya Human Rights Commission V Kenya, Communication 135/94
- Ligue Camerounaise des Droits del'Homme V Cameroon, Communication 65/92
- Legal Resources Foundation V Zambia, Communications 211/98

- Mekongo V Cameroon, Communication 59/91
- Movement Burkinabe des Driots del'Homme et des Peuples V Burkina Faso, Communication 204/97
- Pagnouille (on Behalf of Mazou) V Cameroon, Communication 39/90
- Purohit and Moore V The Gambia, Communication 241/2001
- RADDHO V Zambia, Communications 71/92
- Stephen O. Aigbe V Nigeria, Communication 252/2002

# Chapter One

## Framework of the Research

### 1.1 Background of the Study

The Organization of African Unity (OAU) was the first African regional organization in the continent. The principal concern of the founders of the OAU was mainly eradication of colonialism and apartheid throughout Africa.<sup>1</sup> The OAU Charter recognized the significance of human rights only at a very limited scale. The Charter refers, in its preamble, to the Universal Declaration of Human Rights and the United Nations Charter.<sup>2</sup> The reason why the OAU failed, in real practice, to address the issue of human rights adequately was partly because of the more pressing priorities of Africa during the decolonization process.

Later on, however, African leaders decided to evolve an African regional human rights system beginning with the adoption of the African Charter on Human and Peoples' Rights on June 17, 1981 in Nairobi, Kenya.<sup>3</sup> This Charter requires the establishment of the African Commission on Human and Peoples' Rights as a monitoring organ. With the end of colonial rule and apartheid, during the early 1990's, OAU's historical mission as contained in its Charter seemed to have been exhausted. The peoples and states of Africa needed a new organization that could address their concerns under existing circumstances. Thus, African Heads of State and Government decided to establish the African Union (AU) for attaining those new purposes.<sup>4</sup> As compared to the OAU Charter, AU's Constitutive Act shows, understandably, a more apparent commitment to ensure human rights protection in the continent.

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<sup>1</sup> Christof Heyns, *Human Rights Law in Africa*, Vol.1, Martinus Nijhoff Publishers, Leiden/Boston, 2004, p-387

<sup>2</sup> Article 2(1) e of the Charter of the Organization of African Unity entered into force September 13, 1963.

<sup>3</sup> See OAU document OAU/CAB/LEG/67/3/Rev.5

<sup>4</sup> At 14<sup>th</sup> Extraordinary Summit between 8-9 September, 1999 in Sirte, Libya, the AHSU adopted the Sirte Declaration. See EAHG/ DECL. (VI) Rev).

The Preamble of the Constitutive Act declares that “*African states are determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance*” and the rule of law”.<sup>5</sup> This means that one of the objectives of the AU is, now, promotion and protection of human rights, as provided under the African Charter on Human and Peoples' Rights, and related to human rights instruments. It is, therefore, clear that the African Commission on Human and Peoples' Rights has been established to ensure compliance with the regional human rights system adopted by the African Union.

The Commission, historically speaking, is the first of its kind in the African continent. Its very establishment is indicative to the growing trend in the development of regional human rights system in Africa. However, the performance of the Commission has not been found satisfactory. One of its most serious shortcomings seems to be the failure in ensuring compliance by member states. Thus, the reasons for this weakness deserve deeper investigation. This research is intended to make a modest contribution towards comprehending and explaining such limitation of the Commission. On the basis of the findings to be established, I hope to propose some approaches that may help to improve the rate at which member states show compliance to the decisions of the Commission.

## **1.2 Statement of the Problem**

The Commission has got a wider scope of responsibility. According to article 30, of the Charter on Human and Peoples' Rights, the African Commission has got a considerable mandate to ensure protection and promotion of human rights in Africa. Thus, the functions of the Commission as detailed, under Article 45, includes not only promotion and protection of human rights but also interpretation of the Charter and any other task which may be entrusted to it by the OAU/AU Assembly of Heads of State and Government.

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<sup>5</sup> The Constitutive Act of the African Union, adopted 11 July 2000. at Lome, Togo. Para-9

Its promotional function is prescribed in detail, under article 45 sub-article (1) of the Charter. The Commission may engage itself in, among other things, research in the human rights field, dissemination of information, encouraging national and local human rights institutions, formulation of principles and rules upon which member states conduct cooperative relationship with other international human rights institutions.

On the other hand, Article 45 of the Charter does not carry similarly detailed and specific guidance as to the responsibility of the Commission in protecting human and peoples' rights. It is simply stated that the functions of the Commission shall be to "*ensure the protection of human and peoples' rights under conditions laid down by the present Charter.*"<sup>6</sup> Then, from further reading of the Charter and the Rules of Procedure of the Commission, we may conclude that the main protective function of the Commission is limited to receiving reports and Communications from the states. The Commission seems to have the authority to receive communication from NGOs, individuals and group of individuals.<sup>7</sup> In the absence of more explicit guidance, this understanding of the relevant provisions seems to help in forming a more clear interpretation of the Charter.

The African Charter on Human and Peoples' Rights was adopted on 27 June, 1981 and it entered into force on 21 October, 1986.<sup>8</sup> Up to 1996, 51 out of the 53 OAU member states had ratified the Charter. The states which had not ratified the Charter then were only Ethiopia and Eritrea.<sup>9</sup> However, subsequently, both Ethiopia and Eritrea have acceded to the Charter on 15 June 1998 and 14 January 1999 respectively.<sup>10</sup> The

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<sup>6</sup> Article 45(2) of the African Charter on Human and Peoples' Rights, adopted June 1981, Nairobi, Kenya

<sup>7</sup> Article 55 of the Charter does not explicitly refer to NGOs, or Individuals. It refers to 'other communications'. In practice, however, the Commission accepts communications by NGOs, individuals and group of individuals.

<sup>8</sup> Heyns, *Supra* note1, p-389

<sup>9</sup> *Ibid* p- 390

<sup>10</sup> *Ibid*

reasons for this extra ordinary delay do not seem to have been explicitly stated so far, at least to the knowledge of this researcher.

In any case, this, in effect, means that all state members did agree to comply with the Charter by virtue of their consent which is the basis for creating the Commission. Meanwhile, it should not be forgotten that African countries are historically known for poor performance in the sphere of human rights. In addition, lack of political will on the part of the states may still play a role in the way member states comply with the Charter. Despite all these skepticism, the fact remains, as far as the law is concerned, that AU members have already ratified the Charter thereby accepting obligations to comply with its provisions.

Then, one area of inquiry could be the question is whether or not the Commission has got adequate legal mechanisms and procedures for ensuring compliance which member states have declared commitment to observe. One could imagine several areas of problem in this respect. For example, the procedures for ensuring compliance may have its own limitations.

There could also be some procedural problems which were not foreseen by the time the Commission was created. It is only through experience that such unforeseen problems could be detected. This research is, therefore, intended to explore such problems and limitations in the system. In other words, the research will investigate whether or not the legal framework and procedures are effective enough in enabling the Commission to ensure compliance of member states to observe their obligations under the Charter.

### **1.3 Objectives of the Study**

This research will have the following general objectives as its main theme:-

Firstly, to explore whether or not the African Commission on Human and Peoples' Rights has adequate jurisdiction to ensure enforcement of the Charter;

Secondly, to ascertain whether or not there could be procedural problems which the Commission might have encountered in ensuring Compliance of states;

Thirdly, examining whether or not the African Commission on Human and Peoples' Rights has been practically effective in ensuring the compliance of member states to the Charter on Human and Peoples' Rights in practice.

### **1.4 Scope and Limitations of the Study**

The above stated objectives are very wide. Thus, I have limited my research to some areas which are manageable within the limited time and space allocated for the researcher at my level.

The research will thus be limited to investigate the legal aspects of the institutional framework of the Commission, and to evaluate its performance in specific human rights sample cases. This means that extra-legal considerations do not necessarily constitute the main subject matter, despite our occasional reference to it as supplementary source. In addition, I have not dealt in detail with the nature of rights recognized under the Charter.<sup>11</sup> Because, the main theme of the research is about the jurisdiction of the Commission to ensure compliance. This restricted approach is preferred to give the research as much as possible depth and with view to giving more adequate attention to the legal aspect of the workings of the Commission. The paucity of the existing literature with the respect to the legal aspects is shown below.

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<sup>11</sup> For detailed rights of the Charter refer appendix I of the thesis.

## 1.5 A Brief Review of the Existing Literature

As one may expect, commentators on the African Human and Peoples' Rights Commission have got mixed feelings about it. On the one hand, there are scholars who maintain that the Commission had no chance to make progress due to the very unpleasant records of member States in the field of human rights. But others have chosen not to peruse a position which seems to be pessimistic. Of course they still acknowledge that the precedents of the Commission have not been fully encouraging.

In between these two lines, there are some observers who attempted to explain weakness of the Commission with reference to some historical reasons. Despite all that, the literature on the Commission and African regional human rights system has been scanty. This review is therefore an attempt to re-construct the diverse opinions of the scholars who wrote on this matter and in such a way that one could have some idea on the existing perspectives.

Mutua seems to be deeply frustrated by what he perceived to be the poor performance of the African Human rights Commission. He has gone to the extent of describing the emerging African regional human rights system as *"a facade, a yoke that African leaders have put around our [African's] necks"*.<sup>12</sup> While one may understand his frustration, it seems that Mutua exaggerates the weak points of the Commission. In other words, his observation seems to lack balance. Other scholars have chosen to explain the possible reasons for the weakness the Commission. One of such scholars is Orlu Nmehielle. he agreed with Oloko Onyango who observed that the progress which the Commission has made so far was *"..... steady, but unremarkable."*<sup>13</sup>

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<sup>12</sup> Makau Mutua, The African Human Rights system, in Comparative Perspective: the Need for urgent Reformulation, 3 Rev. African Commission on Human and Peoples' Rights, 10 (1993) P- 35

<sup>13</sup> Vicent O.Orlu Nmehielle, The African Human Rights System, Its Laws, Practice and Institutions, Martinus Nijhoff, the Hague, 2001 P-119

Then, Orlu Nmehielle went a head to show the trends in the institutional development of the Commission. According to him, the Commission was very weak at the initial stage. But, beginning at the 1990s, the Commission started to show some degree of assertiveness by publicizing communications, its views and recommendations, the human rights complaint lodged against member states. While appreciating such progress, Orlu Nmehielle observes that the Commission has still not been in the position to award effective remedies.

Heyns and Killander<sup>14</sup> have treated the African Human rights Commission with some detail. According to them, the development of the Commission should be evaluated, with due consideration of its age and the limited resources available for it. They expressed concurrence with the critics that maintain that the progress made by the Commission during the first two decades, was less than impressive. But both scholars disagreed with the critics on the ground that the latter maintained generalized and sometimes exaggerated opinions about the weakness of the Commission.

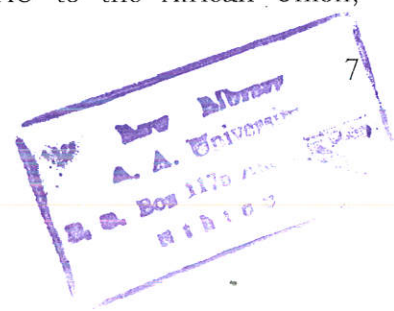
For example, it has been argued that the Commission has been poorly managed by the Secretariat and the resources made available were clearly insufficient for the Commission to act as much as expected. In other words, the two scholars seem to plead for greater understanding and considerate attitude towards the situation under which the Commission is operating.

Murray,<sup>15</sup> on the other hand, has been rather more articulate in analyzing the structural weakness of the Commission within the broader framework of the African Union. She has argued that the Commission needs to have "... independence of members, adequate resources, clear mandates and

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<sup>14</sup> Heyns CH and Killander, "The African Regional Human Rights System (2006)" (ed) Christof Heyns and Karen Steffiszeyn, Human Right, Peace and Justice in Africa; a Reader, Pretoria University Law Press, 2006. P-195

<sup>15</sup> Rachel Murray, Human Rights in Africa: From the OAU to the African Union, Cambridge University Press, 2004 P- 71



*mapping out structural relationship within the AU.*"<sup>16</sup> Further more, Murray has indicated that the Commission also need to have a clear division of responsibility and power with the African Court of Human and Peoples' Rights. Although she has not been explicit in indicating the reason for her concern, it appears that Murray is afraid of the possibility that there could be overlapping of jurisdiction between the Commission and the Court. Despite that, her argument seems to be much more reasonable. From the forgoing discussion, it is clear that scholars have mixed feelings about the Commission and its contributions to the growth of African human rights system on a continental basis. I have tried to present the different perspectives represented by the different perspectives maintained.

Having said this, it is my humble observation that the existing scholarly works on the subject have some clear limitations and short comings. The bulk of such work seems to reflect the prevalent public opinion which fails to make a distinction between what could legitimately be expected from the Commission. There seems to be a tendency to expect the Commission to serve as good as what a Court of law could do. It is clear that the Commission can act only within the scope of its jurisdiction provided by the African Charter on Human and Peoples' Rights. The African court of Human and Peoples' Rights is expected to act within the scope of its jurisdiction provided by law.

This is to say that the Commission is suppose to be evaluated only on the basis of what it can legitimately act within the scope of its competence. Thus, Heyns and Killander were probably right in suggesting that the Commission could be expected to find ".....negotiated solutions which Courts cannot always do."<sup>17</sup> In other words, the fact that the Commission is not competent to make binding decision may not necessarily be a source of weakness provided that the Commission has adequate mandate to

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<sup>16</sup> Ibid

<sup>17</sup> Heyns CH and Killander, Supra note 14, P-217

discharge its responsibilities as much as what such Commission is suppose to do.

However, this is not to say that African institutions, including this very Commission should not be blamed and criticized for what they failed to do in terms of realizing their objectives. My observation on the commonly heard out right dismissal of the Commission and the like is based on the assumption that whatever we may criticize or support has to be based on properly verified facts and studies. Unfortunately, in addition to this common limitation in the existing literature, even those who appear to be more critical and balanced have not yet gone deeper in providing detailed analysis on the internal mechanisms of the Commission.

Murray has suggested that the position of the Commission should be clearly stated within the structure of the African Union, as shown above, that the Commission needs to have more adequate resources.<sup>18</sup> Both observations seem to be quite acceptable. What remains to be done is a more concretized research that can go beyond describing the more apparent features of the Commission. For example, most scholars so far do not seem to have paid adequate attention to the fate of the recommendations made by the Commission.

Do the States concerned comply with the recommendations of the Commission? Does the Commission really follow up whether or not its recommendations are duly implemented by the States concerned? Does the Commission monitor whether or not the States implement the measures which they pledge to do in their report submitted to the Commission? Such questions do no seem to be deeply addressed so far. For example, specific cases in which the Commission did make certain recommendations do not seem to have been investigated to the extent of its implementation. Because of this, we are left in darkness as to the fate of human rights cases submitted to the Commission especially subsequent

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<sup>18</sup> Rachel Murray, *Supra* note 15

to the making of recommendation by the Commission or submission of report by the States concerned. Thus, I hope to make a modest contribution towards filling this gap in the existing literature.

## **1.6 Methodology**

First: I restrict my self to the legal aspects of the workings of the Commission, as indicated above, and without ignoring extra legal considerations altogether.

Secondly: I have used an analytical approach in examining the relevant legal instruments and the cases submitted to the Commission as well as the precedents of the Commission in deciding with such cases.

Thirdly, I have also re-examined and cross checked my findings comparing it with the data collected through interviews conducted to persons having direct experiences with the workings of the Commission.

## **1.7 Sources of Data**

The researcher has relied on the following sources:-

- a) Relevant Legal Instruments related to the Commission,
- b) Cases submitted to the Commission,
- c) Report of the Commission
- d) Official documents Submitted by member states to the Commission,
- e) Existing literature, and
- f) As indicated above, first hand data, secured through interviews.

## **1.8 Significance (Rationale) of the Study**

This research will have considerable significance in promoting the development of international human rights law in Africa. The African Commission on Human and Peoples' Rights is the first of its kind in addressing human rights issues at the continental level. Due to this

pioneering role of the Commission, the research on its responsibilities and powers will help researchers and practitioners to venture into more extensive and detailed inquiry on the subject. In practical terms, this research may serve as a modest contribution to help policy makers, in the member states, that of African regional bodies such as the different organs of the African Union, and other interested parties.

Further, the research may generate new interests in the practical relevance and limitations of the Commission in reality. The growth of independent research activities may provide reliable source of guidance to the policy and decision makers. Similarly, Africa's development partners such as the different UN bodies may make use of independent research outputs on the role of the Commission concerning human rights. Needless to say, governments of member states, civil societies and legal scholars interested in the African regional human rights may hopefully find this humble research output as a good initiative towards a more concreted effort. This is to say that my research may have both academic and practical significance.

## **1.9 Chapter Outline**

While the details of each chapter have been provided in the table of contents, this section is intended to show the rational and logical sequence of the different parts of the thesis. Thus, chapter one provides the background, objectives, scope and limitations of the research. The research problems have been outlined in the same chapter. Moreover, the methodologies employed by the researcher, the sources of data resorted to and brief surveys of the existing literature on the subjects are outlined in the same portion of the thesis.

Under chapter two, the organizational structure of the Commission is discussed with due consideration of the different historical periods in which it has assumed its existing forms. The legal basis of the relation which the Commission is authorized to establish with other bodies, such

as the relevant institutions of member states, and related matters have been elaborated. It is in the same chapter that the relation of the Commission with the African Court on Human and Peoples' Rights and similar institutions has been discussed.

Chapter three analyses the jurisdiction of the Commission, as provided in the relevant legal instruments. The powers and responsibilities of the Commission in the appropriate cases, the specific nature of cases that may be submitted to the Commission and related matters are discussed in the light of the available data.

Chapter four constitutes the main part of the thesis as it focuses on the workings of the Commission to ensure compliance of member states. In addition to the critical appraisal of the ways and approaches which the Commission is allowed to use by way of ensuring the compliance of member states, the chapter has presented a critical review of selected cases in which the Commission has intervened so far acting within the scope of its jurisdiction. Finally, the researcher has presented the findings, conclusions and recommendations based on the research output. This part has been outlined in the final chapter.

## **Chapter Two**

### **The Organizational Structure of the Commission**

#### **2.1. Introductions**

Under this chapter, we shall see the African Human Rights Commission in the broader institutional context of the AU. The nature of its relationship with the other organs of the Union and the way the Commission shares responsibility and power with the African Court on Human and Peoples' Rights will be explained and analyzed.

As is known, the Commission was created by the OAU in 1981 and came to force in 1987. By the time the OAU was transformed to the present AU, in 2002, the Commission was subsequently adopted by the African Heads of State and Government (AHSOG).<sup>19</sup> This section would explore the legal relationship between the Assembly and the Commission especially in terms of accountability and control. The nature of legal relationship between the Court and the Commission also constitutes an interesting area of research. But, for the specific purpose of this research, an attempt is made to briefly examine its relationship with other organs with the view to determine the exclusive areas of competence of the Commission in the sphere of Human Rights.

#### **2.2 Historical Background**

Following the end of colonialism, independent African States established the Organization of African Unity (OAU) as a continental institutional expression of their collective aspirations and visions. The African states have not been widely known for keen interest in observing human rights

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<sup>19</sup> The Assembly of the African Union decides to adopt that the African Commission on Human and Peoples' Rights so that it would operate within the framework of the African Union. See Decisions and declarations of the 1<sup>st</sup> Ordinary Session of the Assembly of African Union, 9-10 July 2002, Durban, South Africa, Ass/AU/Dec. 1-8 (I) and Ass/AU/Dec/.1-2 (I)

and freedoms. Most of them came to be either totalitarian (i.e. one dominant party rule) or military dictatorship.

During the first decades after the creation of the OAU in 1963, virtually all African states had the common problem of not respecting human rights. Very few countries such as Senegal, Tanzania and Kenya were able to maintain civilian administrations as was established by the former colonial powers. Even in the case of these countries, the first presidents of the states remained in power life-long, or until forced to leave by some strong internal pressure. The rest of African countries stayed under dictatorial regimes which were not committed to observe human rights and freedoms in the interest of their citizens. The OAU had no significant precedent in improving African state practice in the field of human rights.

However, we should make distinction between the two forms of human rights violations. The first notion is the one that affects the way the government of a country governs its own citizens. Since, recently, this notion of respecting human rights and freedoms is coined under general terms called "*good governance*". It is in this particular sense that the OAU had failed to help or influence the newly independent African states in improving their degree of commitment to human rights and freedoms. Murray has correctly pointed out saying "... *The OAU's focus was on protection of the state, not the individuals....*"<sup>20</sup>

The second notion is that human rights of people could also be violated by external powers. The peoples of Africa had suffered the worst forms of human right violations and injustice in the hands of the former colonial administrations and apartheid. The peoples of Africa waged liberation struggle against the colonial regimes. For example, the peoples of Mozambique and Angola fought against Portuguese rule until they won their freedom in 1974.<sup>21</sup>

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<sup>20</sup> Rachel Murray, *Supra* note 15.

<sup>21</sup> Heyns *Supra*, note 1, p-387

The people of South Africa fought against Apartheid until the time when majority rule was created during mid 1990's. In all these cases, the peoples of Africa fought in order to ensure the end of human rights violations in the hands of those colonial regimes. In this sense, the OAU had played a significant role in supporting the struggle of the peoples of Africa for human rights, freedom and dignity. In the above stated second sense, therefore, the end of colonialism and apartheid was a historical achievement in the realization of the aspirations of the African peoples for human and peoples' rights and dignity.<sup>22</sup>

Moreover, it may be worth noting that it was in this particular sense that the OAU accepted and promoted the principle of self-determination of peoples. This principle was also recognized under the UN Charter. In fact one of the UN organs created by the Charter was the Trusteeship Council whose primary responsibility was to support and facilitate the implementation of the right of colonized peoples for self-determination and liberation from external rule. The OAU, when established nearly two decades after the foundation of UN in 1945, declared its commitment "*to promote international co-operation having due regard to the Charter of the UN and the Universal Declaration of Human Rights*".<sup>23</sup>

The principle of self-determination of peoples was one of the fundamental objectives of the OAU. But it should be stressed that the recognition given by the OAU to this principle was limited to its application to external control. It was more or less of the same meaning and significance to that of decolonization. The recent trend to extend the meaning and significance of the principle of self-determination to form part of the constitutional rights of peoples living in the existing African Countries is a radical departure from the traditions of the OAU. For instance, the present

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<sup>22</sup> Ibid

<sup>23</sup> Preamble of the Charter, Supra note, Para 4

Ethiopian Constitution recognizes for self-determination up to and including secession.<sup>24</sup>

However, the OAU did not recognize self-determination in this sense. In fact, the famous OAU declaration of 1964, relating to the inviolability of colonial boundaries<sup>25</sup> strongly discourages tendencies leading to secession from any of the existing African countries. For example, the OAU declined to recognize the claim of insurgent groups for exercising the right for internal self-determination in countries such as Nigeria, Sudan, Congo and Ethiopia.<sup>26</sup> This is to say that the OAU did not support the insurgent groups that fought for establishing their own state seceding from the existing states.

Thus, those who fought for independence or secession of Biafra, Katanga-Shaba, Southern Sudan and Eritrea did not succeed to enjoy the support of the OAU.<sup>27</sup> Only in one exceptional case, i.e. the question of Western Sahara in which the insurgents claimed the right for establishing the Saharawi Arab Democratic Republic, the OAU had a different decision. It did not reject the claim completely. Neither did the OAU accept the claim fully. A middle way solution was proposed and was accepted by the OAU. That was to give the liberation front representing Western Sahara an Observer Status in the OAU.<sup>28</sup> Unfortunately, Morocco withdrew from the OAU in 1984 out of displeasure that Western Sahara was given an Observer Status.<sup>29</sup>

The forgoing discussion has made it clear that the African regional system did not recognize internal self-determination as part of those legally recognized rights of peoples. Furthermore, the OAU did not pretend to influence or lead the African states towards full implementation of the

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<sup>24</sup> The Constitution of the Federal Democratic Republic of Ethiopia, enacted 21 August 1995, Addis Ababa Article 39(1)

<sup>25</sup> OAU Doc AHG/Res. 16(1)

<sup>26</sup> Heyns, *supra* note 1, p-387

<sup>27</sup> *Ibid*

<sup>28</sup> *Ibid*

<sup>29</sup> *Ibid*

Universal Declaration of Human Rights. It was with this historical background and less encouraging institutional profile that the OAU had embarked on creating the African Human and Peoples' Rights Commission in 1981.<sup>30</sup>

### **2.3 Appraisal of the Charter**

The African Charter on Human and Peoples' Rights is formed by what the draftsmen considered to be common African values concerning the right and dignity of human beings.<sup>31</sup> Thus, there is emphasis on collective rights by way of stressing of the community of life in African societies. Concepts of ownership, possession and enjoyment of property in most African society tend to reflect collectiveness and communality of social life. But as time goes on, African societies are also adopting the western concept of individual rights and duties as basic terms of societal existence in modern life. Thus, the Charter recognizes both individual and collective rights as interrelated features of African regional human rights standards.

The preamble of the Charter refers to the virtues of the historical tradition and the values of African civilization as sources of inspiration and reflection on the concepts of African human and peoples' rights.<sup>32</sup> By way of expressing the interrelation between the African Charter and similar instruments in the rest of the world, the preamble declares adherence to human and peoples' rights and freedom contained in the declarations, conventions and other instruments adopted by the Organization of African Unity (OAU), the movement of non-aligned countries, and the United Nations respectively.

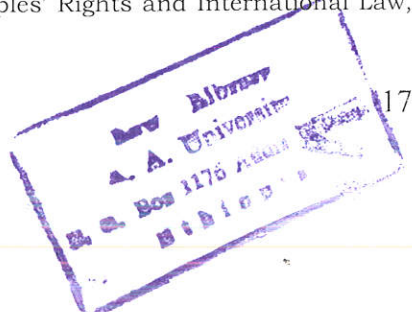
Part one of the Charter consists of a list of rights attributable to individuals following the conventional practice by human rights instruments. But while part one contains 26 specific provisions, the last 3

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<sup>30</sup> Charter, Supra note 6, Article 30.

<sup>31</sup> Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, Oxford, Portland, Oregon, 2000. P-10

<sup>32</sup> Charter, Supra note 6, Para.5



provisions<sup>33</sup> relate to certain duties to families and communities in their collective capacities. For instance, the group rights recognized by the Charter include right to one's common economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.<sup>34</sup> Interestingly, the Charter comprises few provisions relating to duties which individuals and communities are required to observe. For example, it is required as a duty "*Not to compromise the security of the State whose national or resident he is*".<sup>35</sup> Generally speaking, the Charter is like most similar instruments applicable in the other regions of the world. At the same time it also portrays some peculiarities apparently originating from what the draftsmen refers to as unique African cultural values.<sup>36</sup>

#### **2.4 The Establishment and Development of the African Commission on Human and Peoples' Rights**

Unlike the newly created organs of the African Union (AU), the African Commission on Human and Peoples' Rights hereafter the Commission was not a recent creation. The date of its establishment goes back to the OAU era, one significant area in which there has been institutional continuity between the OAU and the AU.

In order to closely understand the historical genesis of the Commission, it may be useful to classify its development into two different stages. The first stage relates to the development of the Commission during the OAU era, i.e. 1981-2000. The second stage relates to recent developments of the Commission after the creation of the African Union (AU), i.e. since 2000- to date.

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<sup>33</sup> Ibid, Article 27, 28 and 29.

<sup>34</sup> Ibid

<sup>35</sup> Ibid. Article 29(3)

<sup>36</sup> Murray, Supra note 31

### 2.4.1 The Commission during the OAU

As mentioned earlier, the African Commission on Human and Peoples' Rights was established based on the African Charter on Human and Peoples' Rights (hereafter the Charter). African Heads of State and Government had adopted the Charter in 1981. Subsequently, the Charter entered into force on 21 Oct. 1987. Then, most of the African states had already ratified the Charter only two states, including Ethiopia and Eritrea, did not ratify the Charter until 1999. Eritrea was not born as an independent state till 1991, i.e. more than one decade after the adoption of the Charter in 1981.<sup>37</sup>

The Headquarter of OAU being in Addis Ababa, the reluctance of the Ethiopian government to ratify the Charter might have caused disappointment on the part of the other OAU member states. One may assume that the military government might have found it difficult to ratify the Charter as it encountered several domestic problems caused by the alleged failure of the public authorities to observe human rights.<sup>38</sup> However, the government of Ethiopia did not ratify the Charter for a period of eight years even after the overthrow of the Derg regime.

The other interesting aspect of the ratification process is the reservation to some provisions of the Charter by another group of two African states including Zambia and Egypt.<sup>39</sup> The reservation of the Republic of Zambia relates to Article 13(3) and Article 37 of the Charter. Article 13(3) is proposed to read "*every individual shall have the right of access to any*

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<sup>37</sup> Eritrea won its independence in 1991.

<sup>38</sup> For Example five cases have been submitted to the Commission against Ethiopia in a single year i.e. 1988. These are Communication 9/88 International Lawyers Committee for Family Reunification V Ethiopia, Communication 10/88 Getachew Abebe V Ethiopia, Communication 14/88 Dr. Abd Eldayem A/E Sanussi V Ethiopia, Communication 19/88 International PEN V Malawi, Ethiopia, Cameroon, Kenya and Communication 21/88 Centre Haitien des Libertes Publiques V Ethiopia. All the cases were dismissed because at the time Ethiopia was not party to the Charter.

<sup>39</sup> Murray, Supra note 24, appendix III Reservations.

*place, services or public property intended for use by the general public.*"<sup>40</sup> The official explanation by the government of the Republic of Zambia has stated that its proposed alternative provision to that stipulated in the Charter was to exclude claims by people other than those having a right fairly established under the law of the country.

In this context, the version which has already been provided in the Charter may be worth-mentioning. Article 13 (3) provides that "*Every individual shall have the right of access to public property and services in strict equality of all persons before the law*".<sup>41</sup> Thus, it appears the government of Zambia sought the Charter to endorse the principle of fairness under the provision.

Egypt was the other country that had registered reservation to some of the provisions of the Charter. One of these provisions relates to the first paragraph of Article 9 of the Charter which requires that "*Every individual shall have the right to receive information*".<sup>42</sup> The alternative which the government of Egypt sought to have it included reads that "*the right to receive information under the Charter should include only such information as could be obtained within the limits of Egyptian laws and regulations*".<sup>43</sup> Mean while, there are also few other provisions to which Zambia and Egypt expressed reservations.<sup>44</sup>

Apart from the reservations of Zambia and Egypt, and the extraordinary delay of Ethiopia and Eritrea, there was no other obstacle in securing the ratification of the Charter by OAU member states. In the light of these developments that eventually lead to unanimous ratification of the Charter by member states in 1999, the OAU could be understood as an institution that had limited impact as to the development of the Commission on Human and Peoples' Rights. But, the OAU still deserve the credit for

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<sup>40</sup> Ibid

<sup>41</sup> Ibid. Supra note 32.

<sup>42</sup> Ibid

<sup>43</sup> Ibid

<sup>44</sup> Article 37 of the Charter was not ratified by Zambia verbatim. Also, Egypt has expressed reservation to paragraph 3 of Art. 8 and paragraph 3 of Article 18 of the Charter.

handling the responsibilities related to the foundation of the Commission. The Commission was officially inaugurated on November 2, 1987 in Addis Ababa. However, the Commission did not have a permanent secretariat for two years i.e. until 1989. During this time, its activities were coordinated by the OAU General Secretariat<sup>45</sup> in Addis Ababa. One year after the unanimous ratification of the Charter by member states, the OAU was transformed to the existing African Union.

#### **2.4.2 The Commission within the Framework of the AU**

When the AU was established in the year 2000, the Commission was already in existence. One would expect that the AU would adopt the Commission as one of its principal organs.<sup>46</sup> For instance, the AU had adopted the mechanism for Conflict Prevention, Management and Resolution, created in 1993, to continue functioning as one of its principal organs. But, AU's Assembly of Heads of State and Government came to recognize the African Commission on Human and Peoples' Rights only as a subsidiary organ within the Union.<sup>47</sup>

The Commission was integrated, three years later after the formal establishment of the African Union. It was initially functioning as its subsidiary organ.<sup>48</sup> However, since 2008, the AU has allocated budget to the Commission.<sup>49</sup> This shows that there is a slow but steady progress towards the better as far as the African regional system on Human and Peoples rights is concerned.

### **2.5 Organization**

The African Charter on the Human and Peoples' Rights provides the legal framework within which the Commission functions. Thus, under Art 30 of the Charter, the Commission is conferred with the power and the

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<sup>45</sup> The African Commission on Human and Peoples' Rights, Establishment, Information Sheet No.1, P-8

<sup>46</sup> However, the Commission is not listed among the organs of the AU under Article 5 of the Constitutive Act of the AU.

<sup>47</sup> Ass/AU/ Dec.1-8(I) and ASS/AU/Dec.1-2 (I), Supra note 19.

<sup>48</sup> Ibid

<sup>49</sup> Interview with Mr. Nadjita Francis Ngaritodjim, a Legal Officer for Protection in the African Commission on Human and Peoples' Rights at Banjul, Gambia. Interviewed on 16 October 2008 in Addis Ababa.

responsibility to protect and to promote human and peoples' rights in the African continent. To this effect, the Charter requires that the Commission should have the independence in discharging its responsibility. One of the mechanisms for ensuring its institutional independence seems to be the mechanism for selecting its members.

The Charter requires that the Commission consists of eleven members known as Commissioners chosen from among prominent African personalities known for their high morality, integrity and competence in matters related to human and peoples' rights.<sup>50</sup> In addition, it is a requirement that special consideration should be given to persons having legal training and experience as the Commissioners may be required to interpret legal treaties. Although preference is given to persons with legal training, Article 31 permits that persons with related background, in the political and diplomatic areas could be accepted. In practice, most of the Commissioners have been persons with legal training and a number of them are persons with political and diplomatic experience.<sup>51</sup>

Commissioners are nominated by member states and elected by the OAU/AU Assembly of Heads of State and Government.<sup>52</sup> States are allowed to nominate not more than two candidates either from their own nationals or nationals of other states.<sup>53</sup> The only requirement is that nominees should be nationals of member states.<sup>54</sup> In practice, so far, states have been nominating their own nationals. Finally, the election is conducted by AU Assembly of Heads of State and Government, using secret ballot.<sup>55</sup>

Commissioners are appointed for six years and are eligible for re-election. However, the term of office of four of Commissioners elected during the first election shall be two years and the term of office of three others shall

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<sup>50</sup> Charter, Supra note 6, Article 31(1)

<sup>51</sup> Ibid, Supra note 1. P- 421

<sup>52</sup> Charter, Supra note 6, Art.33

<sup>53</sup> Ibid. Article - 34

<sup>54</sup> Ibid.

<sup>55</sup> Ibid .Art. 33

be four years.<sup>56</sup> The reason for this arrangement is that to make sure that the Commission won't be composed of all new members.<sup>57</sup> After the first election, lots are drawn to determine which four Commissioners serve for two, and which three serve for four years respectively.<sup>58</sup> Then, the Commissioners elect a chairman and vice-chairman from among the members for a two years term.

After their election members of the Commission are required to serve impartially and faithfully.<sup>59</sup> In cases of death, resignation or failure to continue or has stopped discharging his/her duty, the Commission will inform the Secretary General of the OAU/AU who shall declare the seat vacant. It is then the Assembly of Heads of State and Government who shall replace the member whose seat became vacant for the remaining period of his/her term unless the period is less than six months.<sup>60</sup> The member is expected to remain in office until the date his successor assumes office.<sup>61</sup>

The members of the Commission serve in their personal capacity and they cannot be represented by another person.<sup>62</sup> Also while rendering their services, members of the Commission are required not to have conflict of personal interest either in relation to the parties involved or the issues under consideration. Some Commissioners hold governmental positions. This may conflict with the ability of the Commissioners to function as independent experts. For instance, two former Commissioners during their term served as Attorney General and Minister of Interior in their respective countries.<sup>63</sup>

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<sup>56</sup> Ibid. Article 36

<sup>57</sup> Ibid. Supra note 47.

<sup>58</sup> Ibid, Articles 36 and 37

<sup>59</sup> Ibid, Article 38

<sup>60</sup> Ibid, Article 39

<sup>61</sup> Ibid, Article 40

<sup>62</sup> The African Commission on Human and Peoples' Rights, Rule of Procedure of the African Commission on Human and Peoples' Rights, revised, and adopted on June 6, 1995, Rule 12

<sup>63</sup> Evelyn A. Ankuma, *The African Commission on Human and Peoples' Rights; Practice and Procedures*. The Hague, Martinus. Nijhoff, 1996 P- 18.

The Rules of Procedure precludes a Commissioner from participating in the consideration of complaints if the Commissioner has any personal interest in the case or has participated in any capacity in the adoption of any decision relating to the case.<sup>64</sup> In order to avoid conflicts of interest, the member states should strictly comply to the AU eligibility criteria demanding not to elect candidates currently holding portfolios and positions that might impede their independence as members of the Commission. Commissioners are required to make the following oath prior to holding office: *"I swear to carry out my duties well and faithfully in all impartiality."*<sup>65</sup>

## **2.6 Workings of the Commission**

The African Commission on Human and Peoples' Rights has adopted the revised Rules of Procedure, acting in accordance with authority conferred on it by the Charter, on October 6, 1995. The procedure covers several subject matters including, among other things, the modes to be followed in organizing and managing its regular and extra-ordinary sessions. The Commission holds two ordinary sessions a year.<sup>66</sup> The meeting usually takes place in March or April and in October or November.<sup>67</sup>

The Rule of Procedure is intended to apply guiding the workings of the Commission and its subsidiary bodies. The Commission is allowed to use the working languages of the OAU/AU including alphabetically, Arabic, English, French and Portuguese.<sup>68</sup> Thus, minutes of the proceedings of the Commission and that of its subsidiary bodies as well as all the official decisions and documents of the Commission shall be rendered in the each working languages.<sup>69</sup> Meanwhile, the Commission is required to make facilities available for interpretations when necessary.<sup>70</sup>

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<sup>64</sup> Ibid, Supra note 62, Rule 109.

<sup>65</sup> Ibid, Rule 16.

<sup>66</sup> Ibid Rule 2

<sup>67</sup> Information Sheet 1, Supra note 45.

<sup>68</sup> Rules of Procedure, Supra note 62. Rule 34

<sup>69</sup> Ibid, Rule 36

<sup>70</sup> Ibid, Rule 35

The Rules of Procedure also carry provisions relating to conduct of debates and proceeding of the Commission. As provided under Article 42(3) of the Charter, quorum shall be constituted by seven members of the Commission.<sup>71</sup> The chairman of the Commission has the responsibility to ensure that debates and other official business of the Commission are conducted duly in accordance with the Rules of Procedure

For the sake of brevity, we may restrict our selves to those procedural rules relevant to address the main theme of the research. However, the voting procedures of the Commission deserve to be provided with some detail. Preferably decision may be taken by consensus. But where consensus is found difficult to be attained, the Commission shall resort to voting.<sup>72</sup> The methods to be followed in conducting voting have been provided under Rule 63 of the Rules of Procedures. To highlight those which are of general importance, one may stress that decisions of the Commission are to be taken by simple majority of the members of the Commission present and voting. Within the context of the Rules of Procedures of the Commission, the term "*members present and voting*" shall mean members voting for or against a proposal or a motion submitted for the Commission. Members abstaining from voting are considered to be non-voting members.<sup>73</sup>

As indicated above, the Commission shall adapt decisions by a simple majority of the members. In the case of equal number of votes, the chairman has a casting vote.<sup>74</sup> It is interesting to note that the Rules of Procedure also provided for participation of non-members of the Commission in the proceedings of the Commission or its subsidiary bodies.<sup>75</sup> The Commission is permitted to invite any state having a vested interest in the issue under deliberation to participate in the discussion without having a voting right. Further, any organization or persons

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<sup>71</sup> Ibid, Rule 43

<sup>72</sup> Ibid. Rule 62(2).

<sup>73</sup> Ibid.

<sup>74</sup> Ibid, Rule 60.

<sup>75</sup> Ibid, Rule 71

capable of enlightening the Commission may be invited to participate in the same manner.<sup>76</sup> It should be stressed that the right to invite such entities is not limited to the Commission. Its subsidiary bodies may do the same provided that they act within the scope of right recognized under the Rules of Procedure.

## **2.7 The Relation of the Commission with Other AU Organs**

### **2.7.1 Assembly of Heads of State and Government (AHSG)**

The Commission has a legal obligation to report on its activities to the AHSG on an annual basis.<sup>77</sup> Thereby making its activities known by the state parties to the Charter. Because the Commission was adopted by the AHSG and its accountability is to the same principal organ. The Annual regular report of the Commission is different from those periodic reports which contain recommendations on given problems and complaints. The latter is supposed to be confidential and, therefore, it cannot be published for wider circulation until the issue under consideration is resolved. Only then the chairman of the Commission may publish the report on the deliberations and recommendations of the Commission as well as the decisions taken by the Assembly on the given specific matter with the direction or permission of the AHSG.<sup>78</sup> Even at this stage the chairman of the Commission may not publish such report when the Assembly directs otherwise. What is more relevant in this context is that the Commission has the responsibility to report on its activities to the Assembly of the African Union.

Rule 79, of the Rules of Procedure, stipulate that the Commission shall submit annual report on its deliberations. First, the report should be submitted to and considered by the Executive Council of the AU, and transmitted to the AHSG of the AU. Once the Assembly considered it, then, the Commission can publish the report translating the original document into each of the working languages of the Commission.

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<sup>76</sup> Ibid, Rule 72,

<sup>77</sup> Charter, Supra note 6, Article 54.

<sup>78</sup> Ibid, Article 59

## 2.7.2 The African Court on Human and Peoples' Rights

The Assembly of Heads of State and Government of the OAU/AU had established the African Court on Human and Peoples' Rights, hereinafter referred to as the Court.<sup>79</sup> It conferred on it power to exercise jurisdiction on matters related to human and peoples' rights. The Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights in Ouagadougou, Burkina Faso, on 9 June 1998. This Protocol entered into force 25 January 2004.

It was established within the AU to serve as its judicial organ. The first members of the Court were elected by the Executive Council of the AU and appointed by the AHS in Khartoum, Sudan in January 2006.<sup>80</sup> The seat of the Court is Arusha, United Republic of Tanzania. Only 24 states have ratified the Protocol. These are: Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Senegal, South Africa, Tanzania, Togo, Tunisia, and Uganda.<sup>81</sup> Out of these 24 states which have ratified the Protocol, only Burkina Faso has issued so far, the declaration accepting the Court's competence to entertain cases from individuals and NGOs.<sup>82</sup> As a result, this has limited the Court's accessibility to individuals and NGOs.<sup>83</sup>

The Court consists of eleven judges who have reputation as jurists of high moral character and academic competence and experience in the field of

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<sup>79</sup> The AU has adopted in its 11<sup>th</sup> Ordinary Session in Sharm El-Sheikh, Egypt, the Protocol on the Statute of the African Court of Justice and Human Rights in 11, July 2008. This Protocol merges the African Court on Human and Peoples' Rights with the AU Court of Justice. It is now open for Signature.

<sup>80</sup> Report of the African Court on Human and Peoples' Rights, Executive Council, 13<sup>th</sup> Ordinary Session 24-28, June 2008, Sharam El-Sheikh, Egypt. Ex. CL/445(XIII) P-1

<sup>81</sup> Ibid.

<sup>82</sup> Ibid. P-2

<sup>83</sup> The new Protocol on the Statute of the African Court of Justice and Human Rights, Supra note 79, still contains these limitations. The right of NGOs or individuals to submit cases before the Court is subject to or depends upon the declaration of the State against which the Complaint has been lodged, to accept the competence of the Court to receive such cases. Article 30(f) and Article 8 (3)

human and peoples' rights.<sup>84</sup> The judges are elected by secret ballot by the Assembly from the list prepared by OAU Secretary General by way of ensuring equity and wider representation. It is a requirement that there is a gender participation and proportionate representation of the different region of Africa and their legal traditions.<sup>85</sup>

More importantly the Court has jurisdiction to deal with cases and disputes submitted to it by interested parties. In addition, the Court has the competence to give advisory opinions on any relevant legal matter at the request of a member state of the OAU, or any of its organs recognized by the OAU.<sup>86</sup> After the establishment of the AU, whatever legal right or privilege attributable to the OAU has now been transferred to the AU. Thus, the Court is now responsible to function under the authority and guidance of the AU as it used to do in relation to the OAU.

The Court is allowed to resort to different sources of law including the Charter and any other relevant human rights instruments ratified by the state parties concerned.<sup>87</sup> As a judicial body, the Court has been given institutional and legal safeguards that can ensure the independence and impartiality of the judges. Thus, it is a requirement that presiding judges must be persons that have not previously taken part in the same case as agents, counsels or advocates for one of the parties in the disputes.<sup>88</sup>

Meanwhile the judges of the Court are allowed to enjoy the immunities extended to diplomatic agents under international law. Similarly, a judge of the Court is immune from suspension or removal from office unless under exceptional circumstances.<sup>89</sup> Such situation may include a circumstance where the rest of the judges of the Court become unanimous

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<sup>84</sup> The new Court will have 16 Judges instead of 11. Article -3

<sup>85</sup> The Protocol to the African Charter on Human and Peoples' Rights, on the Establishment of an African Court on Human and Peoples' Rights adopted in Ouagadougou, Burkina Faso, on 9 June 1998. Articles 11-14.

<sup>86</sup> Ibid. Article 7.

<sup>87</sup> Ibid. Article 3(1).

<sup>88</sup> Ibid Article 17(2).

<sup>89</sup> Ibid. Article 17(3).

in maintaining that the judge concerned has been found to be no longer fulfilling the basic conditions required from any judges of the Court.

A number of institutions are recognized to be eligible to submit cases to the Court. These include the African Human and Peoples' Rights Commission, African Intergovernmental Organizations and state parties to an existing case submitted to the Commission. Moreover, the state party whose citizen is a victim of human rights violation can equally submit cases to the Court.<sup>90</sup> The Court may entitle NGOs with observer status and individuals to institute cases directly in exceptional cases where the state shall make a declaration accepting the Court's jurisdiction to receive cases.<sup>91</sup> Therefore, individuals and NGOs are left with the only option of taking their case to the Commission.

Here, we shall endeavor or attempt to understand the relationship between the Court and the Commission. The Protocol has expressly stated that the Court has the responsibility to complement and reinforce the activities of the Commission. As was indicated above, the responsibilities of the Commission include among other things, promotion and protection of human and peoples' rights in the member states. On the other hand, the Court is assigned with the responsibility to exercise judicial authority on matters related to human rights and to provide advisory opinions at the request of parties enumerated under the Protocol.<sup>92</sup> It is clear that there is no duplication of assignment and conflicting jurisdiction between the Court and the Commission. Some developments<sup>93</sup> have taken place since recent times, which I have not dealt with due to the limited scope of this research and for the sake of brevity.

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<sup>90</sup> Ibid 5 (1)

<sup>91</sup> Ibid 5 (3)

<sup>92</sup> Ibid. Preamble Para. 8

<sup>93</sup> The merger of the African Court on Human and Peoples' Rights and the Court of Justice of the AU into a single Court and establishes "The African Court of Justice and Human Rights" Article 2 ssupra note 79.

Under this section, we have seen the mode of relationship between the Commission and the other organs of the OAU which is currently the AU. It has been shown that the relationship between the Court and the Commission is of peculiar importance. Each of them complements the other thereby promoting the proper protection of human rights in the continent.

Therefore, the Commission is not placed in a circumstance that involves jurisdictional conflict with the Court and the other organs of the AU. However, this observation is based on the apparent significance of the provisions of the law. We shall endeavor to see the facts on the ground under those sections dealing with the actual workings of the Commission.

## **2.8 Relation with National Human Rights Institutions and NGOs**

### **2.8.1 National Human Rights Institutions**

The UN recognizes the complementary role of national institutions in the promotion and protection of human rights. Thus, ECOSOC advised that states should consider establishing local human rights committees, which would assist in furthering the work of the UN Commission on human rights at national level.

Consistent with this international trend, the African Charter calls upon state parties to the Charter to *“allow the establishment and improvement entrusted with the promotion and protection of the rights and freedoms of appropriate national institutions guaranteed by the present Charter”*.<sup>94</sup> Article 26 should be read in conjunction with article 25 which imposes a duty on states to “promote and ensure through teaching, education and publication, the respect of the rights contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.” Article 45 states as a function of

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<sup>94</sup> Charter, Supra note 6, Article 26

the Commission to “*encourage national and local institutions concerned with human and peoples’ rights.*”

The Cooperation between the Commission and National Human Rights Institutions (NHRI) is a critical safeguard to ensure that people can obtain recourse and redress in the face of injustice. It may function as the extended hand of the Commission in member states in promoting and protecting human and peoples’ rights without interfering in the domestic affairs of states. As result, it is important that existing human rights commissions are encouraged to play an active and central role in the upholding of human rights.

The Mauritius Plan of Action sets out that:

*“National institutions and associations could serve as a basis for initiatives for human rights in the respective countries, and will help the Commission to disseminate the Charter and fulfill its educational mission on human and peoples’ rights in general. They may also contribute to protective activities by providing the Commission with information on human rights violations and by assisting the victims of such violations.”*<sup>95</sup> The Commission adopted a resolution at its 24th Ordinary Session in October 1998 granting national institutions an Affiliated Status.<sup>96</sup> NHRI's may apply to the Commission seeking Affiliated Status. To date, the Commission has granted Affiliated Status to 20 National Human Rights Institutions.<sup>97</sup>

For instance, the Ethiopian Human Rights Commission has been granted an affiliated status at the Commission’s 41<sup>st</sup> Session in Accra.<sup>98</sup> NHRI's have the following rights and responsibilities.

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<sup>95</sup> The Mauritius Plan of Action, 20<sup>th</sup> Session held in Grand Bay, Mauritius, 21-31 October 1996. No. 67

<sup>96</sup> Resolution ACHPR/ Res.31 (XXIV) 98.

<sup>97</sup> Interview with Mr. Francize, Supra note 48

<sup>98</sup> Ibid

They can:<sup>99</sup>

1. be invited to sessions of the Commission;
2. be represented in public sessions of the Commission and its subsidiary bodies; and
3. participate in the discussions and submit proposals which may be put to the vote at the request of any member of the Commission. However, they don't have voting rights.

When we look at the Ethiopian situation, Ethiopia has ratified or acceded to the major international human rights instruments including the ICCPR, ICESCR, CEDAW, CAT, CERC, CRC and the African Charter on Human and Peoples' Rights .It has enacted in 1995 the FDRE Constitution which has incorporated a range of human rights provisions that have their basis on the various international and regional human rights instruments.<sup>100</sup> Under international law, state is the primary duty holder in harmonizing domestic law with international and regional human rights standards. As provided in article 27 of the Vienna Convention on the Law of Treaties, a state "*may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*" Thus, the FDRE Constitution is one major legislative measure through which human rights rules and principles are transformed in the Ethiopian legal system.

The Constitution requires establishment of a Human Rights Commission and Office of the Ombudsman.<sup>101</sup> To this effect, proclamations were enacted in 2000 to provide for the establishment of these institutions. Pursuant to Proclamation No. 210/2000<sup>102</sup> among others, the Human Rights Commission is intended to participate in international human rights meetings, conferences or symposia and to forward its opinion on human rights reports to be submitted to international and regional organs

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<sup>99</sup> Rules of Procedures, Supra note 62, Rule 6.

<sup>100</sup> The FDRE Constitution, Supra note 24, Article. 9(4)

<sup>101</sup> Ibid, Article 55 sub-Articles 14 and 15 respectively.

<sup>102</sup> A Proclamation to provide for the establishment of the Human Rights Commission, Proclamation No. 210/2000

such as the Commission.<sup>103</sup> However, in Ethiopia, the mandate to submit reports on behalf of the Ethiopian government was not explicitly given to any governmental institutions.

Therefore, which institution has the mandate to prepare reports to the Commission is not clear. However, in practice the FDRE Ministry of Foreign Affairs prepares these reports in consultation with other institutions. For example, Ministry of Foreign Affairs has prepared Ethiopia's first state report, to be submitted in November 2008, in consultation with the Ethiopian Human Right Commission.<sup>104</sup> Thus, national institutions also have a role in ensuring compliance by member states especially the reporting obligations.

## **2.8.2 Non-Governmental Organizations (NGOs)**

There is also an interesting interrelation between the OAU, now the AU, and the Commission with respect to modality through which certain specialized institutions such as the NGOs may take part in the discussions of the Commission. The AU has the power to grant an Observer Status to any Inter-governmental Organization having the interest to take part in the discussions of the Commission.<sup>105</sup> Like wise within the same framework of cooperation with different human right agents, the Commission itself, acting directly, may such grant Status to states to Non-governmental Organizations (NGOs) to participate in the proceeding of the Commission on issues which shall be of interest to them. In both cases such an Observer Status does not carry a right to vote.

On the other hand, NGOs, may apply to have an Observer Status in the Commission. However, NGOs applying for this status need not be an

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<sup>103</sup> Ibid, Article 6.

<sup>104</sup> Interview with W/o Ferdosa Abdulkadir, Second Secretary, International Law and Counselor Affairs Directorate General, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, on 10 Oct, 2008, Addis Ababa.

<sup>105</sup> Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights, ACHPR/Res.33 (XXV) 99, adopted in 1999.

African origin. They are only required to operate in Africa. <sup>106</sup> For example, Norwegian Refugee Council (NRC) was granted an Observer Status on the condition that it submits proof that it operates in Africa. <sup>107</sup> Ethiopian Human Rights council is another Ethiopian NGO with an Observer Status. Up to now, the Commission has granted Observer Status to 380 NGOs. <sup>108</sup> NGOs enjoying Observer Status have obligation to submit a report of their activities every two years. These reports should include all the measures taken by the NGO in the promotion and protection of human and peoples' rights protected by the Charter. <sup>109</sup>

Interestingly, the right of such institutions is not limited to attending the public sessions and participating in the discussions of the Commission or its specialized bodies. The NGOs may submit proposals on the issues under discussions that may be put to vote at the request of any member of the Commission. The Commission also has the mandate to allow non-members of the Commission to attend and take part in the discussions of the Commission.

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<sup>106</sup> 24<sup>th</sup> Activity Report of the African Commission on Human and Peoples' Rights, Executive Council, 13<sup>th</sup> Ordinary Session 24-28, June 2008, Sharm El-Sheikh, Egypt. (EX.CL/446 (XIII), Annex II P-9

<sup>107</sup> Ibid, P-10

<sup>108</sup> Ibid.

<sup>109</sup> Ibid. Supra note 107

## **Chapter Three**

### **Scope of Jurisdiction and Rules of Procedure of the Commission**

#### **3.1. Powers and Responsibilities**

The African Charter on Human and Peoples' Rights provides the legal framework within which the Commission functions. Under Art, 30 of the Charter the Commission is conferred with the power and responsibility to promote human and peoples' rights in the African continent. To this effect, the Charter requires that the Commission should have independence in discharging its responsibility. The mechanisms created for ensuring its independence have been discussed under chapter two of the thesis.

In addition, the Commission may also engage itself in interpreting the Charter. Meanwhile, the Charter permits the Assembly of Heads of State and Government to further assign to the Commission any other task which the Assembly may deem necessary. It appears that the responsibility to interpret the provisions of the Charter seems to be a quasi-judicial while its responsibility to ensure the protection of human and peoples' rights may be perceived as a quasi-legislative function. The scope of responsibilities and power of the Commission appear, therefore, multi purpose in nature.

Under chapter four, each of these functions of the Commission are discussed in detail. There, the specific practical cases where compliance and non-compliance of member states have been evaluated in the light of a more detailed description of the responsibilities and power of the Commission. The objective behind using this approach is to show the gap between the law and the practice in reality.

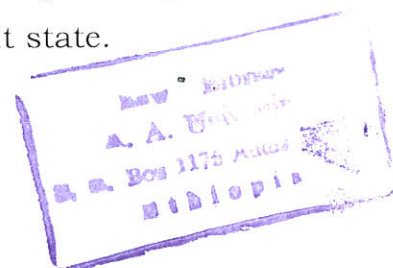
## 3.2 Jurisdiction

### 3.2.1 Nature of Violations Submitted to the Commission on Human and Peoples' Rights

The Charter provides that the Commission shall draw inspiration from international law as provided by the UN and other relevant multilateral instruments.<sup>110</sup> The Commission is, thus, empowered to consider any communication from any one as long as there has been a violation of the Charter. According to Rule 104 (1) (d) of the Rules of Procedure, the author of the complaint is required to show the applicability of the Charter to his or her communication and to specify the provision of the Charter violated by the respondent State. In addition, communication may consist violations of other international human rights instruments which the state is party to it.

Article 1 of the Charter imposes an obligation upon state parties to the Charter to enforce the rights, duties and freedoms enshrined in the Charter. To this effect, the states are deemed duty-bound to undertake and to adopt legislative or other measures to give effect to the provisions of the Charter.

Thus, *in the case Jawara V the Gambia*, the Commission held that Article 1, gives the Charter a legally binding character always attributed to international treaties. In other words, a violation of any provision of the Charter automatically amounts to a violation of Article 1 of the Charter.<sup>111</sup> Hence, every communication, first of all is required to mention the violation of article 1 of the Charter, before referring to any other provision of the same Charter allegedly violated by the respondent state.



<sup>110</sup> Charter, Supra note 6, Article 60

<sup>111</sup> Communications 147/95 and 149/96, Sir Dawda K. Jawara V The Gambia, 13<sup>th</sup> Activity Report, (2000), AHRLR 107 (ACHPR 2000)

### **3.2.2 Locus Standi**

Locus standi means the capacity of a complainant to bring a complaint before the Commission. The Charter does not explicitly deal with the individual and NGO communication procedures. It explicitly mentions the inter- state communication. However, Art 55 allows the commission to consider "other communication". As a result, the Commission it gives access to either natural (individual) or juridical persons (NGOs). Complainants should not necessarily be victims, their families or persons authorized by them. In addition, complainants do not need to be African citizens or residents. For instance, *in Baes V Zaire case*, a Danish national submitted a communication in respect of the illegal detention of one of her colleagues at the University of Kinshasa.<sup>112</sup>

### **3.2.3 Legal Representation**

The Charter and the Rules of Procedures are silent as to the legal representation and legal aid to complainants in bringing communications before the Commission. In order to assist complainants representing themselves, the Commission has developed guidelines for the submission of communications.<sup>113</sup> However, the Commission does not offer legal assistance or aid to complainants.<sup>114</sup> Thus, NGOs have become important actors in representing and providing legal aid.

According to the Submission Guidelines, communications should include the following:<sup>115</sup>

- The complainant's personal details;
- The government accused of the violation;
- The facts constituting the alleged violation;
- The provisions of the Charter alleged to have been violated;

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<sup>112</sup> Communication 31/89, Baes V Zaire, 8<sup>th</sup> Activity Report, (2002) AHRLR 72 (ACHPR 1995)

<sup>113</sup> The African Commission on Human and Peoples' Rights, Guidelines on the Submission of Communications, Information Sheet No.2.

<sup>114</sup> Ibid. P-9

<sup>115</sup> Ibid. P-14

- Names and titles of government authorities who committed the alleged violation;
- Witnesses to the violation;
- Documentary proof of the violation;
- Domestic legal remedies not yet pursued and the reasons why they have not been pursued; and
- Other international avenues which have considered the same complaint.

### **3.2.4 Registration of Communications**

Once a communication has been submitted to the Commission, the Secretariat sends it to the members of the Commission. The communication will be registered in the Commission's Official Register and the Secretariat will inform the complainants the receipt of the author's letter of complaint.<sup>116</sup>

If the Commission needs information or further clarification is required, it will communicate the complainant. The Commission can only accept communications lodged against a state party and not those submitted against a non- state party to the Charter. In the latter case, the complaint will not be registered and the complainants will be informed accordingly.<sup>117</sup>

### **3.2.5 The Seizure Procedure**

After registration of communication, the Secretariat will send the communications to the members of the Commission for approval. To seize the case, at least seven out of the eleven members must approve it. <sup>118</sup> The examination of communications by the Commission takes place in a closed session and no oral arguments are required by the parties during seizure.<sup>119</sup>

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<sup>116</sup> Charter, Supra note 6 Article 55(1)

<sup>117</sup> Information Sheet No. 2, Supra note 113, P-16.

<sup>118</sup> Charter, Supra note 6, Article 55(2)

<sup>119</sup> Rules of Procedure, Supra note 62, Rule 102 (2)

In order for the Commission to seize a communication, firstly, there must be a violation of the provision of the Charter. Secondly, the allegation must only be in respect of a member state of the African Union that has ratified or acceded to the Charter. The AU itself cannot be respondent in any proceeding before the Commission. After a communication has been approved for seizure, the Secretariat will inform the parties that the communication was seized and it shall be considered for admissibility at its next session. The parties are expected to submit their comments within three months. This procedure conforms to article 57 of the Charter and Rule 112 of the Rules of Procedure.

The seizure and admissibility procedures are undertaken during separate sessions. These sessions need not be successive. ***In Modise V Botswana case***, the Commission decided to seize of the communication at its 13<sup>th</sup> Session<sup>120</sup> and declared it admissible at its 17<sup>th</sup> session. That means, after nearly two and half years. However, ***in the case Mouvement Burkinabe des Droits de l' Homme et des Peuples V Burkina Faso***, the Commission was seized of the communication at its 23<sup>rd</sup> Session and declared it admissible at its 24<sup>th</sup> Session.<sup>121</sup>

### **3.2.6 Admissibility of a Communication**

After the Commission has seized the Communication, it has to decide, on the admissibility of the communication by undertaking admissibility hearing. There are seven conditions which need to be met for a communication to be considered admissible. These conditions are discussed below.

### **3.2.7 Conditions of Admissibility of a Communication**

Before a Communication is sent to the Secretariat of the Commission, it must fulfill the admissibility requirements provided under Article 56 of the Charter. The Communications should:-

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<sup>120</sup> Communication 97/93, John Modise V Botswana, 10<sup>th</sup> Annual Activity Report.

<sup>121</sup> Communication 204/97, Mouvement Burkinabe des Driots del'Homme et des Peuples V Burkina Faso, 14<sup>th</sup> Annual Activity Report.

1. indicate their authors even if they request anonymity,
2. be compatible with the [AU Act] or with the present Charter,
3. not be written in disparaging or insulting language directed against the state concerned and its institutions or to the AU,
4. not be based exclusively on news disseminated through the mass media,
5. be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the AU Constitutive Act or the provisions of the present Charter.

### **1. Communications should Indicate their Authors Even if they Request Anonymity** <sup>122</sup>

As discussed earlier, authors can be either natural or juridical persons. That means individuals or NGOs can submit a communication. In case of individuals, a communication is required to indicate the name of the complainants, or authors and their contact address. If it lacks both or one, it will not be considered. However, if a complainant wishes to remain anonymous, he or she will indicate his/her name and request the Commission not to disclose it to the respondent state. He/she doesn't need to give reasons for his/her request.<sup>123</sup> The communication will be address as X v the State Party. <sup>124</sup>

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<sup>122</sup> Charter, Supra note 6, Art. 56(1)

<sup>123</sup> The African Commission on Human and Peoples' Rights, Communication Procedure, Information Sheet No. 3, P-7

<sup>124</sup> Communication 283/2003, B V Kenya, 17<sup>th</sup> Activity Report (ACHPR)

On the other hand, where the author is an NGO, the names and address of the representatives of the NGO would be required. The Charter does not require the authors to be neutral persons. For example, **in Communication 233/99, INTERIGHTS (On Behalf of the Pan African Movement and Citizens for Peace in Eritrea) V Ethiopia and in Communication 234/99; INTERIGHTS (On Behalf of the Pan African Movement and Inter-Africa Group) V Eritrea**, INTERIGHTS\* filed a communication against Ethiopia on behalf of Eritrea. This same Organization filed a case on behalf of the Ethiopian people against Eritrea. This indicates that neutrality of the party submitting the case is not a requirement under the Charter.

## **2. Communications should be Compatible with the Constitutive Act of the AU or with the Present Charter** <sup>125</sup>

First, according to the Constitutive Act of the AU and the Charter, Communication may be brought only against African states. For instance, the Commission has dismissed the communications brought against Bahrain, Yugoslavia and USA.<sup>126</sup> Because these are not parties to both instruments, i.e. the Charter and the Constitutive Act of the AU. Similarly the Commission has dismissed communications brought against Ethiopia prior to 1999.<sup>127</sup>

Another form of incompatibility in this regard, is in the case where a complainant files a communication against a non- state entity i.e. individuals. That means, the communication is brought against a non party to both the Constitutive Act of the AU and the Charter. For instance, the Commission dismissed a case initiated against the Secretary-General of the OAU. <sup>128</sup>

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<sup>125</sup> Charter, Supra note 6, Article 56(2)

<sup>126</sup> Heyns, Supra note 1. P-389

<sup>127</sup> For example, Communication 10/88, Getachew Abebe V Ethiopia, and Communication 9/88, International Lawyers Committee for Family Reunification V Ethiopia, 7<sup>th</sup> Activity Report.

<sup>128</sup> Ibid, Supra note 126

Second, although a communication was brought against a state party to both instruments, it would be inadmissible if it requests a remedy that is incompatible with the territorial integrity of one or more states parties to the Charter. For example, the Commission dismissed a communication that requested the Katangese Peoples' entitlement to secede from the Democratic Republic of Congo.<sup>129</sup>

Third, the communication should invoke the provisions of the African Charter alleged to have been violated and/or the principles enshrined in the AU Constitutive Act.<sup>130</sup> In other words, the author does not have to name specific articles or provisions of the Charter. But it has to at least show that facts alleged would violate any of the substantive rights recognized by the Charter or some of the basic principles of the AU Constitutive Act, such as "*freedom, equality, justice and dignity*".<sup>131</sup> Nevertheless, communications which are in violation of national legislations cannot be said to be incompatible with both the Charter and the AU Constitutive Act.<sup>132</sup>

### **3. Communications should not be written in Disparaging or Insulting Language Directed against the State Concerned and Its Institutions or to the AU**<sup>133</sup>

Although the Charter does not define what 'disparaging' or 'insulting' languages mean, it prohibits the use of such languages in communications. These languages will render a communication inadmissible, irrespective of the seriousness of the complaint. For example, in *Ligue Camerounaise des Droits de l' Homme V Cameroon*, the authors alleged serious and massive violations, including 46 distinct cases of torture, deprivation of food, ethnically motivated persecution and massacres of civilian populations. However, the communication was

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<sup>129</sup> Communication 75/92, Katangese Peoples' Congress V Zaire, 8<sup>th</sup> Activity Report, (2000) AHRLR 72 (ACHPR 1995)

<sup>130</sup> Information Sheet No. 3, Supra note 123, p-8

<sup>131</sup> Ibid.

<sup>132</sup> Communication 13/88, Hadjali Mohammed V Algeria, 7<sup>th</sup> Activity Report (2000) AHRLR 15 (ACHPR 1994)

<sup>133</sup> Charter, Supra note 6, Article 56(3)

declared inadmissible for using statements such as "Paul Biya must respond to crimes against humanity", and phrases including: '30 years of the criminal', 'neo-colonial regime incarnated by the duo Ahidjo/Biya', 'regime of torturers' and 'government barbarism'.<sup>134</sup>

#### **4. Communications Should not Be Based Exclusively on News Disseminated Through the Mass Media** <sup>135</sup>

Communications based exclusively on news disseminated through the mass media are inadmissible. However, the author must ascertain the truth of the information before submitting the case to the Commission. For instance, *in Sir Dawda K. Jawara V the Gambia*, the government of Gambia alleged that the communication should be declared inadmissible because it was based exclusively on news disseminated through the media.<sup>136</sup> However, the Commission declared the communication admissible. The Commission reasoned that it would be: <sup>137</sup>

*Equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word "exclusively". There is no doubt that the media remains the most important if not the only source of information...the issue, therefore, should not be whether the information was gotten from the media, but whether the information is correct .*

Therefore, if the author gets the information from the media, then he/she has to make sure it is correct before lodging the complaint.

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<sup>134</sup> Communication 65/92, Ligue Camerounaise des Droits de l'Homme V Cameroon, 10<sup>th</sup> Activity Report, (2000) AHRLR 61 (ACHPR 1997)

<sup>135</sup> Charter, Supra note 6, Article 56(4)

<sup>136</sup> Communication 147/95 and 149/96, Supra note 111

<sup>137</sup> Ibid

## **5. Communications should be Sent after Exhausting Local Remedies, If any, Unless It is Obvious That This Procedure is Unduly Prolonged** <sup>138</sup>

The Charter requires authors of communications to exhaust local remedies before resorting to the procedure of the Commission '*unless it is obvious that this procedure is unduly prolonged*'.<sup>139</sup> If the local remedies are unduly prolonged, unavailable, ineffective or insufficient, the exhaustion rule will not bar consideration of the case. Authors of communications must first seek domestic remedies from judicial bodies.<sup>140</sup> Non-judicial bodies such as National Human Rights Commissions are not considered domestic remedies. Thus, only local remedies of judicial nature need to be exhausted. However, these judicial remedies also have to be adequate, effective and not unduly prolonged. Otherwise, the complainant is not bound to exhaust these local remedies.

***In RADDHO V Zambia case***, although the government of Zambia raised the issue of non-exhaustion of local remedies, the Commission dismissed the objection of Zambia and seized the case.<sup>141</sup> The Commission reasoned that Article 56(5) of the Charter '*does not mean ....that complainants are required to exhaust any local remedy which is found to be, unavailable or ineffective*'. Thus, the Commission concluded that the remedies referred to by the government of Zambia were practically unavailable.

***In Mekongo V Cameroon***, the communication was declared admissible where appeal has been pending before the courts for twelve years.<sup>142</sup> The Commission considered it to be unduly prolonged. However, ***in Kenya Human Rights Commission V Kenya***, the Commission dismissed the case saying that it does not constitute undue delay because the case has

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<sup>138</sup> Charter, Supra note 6, Article 56(5)

<sup>139</sup> Ibid

<sup>140</sup> Information Sheet No.3, Supra note 123, P-9

<sup>141</sup> Communications 71/92, RADDHO V Zambia, 10<sup>th</sup> Activity Report, (2000) AHRLR 321 (ACHPR 1996)

<sup>142</sup> Communication 59/91, Mekongo V Cameroon, 8<sup>th</sup> Activity Report, (2000) AHPRLR 56 (ACHPR 1995)

been pending only for three months.<sup>143</sup> Similarly, *In Stephen O. Aigbe V Nigeria*, the Commission declared the communication inadmissible because:<sup>144</sup>

*the complainant had alleged that he sought redress before "Several authorities".The Commission has no indication in the file before it that there was any proceeding before the domestic courts on the matter.*

This indicates that complainants are expected to show the efforts made to exhaust such remedies. Nevertheless, there is an exception regarding cases of serious and massive violations of human rights. The Commission holds that it must read Article 56(5) in light of its duty to:<sup>145</sup>

*ensure the protection of human and peoples' rights... The Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual complaint. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the number of people involved, such remedies as might exist in the domestic courts are as a practical matter unavailable or, in the words of the Charter, 'unduly prolonged.'*

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<sup>143</sup> Communication 135/94, Kenya Human Rights Commission V Kenya, 9<sup>th</sup> Activity Report.

<sup>144</sup> Communication 252/2002, Stephen O. Aigbe V Nigeria, 17<sup>th</sup> Activity Report,(2003) AHPRLR 128 (ACHPR 2003), para.15

<sup>145</sup> Communications 140/94,145/95, Constitution Rights Project, Civil Liberties Organization and Media Rights Agenda V Nigeria, 13<sup>th</sup> Activity Report, (2002) AHRLR 277 (ACHPR 1999) Para.56-57

**6. Communications should be Submitted Within a Reasonable Period from the Time Local Remedies are Exhausted or from the Date the Commission is Seized of the Matter** <sup>146</sup>

The Charter does not give a specific time frame within which the local remedies must be exhausted. It is left to the discretion of the Commission to determine what is meant by a reasonable period. However, it is always advisable to submit a complaint as early as possible.<sup>147</sup>

**7. Communications should not Deal with Cases which Have Been Settled by These States Involved in Accordance With the Principles of the Charter of the United Nations, or the AU Constitutive Act or the Provisions of the Present Charter**<sup>148</sup>

Communications which have been settled by an international body such as the UN or AU dispute resolutions mechanisms will not be accepted by the Commission. For example, if a case has been settled by the ICJ or the Human Rights Committee, no claim can be made to the Commission. On the other hand, the fact that a matter has been brought to the attention of the High Commissioners for Refugees, for instance, should not preclude its being considered by the Commission under this requirement. Because such a matter has, therefore, not been settled and it is admissible. However, *in INTERRIGHTS (On Behalf of the Pan African Movement and Citizens for Peace in Eritrea) V Ethiopia and INTERRIGHTS (on Behalf of Pan African Movement and the Inter African Group) V Eritrea*, the complaint concerned forced population transfers connected with the conflict between Eritrea and Ethiopia between 1998 and 1999.<sup>149</sup> Under a peace settlement to end the conflict, reached after the communication was initiated before the Commission, a Claims Commission was set up to

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<sup>146</sup> Charter, Supra note 6, Article 56(6)

<sup>147</sup> Information Sheet No. 3, Supra note 123, P-10

<sup>148</sup> Charter, Supra note 6, Article 56(7)

<sup>149</sup> Communications 233/95, *INTERRIGHTS (on Behalf of the Pan African Movement and Citizens for Peace in Eritrea) V Ethiopia*, and Communication 234/99, *INTERRIGHTS (on Behalf of the Pan African Movement and the Inter-African Group) V Eritrea*, 16<sup>th</sup> Activity Report (2003), ACHPR 1995

consider and award compensation, restitutions and other remedies for the violation suffered by the victims of the forced population transfers. On the facts, the Commission ceased consideration of the case to the Claims Commission and suspended indefinitely the consideration of the communication.

The Commission may set up working groups, composed of a maximum of three members to determine whether or not conditions have been met. These conditions are cumulative. All of them must be fulfilled. If one is missing, then the communication will be declared inadmissible.<sup>150</sup> The working groups submit recommendations to this effect. Based on the recommendations, the Commission decides the admissibility of the Communications.<sup>151</sup> The admissibility or non admissibility decision will be transmitted to the parties.

In case of inadmissibility, the Commission shall indicate the reasons and its decision, in this respect, is final. However, if there are grounds for challenging inadmissibility of the case, then the complainant could apply for reconsideration.<sup>152</sup> On the other hand, in case of admissibility, the Commission will inform the complainant and the responding state to send their observations on the merits.

### **3.2.8 Burden of Proof**

The burden of proof lies on the author, when making allegations, and, likewise, on the State Party when rejecting such allegations. For instance, merely alleging that domestic remedies are not effective does not suffice to convince the Commission that local remedies need not be exhausted. The importance of the burden is further elaborated in *Anuak Justice Council V Ethiopia*.<sup>153</sup> In this case, Obang Metho, the Director of International Advocacy, instituted a case before the Commission on behalf of the Anuak Justice Council by alleging that the Ethiopian Defense Forces, has been

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<sup>150</sup> Rules of Procedure, Supra note 62, Rule 115

<sup>151</sup> Ibid Rule 113

<sup>152</sup> Ibid Rule 18 (2)

<sup>153</sup> Communication 299/05, Anuak Justice Council V Ethiopia, 12<sup>th</sup> Activity Report (ACHPR)

engaged in massive discrimination resulting in serious human rights abuses and violation on the people of Anuak ethnicity, including extrajudicial killing, torture, detention, rape and property destruction. They allege that it cannot seek exhaustion of domestic remedies due to the lack of an independent, impartial and fair hearing, as a direct consequence of the fact that the aggressor is the Ethiopian government. The respondent state i.e. Ethiopia argues that the case is pending before the Federal Circuit Court and, therefore, domestic remedies have not been exhausted.

Thus, the Commission dismissed the case on grounds of inadmissibility for non-exhaustion of local remedies saying that *"the applicant must provide some prima facie evidence of an attempt to exhaust local remedies and they are expected to indicate, for instance, the Courts where they sought domestic remedies. If they were unable to use such remedies, they must explain why, by submitting evidence derived from analogous situations or testifying to a state policy of denying complainant not to exhaust local remedies and the case is still pending before the Courts of the respondent state and does not meet the criteria mentioned under Article 56(5) of the African Charter on Human and Peoples' Rights"*.<sup>154</sup>

### **3.2.9 Interim Measures**

In cases of a series of serious or massive violations of human and peoples' rights, the Commission draws the attention of the AHSR.<sup>155</sup> Because these type of violations have to be stopped as soon as possible to prevent irreparable damage. This is known as an interim measure. In these cases, the Commission doesn't follow its normal procedures such as the admissibility procedure. However, interim measures are necessary only in case of emergency. Thus, the complainant may request the Commission to take interim measures *'to avoid irreparable damage being caused to the victim of the alleged violation'* or the Commission may do so of its own

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<sup>154</sup> Ibid

<sup>155</sup> Charter, Supra note 6, Article 58()

motion.<sup>156</sup> However, interim measures do not have effect on the final decision of the case. The Commission has clarified that 'in circumstances where an alleged violation is brought to the attention of the Commission and where it is alleged that irreparable damage may be caused to the victim, the Commission will act expeditiously appealing to the state to desist from taking any action that may cause irreparable damage until after the Commission has had the opportunity to examine the matter fully'. *In International PEN and Others (On Behalf of Saro-Wiwa) V Nigeria*,<sup>157</sup> the Commission requested Nigeria for a stay of execution until the case is determined by the Commission. However, Nigeria disregarded the provisional measure given by the Commission and the applicant was executed.

### **3.2.10 Amicable Settlement**

The parties to the dispute may apply or the Commission on its own may offer friendly settlement of the dispute at any stage of the proceedings.<sup>158</sup> If both parties accept the offer, then the Commission will assign a rapporteur or a Commissioner or group of Commissioners to settle the case. The Commission will receive a report on the terms of the settlement and the case will be closed.<sup>159</sup> However, if the case has not been settled, then the Commission will proceed to consider the merits of the case.

There is no explicit provision in the Charter and/or in the Rules of Procedure, for amicable settlement of complaints. Nevertheless, in practice, once a communication has been declared admissible, the Commission attempts to settle the dispute amicably.

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<sup>156</sup> Rules of Procedure, Supra note 62, Rule 111

<sup>157</sup> Communication 239/2001, *International PEN and Others (on Behalf of Saro-Wiwa) V Nigeria*, 12<sup>th</sup> Annual Activity Report

<sup>158</sup> Information Sheet No.3, Supra note 123, P-13

<sup>159</sup> Ibid. P-13

### 3.2.11 Consideration of the Merits

At this stage, the Commission will examine the allegations in light of the provisions of the Charter and other international human rights instruments. During the proceedings, the parties present their case orally or in writing and both parties have equal footing.<sup>160</sup>

First, as stated above, consideration of the merit involves the international human rights law and interpretation of the Charter in relation to the allegations of the complainant. Second, it also involves the weighing of evidence presented to the Commission by the parties. Third, the Commission may also use international human rights principles from other regional human right systems such as the Inter-American and European systems. For instance, *in the case Legal Resources Foundation V Zambia*,<sup>161</sup> the Commission referred to the Vide cases of the Inter- American Commission and to article 27 of the Vienna Convention on the Law of Treaties.

On the other hand, in cases where respondent states do not respond to the allegations brought against it, the Commission relies on the facts at its disposal.<sup>162</sup> The Rules of Procedure of the Commission further provides that respondent states from which explanations or statements are sought within specified times shall be informed that if they fail to comply within those times, the Commission will act on the evidence before it.

However, the fact that the complainant's allegations were not contested by the respondent state does not mean that the Commission will accept them as true. Thus, the Commission should examine the allegations by resorting to any appropriate method of investigation in order to get information from other sources such as third parties.

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<sup>160</sup> Ibid P-14

<sup>161</sup> Communications 211/98, Legal Resources Foundation V Zambia, 14<sup>th</sup> Activity Report

<sup>162</sup> Rules of Procedure, Supra note 62 ,Rule 119(4)

Finally, after a careful consideration of the facts and the arguments put forward by both sides, the Commission will decide whether there has been a violation of the Charter or not. If it finds a violation, it makes recommendations to the state party concerned.

### **3.2.12 Recommendations**

The Commission's final decisions are called recommendations. It may be argued that these recommendations have no binding effect because no Article in the Charter or rule in the Rules of Procedure defines the status of the Commission's recommendations. At the same time, the mandate of the Commission is quasi-judicial. However, it can also be argued that by signing and ratifying the Charter, states signify their intention to be bound by and to adhere to the obligations arising from it even if they do not enact domestic legislation to effect domestic incorporation.<sup>163</sup> The Commission includes these recommendations in its Annual Activity Reports submitted to the Assembly of Heads of state and Government.<sup>164</sup> Once it has been adopted by the Assembly, then it will be published by the Commission.

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<sup>163</sup> Article 14 of the Vienna Conventions on the Law of Treaties of 1969.

<sup>164</sup> Charter, Supra note 6, Article 54

## **Chapter Four**

### **Examining How the Commission Ensures Compliance of Member States**

Under Chapter three, we have examined the scope of jurisdiction of the Commission in securing the compliance of member states in contentious cases involving human rights complaints. It is found out that member states have accepted obligation to comply with the Charter by virtue of the fact that they are signatories to it.

However, it is a Common knowledge that international and regional organizations dealing with human rights cases may not find it easy to practically exercise the jurisdiction conferred upon them by their constitutive legal instruments. This may be more likely in the case of Africa because of the fact that member countries have one of the least developed human rights records in the modern world. African countries are known for their frequent involvement in military coup d'etas, civil wars and gross human rights violations including, among others, genocide. In the light of such a background, it will not be difficult to imagine the challenges that the Commission is likely to encounter in exercising the jurisdiction given to it by the Charter. This Chapter, therefore, will examine the actual operation of the Commission within the scope of its jurisdiction.

#### **4.1 Mandate of the Commission to Ensure State Compliance**

The Charter specifies different mechanisms for the member states to resort to by way of complying with its provisions. Before embarking on describing these mechanisms, it may be pertinent to stress the mandate of the Commission in enforcing the rights recognized by the Charter.

##### **4.1.1 Promotion of Human and Peoples' Rights**

The responsibility of the Commission to promote human and peoples' rights in Africa involves several specific tasks. On the one hand, the

Commission has the power to disseminate information on human and peoples' rights so collected through various mediums including seminars and symposium.<sup>165</sup> As a result, the Commission has established documentation centre used for human rights studies and research, and has also organized several seminars, symposiums and conferences. As part of its promotional functions, the Commission may make recommendations to governments concerned with a given human rights related issue or situation.<sup>166</sup> Meanwhile, it has to be stressed that the Commission acts by way of supplementing institutions of national governments that work in the field of human rights. The Commission has been cooperating with different human rights stakeholders especially National Human Rights Institutions (NHRIs) and NGOs.

The Commission has the competence to carry out promotional activities to each member state by undertaking missions to ascertain whether or not the member state concerned is discharging its obligations under the Charter.<sup>167</sup> Thus, each member of the Commission shall submit a written report on his/her activities provided that it shows the relevance of the endeavors being made by individual members of the Commission.<sup>168</sup> In addition to the collective responsibility of the Commissioners, such requirement on an individual basis will make their commitment as practical as possible.

Although the Charter does not explicitly provide for the appointment of Special Rapporteurs, the Commission has appointed Special Rapporteurs, on Prisons and other places of Detention in Africa, on Arbitrary, Summary and Extra-judicial Executions and on the Rights of Women.<sup>169</sup> Commissioners will be appointed as Rapporteurs. For example, Commissioner Dankwa is Special Rapporteur on Prisons in Africa. These

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<sup>165</sup> Charter, Supra note 6, Article 45(1)

<sup>166</sup> Ibid

<sup>167</sup> Information Sheet 1, supra note 45, p-1

<sup>168</sup> Ibid

<sup>169</sup> Ibid. p-12

Rapporteurs make research and document information on the specific human rights violation and report the situation to the Commission where by the Commission gives advice or recommendation to the member states. Furthermore, the Charter gives the Commission a protective mandate.

#### **4.1.2 Protection of Human and Peoples' Rights**

The mechanisms employed by the Commission to fulfill its task of protection of the Charter against violation by State parties include consideration of periodic state reports and communication procedures applicable to inter-state communications and individual and NGO communications.<sup>170</sup>

##### **4.1.2.1 Consideration of Periodic State Reports**

Under article 1 of the Charter, Member States agreed to adopt legislative and other measures to give effect to the rights contained in the Charter. In order to insure this obligation, member states are required to report on the measures the government has taken to give effect to the rights recognized by the Charter. Article 62 of the Charter obligates Member States to submit report every two years saying: *"Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter."* The Commission has adopted guidelines for Periodic National Reports.<sup>171</sup>

In accordance with the guidelines, states are required to submit initial general reports followed by detailed periodic reports. In cases where states submitted report on the measures undertaken in fulfillment of the

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<sup>170</sup> Vincent O. Orlu Nmeielle, *The African Human Rights System: Its Laws, Practice, and Institutions*, Martinus Nijhoff Publishers, the Hague, 2001 p-180

<sup>171</sup>Amendments of the General Guidelines for the Preparation of Periodic Reports by States Parties, DOC/ OS/27 (XXIII) adopted at the 23<sup>rd</sup> Ordinary Session of the African Commission, April (20-29), 1998 in Banjul, The Gambia

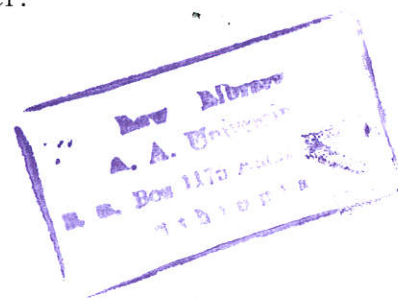
Charter, then the Commission will consider the reports and will give advice and recommendations.<sup>172</sup>

Another interesting point which need to be mentioned in this context relate to measures applicable to non-submission of reports. First of all, the Secretary of the Commission has the duty to inform the Commission, at each session, of all cases in which member states fail to submit report to the Commission. Subsequent to this, the Commission will authorize the Secretary to send reminders as to the need to submit report as part of the obligation of member states.<sup>173</sup> If the state concerned remain silent, after receiving the reminder, then the Commission can include failed to submit report and discharge its obligation under the Charter, as part of its yearly report to the Assembly.<sup>174</sup>

However, it should be stressed that a state party to the Charter may equally be obliged to submit additional report on matters, the Commission believes that, the report submitted earlier on does not contain adequate and full information.<sup>175</sup> This is to say that reports to be submitted by member states should not be nominal as it has to carry full and adequate information on relevant matters to the satisfaction of the Commission.

#### **4.1.2.2 Communication Procedure**

The communication procedure is divided into: the inter-state communication and the individual and NGO communication procedure referred to as "*other communications*" under the Charter.



<sup>172</sup> Orlu Nmehielle, Supra note 169, P-189

<sup>173</sup> Rules of Procedure, Supra note 62, Rule 84(1)

<sup>174</sup> African Commission on Human and Peoples' Rights, State Reporting Procedure, Information Sheet No. 4, P-172

<sup>175</sup> Ibid, Supra note 172

## **A. The Inter-State Communication**

Concerning the relations between the Commission and member states, there is one interesting mandate recognized under the Charter i.e. the freedom to conduct interstate communications.<sup>176</sup> If a state party to the Charter believes that another signatory state has violated any of the provisions of the Charter, then that state is allowed to conduct written communication with the "*offending state*" by way of drawing attention to the matter.<sup>177</sup> At the same time, this communication shall be addressed to the Secretary General of the AU and to the Chairman of the Commission.

This is done with the view to settling the matter friendly without involving the Commission. However, if within 3 months the dispute is not settled, either state has the right to submit the case to the Commission.<sup>178</sup> Instead Article 49 also permits a state party having such complaint to refer the matter directly to the Commission. Despite this, the Commission can deal with such matters only after ascertaining that the complaining state party has exhausted all existing local remedies.<sup>179</sup>

As an exception to this, the Commission may choose to automatically consider the matter if it is obvious that the procedures for utilizing local remedies would be unduly prolonged.<sup>180</sup> However, the interstate complaint procedure is hardly used as a human rights protection mechanism. Therefore, the individual and NGO complaint mechanism is the major one used for protection of human rights.

## **B. Individual and NGO Communication**

In practice, individuals, group of individuals and NGOs can lodge a complaint as to the violation of the Charter by a state party. As mentioned earlier the basis for considering this type of communications is Article 55,

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<sup>176</sup> Charter, Supra note 6, Article 47

<sup>177</sup> Ibid.

<sup>178</sup> Rules of Procedure, supra note 62, Rule 92

<sup>179</sup> Ibid Art. 50

<sup>180</sup> Ibid

which allows the Commission to consider "*other communications*". However, neither the Charter nor the Rules of Procedures define the term "*other communications*." In effect, the Commission allows it. How to submit communications has been discussed in detail in chapter three dealing with the jurisdiction of the Commission.

#### **4.1.3 Interpretation**

Article 45 (3) of the Charter gives the Commission the mandate to interpret the provisions of the Charter. It may do so at the request of the OAU, States Parties and NGOs. The interpretation must be undertaken in light of initial human rights law, such as the UN Charter, the OAU Charter, the UDHR, and other conventions ratified by States Parties.<sup>181</sup> This mandate of the Commission is significant regarding the provisions of the Charter which are unique to it i.e. which are not tackled by any other regional or international human rights instruments. These are provisions related to group rights, duties, and economic, social and cultural rights. However, to date, except some NGOs neither the OAU nor a state party has required the Commission the interpretation of the provisions of the Charter.<sup>182</sup>

#### **4.1.4 Other Tasks**

The Charter also suggests that the Commission can perform any other task which may be entrusted to it by the Assembly of Heads of State and Government.<sup>183</sup> Although, it is not clear as to what constitutes "*any other tasks*", so far the AHSG has not entrusted any other task outside those provided under the Charter.<sup>184</sup>

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<sup>181</sup> Charter, Supra note 6, Article 60 and 61

<sup>182</sup> Information sheet No 1, Supra note 45, P-16

<sup>183</sup> Charter, Supra note 6, Article 45(4)

<sup>184</sup> Supra note 182, p- 17

## 4.2 State Compliance to the Charter

As discussed earlier, member states of the OAU/AU that have ratified the Charter have the obligation to recognize the rights, duties, and freedoms enshrined in the Charter.<sup>185</sup> To this effect, they are expected “to adopt legislative or other measures,”<sup>186</sup> States parties also have “the duty to promote and ensure through teaching, education and publication the respect of the rights and freedoms...” guaranteed by the Charter.<sup>187</sup> Similarly, states also have the duty to “guarantee the independence of the courts” and to “allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the Charter.”<sup>188</sup>

There are also some specific ways and manners through which the Commission is expected to secure the compliance of the states in the appropriate cases. Firstly, the State reporting mechanism as required under Art. 62 and the state compliance with the recommendations given by the Commission, would amount to discharging obligations, under the Charter. Do the states act, as communicated by the Commission, as a matter of serious international legal obligation or treat it as an optional matter left for their discretion? Assuming the states fail to comply, what can the Commission do to enforce its decisions? These and similar issues will be addressed in this particular chapter.

### 4.2.1 State Compliance with the Requirement to Report

As of May 2008, out of the 54 states which have ratified the Charter 15 states never submitted reports to the Commission so far.<sup>189</sup> For instance,

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<sup>185</sup> Charter, Supra note 6, Article 1

<sup>186</sup> Ibid

<sup>187</sup> Ibid, Art. 25

<sup>188</sup> Ibid, Art. 26

<sup>189</sup> 24<sup>th</sup> Activity Report of the ACHPR, Executive Council, 13<sup>th</sup> Ordinary Session, 24-28 June 2008, Sharm El-Sheikh, Egypt. Ex.CL/446 (XIII) 254,p-45

to date, Ethiopia has never submitted a report. It has 4 overdue reports.<sup>190</sup> According to our sources, the Ethiopian report is still in preparation and is expected to be submitted on November 11, 2008.<sup>191</sup>

But it is possible that, states with overdue reports can combine their initial and all their overdue periodic reports in a single report. Rule 89 states that: *“The Secretary shall, at each session, inform the Commission of all cases of non- submission of reports or of additional information .... In such a case, the Commission may send through the Secretary, to the state party... a reminder relating to the submission of the report or additional information”*. If, after the reminder, the state party still does not submit the report or the information required, the Commission shall indicate this in its annual activity reports to the Assembly of Heads of State and Government of the OAU/AU. Reminders may still be sent to State Parties every three months.

At each session, status of submission of state reports will be published. This is the only strategy used, so far, by the Commission in order to persuade the non reporting state to comply with its requirement.<sup>192</sup> In practice, the Commission also receives shadow reports from NGOs having an Observer Status. However, the so-called shadow reports will not be published. It is used as a source of information for the Commission.<sup>193</sup>

### **Status of Submission of Reports by States Parties**

The status of submission and presentation of the periodic Reports of states as at the 43<sup>rd</sup> Ordinary Session of the Commission stood in Tables 4.1 to 4.6 as follows: <sup>194</sup>

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<sup>190</sup> See Table 4.6, List of states which have not submitted any reports.

<sup>191</sup> Interview with W/ro Ferdosa, Supra note 104

<sup>192</sup> Interview with Mr. Francis, Supra note 49

<sup>193</sup> Ibid.

<sup>194</sup> All tables are taken from 24<sup>th</sup> Activity Report, Supra note 189, pp 45-48

#### 4.1: Status of Submission of Reports

No.	Category	Number of States
1	States which have submitted and presented all Reports	15
2	States which have submitted all their Reports and will present the next Report at the 44 <sup>th</sup> Ordinary Session of the African Commission	2
3	States which have submitted two (2) or more Reports but still owe one or more Reports	7
4	States which have submitted one (1) Report but still owe more Reports.	13
5	States which have not submitted any Report	15

Table 4.2: States which have submitted and presented all their Reports:

No.	State Party
1	Cameroon
2	Central African Republic
3	DRC
4	Egypt
5	Libya
6	Mauritania
7	Nigeria
8	Kenya
9	Uganda
10	Seychelles
11	South Africa
12	Sudan
13	Tanzania
14	Zambia
15	Zimbabwe

Table 4.3: States which have submitted all their Reports and will present the latest one at the 44<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights:

No.	State Party
1	DRC
2	Namibia

Table 4.4: States which have submitted two or more Reports but owe more:

No.	State Party	Status
1	Benin	3 overdue Reports
2	Burkina Faso	1 overdue Report
3	Gambia	6 overdue Reports
4	Ghana	3 overdue Reports
5	Namibia	2 overdue Reports
6	Senegal	1 overdue Report
7	Togo	2 overdue Reports

Table 4.5: States which have submitted one Report but owe more:

No.	State Party	Status
1	Angola	4 overdue Reports
2	Burundi	3 overdue Reports
3	Cape Verde	5 overdue Reports
4	Chad	3 overdue Reports
5	Congo (Brazzaville)	2 overdue Reports
6	Guinea Republic	4 overdue Reports
7	Lesotho	2 overdue Reports
8	Mali	4 overdue Reports
9	Mauritius	5 overdue Reports
10	Mozambique	5 overdue Reports
11	Niger	1 overdue Report
12	Saharawi Arab Democratic Rep.	1 overdue Report
13	Swaziland	3 overdue Reports

Table 4.6: States which have not submitted any Reports:

No.	State Party	Status
1	Botswana	10 overdue Reports
2	Comoros	10 overdue Reports
3	Cote d'Ivoire	7 overdue Reports
4	Djibouti	8 overdue Reports
5	Equatorial Guinea	10 overdue Reports
6	Eritrea	4 overdue Reports
7	Ethiopia	4 overdue Reports
8	Gabon	10 overdue Reports
9	Guinea Bissau	10 overdue Reports
10	Liberia	11 overdue Reports
11	Madagascar	12 overdue Reports
12	Malawi	7 overdue Reports
13	Sao Tome and Principe	10 overdue Reports
14	Sierra Leone	12 overdue Reports
15	Somalia	11 overdue Reports

In the light of this situation, one may conclude that most of the states do not report within the schedule provided for them. But, in the case of prompt submission, it is sufficient to suggest that the reports necessarily contain activities and measures taken in compliance with the recommendations of the Commission.

#### **4.2.2 State Compliance with the Recommendations of the Commission**

Recommendation is the other mechanism which the Commission communicates its position, on a given human right case, to the states concerned. As is provided under Art. 45 sub Art. 2 of the Charter, the Commission may receive communication by concerned parties including, individuals, group of individuals and NGOs. Under the Charter, the Commission issues "recommendations" to state parties, which is different from "decisions" which would be binding on the State parties. By way of discharging its responsibilities, the Commission has developed a procedure for receiving complaints alleging violations of the Charter by States parties to the Charter. When the Commission finds out that there was indeed a violation, it would be responsible not only to indicate the

provisions violated, but also to recommend remedial measures such as an interim measure to be adopted by the state concerned.

However, very little is known about what states usually do in response to the Commission's recommendations. Again, the Charter and the Rules of Procedure of the Commission do not address the fate of recommendations communicated to the States concerned. The Commission also does not have any follow-up mechanism or policy in place to monitor state compliance with its recommendations.

However, as the practice of the Commission shows, the Secretariat usually keeps on reminding the states to honor their obligations, under Article 1 of the Charter.<sup>195</sup> This is because the Commission does not have a clear mandate to take further action, by way of enforcing its decisions.<sup>196</sup> The Commission has acknowledged that the lack of state compliance with its recommendations as "*one of the major factors of the erosion of the Commission's credibility.*"<sup>197</sup> Thus, compliance solely relies on the good will of the member states.

## **4.2 Review of Selected Cases Submitted to the Commission**

### **4.3.1 Cases in which member states showed compliance**

Due to the difficulties to have access to the records of the Commission as much as one would like to have, the list of cases discussed in this Chapter is far from being exhaustive. The cases analyzed below are only sample cases intended to show the overall trend in the workings of the Commission. It may also not be early to indicate that the cases in which the Commission succeeded to win the compliance of member states were largely 'soft' cases i.e. not involving politically sensitive matters.

As a matter of practice, a state party is deemed to have complied with the recommendations of the Commission when it acted in accordance with the

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<sup>195</sup> Information Sheet No. 3, Supra note 123 p-17

<sup>196</sup> Interview with Mr. Francis, Supra note 49

<sup>197</sup> 11<sup>th</sup> Annual Activity Report in November (1997-98), African Commission on Human and Peoples' Rights, 22<sup>nd</sup> -23<sup>rd</sup> Ordinary Session Para-38, OAU Doc. Doc/OS/43 (XXIII)

recommendation, expressed the will to effect compliance, or took steps by way of implementing the recommended measures.<sup>198</sup> In the case of ***Pagnouille (on Behalf of Mazou) v. Cameroon***,<sup>199</sup> Abdoulaye Mazou asked Amnesty International to pursue a legal action, on his behalf, against the government of Cameroon. Mazou had been imprisoned in 1984 by a military tribunal without trial, witnesses, or the right to defense, for allegedly hiding his brother who was later sentenced to death for an attempted coup d'état. After serving his five-year sentence and being placed under subsequent house arrest, the accused was not reinstated as a magistrate under the Amnesty law enacted by the government on April 23, 1992. Others condemned to imprisonment, under similar conditions, were reinstated.

The Commission found the Government of Cameroon in violation of Articles 6, 7 sub- Article (1) (b) and (d), and 15 of the Charter. The Commission recommended that “*the government of Cameroon draw all the necessary legal conclusions to reinstate the victim as a matter of right.*”<sup>200</sup> During the delivery of its initial state report in 2002, acting in accordance with Article 62 of the Charter, the Government of Cameroon reported that it had reinstated Mazou to his previous position in the state judiciary.<sup>201</sup> It further claimed that compensation had been offered to Mazou, despite that he had declined it. The Commission did not make any additional recommendations to Cameroon. This means that, in this case, the Commission seemed to be satisfied that the Government of Cameroon has complied with its recommendation.

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<sup>198</sup> Frans Viljoen, Lirette Louw, State Compliance with the Recommendations of the ACHPR, 1994-2004, American Journal of International Law, Jan. 2007, P-3

<sup>199</sup> Pagnouille (on Behalf of Mazou) V Cameroon, Communication 39/90, (2000), AHRLR 57 (ACHPR 1997).

<sup>200</sup> Ibid, P- 61, Para 31

<sup>201</sup> 31<sup>st</sup> Ordinary Session, Pretoria, South Africa, May 6, 2002

The second case was ***Amnesty International (on Behalf of Banda and Chinula) v. Zambia***.<sup>202</sup> In this case, it was alleged that the deportation from Zambia to Malawi, of William Steven Banda and John Lusson Chinula, based on their political convictions, violated the Charter. Both Banda and Chinula were prominent political figures in Zambia. Both complainants were deported to Malawi in 1994 on the basis of allegations that they were a threat to peace and stability in Zambia, but only Banda was given an opportunity to contest his deportation order through the Zambian courts.

The Commission concluded that Zambia had violated Articles 2, 7(1) (a), 8, 9(2), 10, and 18(1) and (2) of the African Charter.<sup>203</sup> The Commission made recommendation saying that: *“Zambia must be required to allow the return of William Stephen Banda with a view to making application for Citizenship by naturalization. No evidence was laid before the Commission for compensation. The evidence is that Banda had lost his job as Governor after the 1999 Elections. No award for compensation is called for John Lyson Chinula died in Malawi. He was a prominent businessman. His deportation must have caused prejudice to his business interests. His family is requesting the return of his body for burial in Zambia. The Government of Zambia should grant that wish.*

Three years later the Zambian Government announced the reversal of Banda's and Chinula's deportation orders.<sup>204</sup> The President authorized the repatriation of Chinula's remains to Zambia for reburial and invited Banda to return to Zambia unconditionally.<sup>205</sup> This measure by the Government of Zambia was considered as an act of compliance to the Charter.

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<sup>202</sup> Amnesty International (on Behalf of Banda Chinula) v. Zambia, Communication 212/98, 2000 AHRLR) 325 (ACHPR 1999)

<sup>203</sup> Ibid. Paras. 39-40.

<sup>204</sup> African Commission on Human and Peoples' Rights, Report of the Promotional Mission to the Republic of Zambia, 9-13 September 2002, P-10 (2002)

<sup>205</sup> Ibid.

The third case was ***Constitutional Rights Project v. Nigeria***.<sup>206</sup> In this case, complainants were arrested in June 1995 and detained without being charged or tried for more than two years before a complaint was lodged with the Commission. This situation had not changed for the better. And finally, the Commission decided the case in November 1999. The Commission found Nigeria in violation of Articles 6, and 7(1) (a) and (d) of the Charter. The Commission appealed to the government of Nigeria either to charge the detainees or release them. Nigeria complied and charged the detainees.<sup>207</sup>

Finally, the fourth case is ***Centre for Free Speech v. Nigeria***.<sup>208</sup> In this case, four journalists were tried in secret by a military tribunal and not allowed access to counsel of their choice. Under military decrees the jurisdiction of regular courts to hear appeals from military tribunals was ousted, leaving the journalists without any right to appeal their sentences. The Commission found that Nigeria had violated Articles 6, 7(1)(a) and (c), and 26 of the Charter. The Commission also urged the Nigerian government to release the four journalists. The Nigerian government complied and eventually released the journalists.<sup>209</sup>

#### **4.3.2 Cases of Non-Compliance**

Under this section, we shall examine the various circumstances under which a state party may be deemed a non-complying state. Non-compliance refers to cases in which states parties did not implement any of the Commission's recommendations or where states parties did not accept the findings of the Commission, challenging it on factual or legal grounds.<sup>210</sup> Indeed, there has not been a precedent in which a non-complying state faced expulsion, sanction or any other punitive measures. As the cases involving non-compliance would show, victims of human rights violations have found themselves helpless where the state in

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<sup>206</sup> *Constitutional Rights Project V Nigeria*, Communication 153/93, 2000 ACHPR 248 (ACHPR 1999)

<sup>207</sup> Frans Viljoen, *Supra* note 198, P-15

<sup>208</sup> *Center for Free Speech v. Nigeria*, Communication 206/97, 2000 AHRLR 250 (ACHPR 1999)

<sup>209</sup> *Ibid*, *Supra* note V p-6

<sup>210</sup> *Ibid*. 198, p-4

question declined to comply with the recommendation of the Commission. Some selected non-compliance cases are summarized below.

The first case was **Constitutional Rights Project of Nigeria (on Behalf of Ken Saro - Wiwa V Nigeria)**,<sup>211</sup> a Nigerian environmental rights advocate and leader of the Movement for the Survival of the Ogoni Peoples (MOSOP), and eight of his kinsmen were sentenced to death by a Special Tribunal. The Constitutional Rights Project (C R P), a non-governmental human rights advocate in Nigeria submitted a complaint on behalf of them, alleging that the Nigerian government had violated the Charter, especially Article 7 which guarantee the right to a fair trial and urged the Commission to take an interim measure. The CRP also filed an application for a stay of execution before the Federal High Court of Nigeria.<sup>212</sup> The Commission took an interim measure requesting the Nigerian government to suspend the executions until the Commission had considered the case.<sup>213</sup> However, the Nigerian government did not comply with the Commission's request. The government disregarded the Commission's decision and Saro-Wiwa and his 8 kinsmen were executed on November 10, 1995.<sup>214</sup>

The second case of non-compliance was **Union Interafricaine des Droits de l'Homme and Others V Angola**.<sup>215</sup> In this case, certain Senegalese, Malian, Mauritanian and other nationals requested these NGOs to institute a case on behalf of them. These West African nationals were expelled from Angola between April and September 1996 and the Angolan government rounded and expelled the complainants using illegal measures. Those affected lost their belongings in the process. The

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<sup>211</sup> Two Complaints were Submitted separately by International PEN (on behalf of Ken Saro- Wiwa) V Nigeria, Communication 137/94 and the Constitutional Rights Project of Nigeria (on Behalf of Ken Saro-Wiwa) V Nigeria, Communication 139/94, 7<sup>th</sup> Annual Activity Report (1993-1994)

<sup>212</sup> Nsongurua J. Udombana, Toward the African Court on Human and Peoples' Rights: Better Late than Never, 3 Yale Hum. Rts. and Dev. L.J.45, 2000, P- 9

<sup>213</sup> Ibid, Supra note 211

<sup>214</sup> Ibid

<sup>215</sup> Union Interafricanine des Droits de l'Homme and Others V. Angola, Communication 159/96, (2000) AHRLR 18 (ACHPR 1997)



complainants maintain that the Angolan Government violated the provisions of Articles 2, 7, (1) (a), 12(4) and (5) of the Charter”.

The Commission found that the Angolan Government violated the right of those West African nationals and declared that “*the deportation of the victims constitutes a violation of Articles 2, 7(1) (a), 12(4) and (5), as well as Articles 14 and 18 of the Charter.*”<sup>216</sup> Concerning the damages for prejudice suffered, the Commission urged the Angolan government and the complainants “*to draw all the legal consequences arising from the present decision.*”<sup>217</sup> However, it was found that the Angolan Government didn't comply with the decision of the Commission.<sup>218</sup>

Finally, **in *OUKO v. Kenya***,<sup>219</sup> - the complainant, Mr. Ouko claimed to be a students' union leader at the University of Nairobi, Kenya. He alleged that he was forced to flee the country due to his political opinion. Prior to his fleeing from the country, he was arrested and detained without trial for ten months at the basement cells of the Secret Service Department headquarters in Nairobi.<sup>220</sup> The Kenyan authorities took such a measure in response to his condemnation of the frequent closure of public universities and his demand for setting up of a judicial commission of inquiry into the murder of his late uncle, the former Kenyan Minister of Foreign Affairs, Mr. Robert Ouko. Throughout his period of detention, Ouko was denied bathroom facilities and was subjected to both physical and mental torture. The complainant was no longer in Kenya and denied asylum in Uganda.

Therefore, he had to leave for the Democratic Republic of Congo in March 1998. The Commission found that Kenya was in violation of Articles 5, 6, 9, 10 and 12(1) and (2) of the Charter. Thus, the Commission urged the

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<sup>216</sup> Ibid para. 21

<sup>217</sup> Ibid

<sup>218</sup> Frans viljoen, Lirette Louw, Supra note 198, p-5

<sup>219</sup> Ouko V Kenya (2000) AHRLR 135 (ACHPR 2000)

<sup>220</sup> Ibid

Government of Kenya to facilitate the safe return of the complainant to his home country. However, Kenya didn't comply. Nevertheless, the Commission did nothing further to ensure implementation of its decision. As a result, Ouko is, reportedly, still living helplessly in exile in Congo.<sup>221</sup>

### **4.3 Sources of Limitations in the Workings of the Commission**

Under this section, we shall try to explore the possible reasons for the limitations in the workings of the Commission. In doing this, first, we may resort to the experience of other multilateral organizations having responsibility to deal with human right matters. In this respect, the Council of Europe, representing another regional mechanism and the UN system which represents the global framework for human rights protection are found relevant sources of guidance.

As far as the European experience is concerned, Article 3 of the Statute of the Council of Europe prescribes, as one of the prerequisite for membership, that member states accept obligation to observe human rights and respect the rule of law. To this effect, Article 3 of the Statute requires that:<sup>222</sup>

*Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council.*

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<sup>221</sup> Supra note 218

<sup>222</sup> Statute of the Council of Europe, (ETS No. 001), entered into force August 3, 1949, retrievable at <http://www.umn.edu/humanrts/euro/ets1.htm/>

These prerequisites for membership in the Council of Europe would remain in force even after the state has already become a full member. This means that a violation of this obligation may eventually lead to sanctions, including suspension or expulsion of a member state, as provided under Article 8 of the Statute.<sup>223</sup> As such, the European Convention on Human Rights has evidently become enforceable.

If we look at the UN enforcement mechanism, for comparison, there is no explicit sanction and enforcement mechanism under the UN system for the promotion and protection of human rights. The only sanction available may be the possibility of suspension of the membership of a state that keeps on violating human rights, relying on by a 2/3 majority vote in the UN General Assembly. And this measure is to be resorted to only as a last resort.

However, compliance with human rights provisions within the UN system is not left solely for the possible cooperation and good will of the states concerned. This is to say that the system permits reliance on some other supplementary measures. For instance, the HRC is a supervisory body established under Art. 28 of the ICCPR. The decisions of the HRC are legally considered to be recommendations. Thus, compliance is secured in a different way. For instance, one of the prerequisite for admitting a case is securing State's consent to entertain complaint.<sup>224</sup> Moreover, following the introduction of the follow-up procedures in 1989 and with the appointment of the special rapporteur for follow-up on views, non compliance has become open for scrutiny by the HRC.<sup>225</sup>

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<sup>223</sup> Article 8 of the Statute stipulates that "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member.

<sup>224</sup> Optional Protocol to the International Covenant on Civil and Political Rights of 1976, UNGA Res. 2200 A(XXI) entered into Force March 23, 1976. According to this Protocol, States should accept the HRC's authority to receive cases.

<sup>225</sup> Steiner and Alston, international Human Rights In Context- Law Politics, Morals, (2000) P- 550

In the light of the experience of these two organizations, it seems clear that the ACHPR lacks a follow-up mechanism that could help to monitor implementation of its recommendations by the states concerned.<sup>226</sup> As the experience of the above multilateral organizations has shown, the only way through which it can make a reasonable degree of progress could only be by developing follow up mechanism for monitoring implementation.

#### **4.4 New Initiative for Supplementing the Existing System**

In the absence of a formally created effective follow-up mechanism, the Commission has resorted to some supplementary activities apparently intended to cultivate culture of compliance. Despite the fact that there is limitation in its mandate to undertake follow-up measures; the Commission has undertaken some forward looking initiatives. First, it has been sending reminders to state parties calling upon them to implement its decisions. Sometimes, the Commission pays promotional visits to States that need encouragement. During such visits, the Commission assigns individual Commissioners to discuss matters with the state's officials.

On the other hand, the Commission also sends missions to several African countries to investigate allegations of massive and serious human rights violations. Based on the outcome of these missions, the Commission makes recommendations to member states. For example, In ***Forum of Conscience V. Sierra Leone Case***,<sup>226</sup> 24 soldiers were sentenced to death and executed by Court Martial without the right to appeal to a higher tribunal. Thus, the Commission sent a delegation to Freetown, Sierra Leon, on a promotional mission between February 14 and 19, 2000 and the subject was brought up with relevant government officials including the attorney general. As a result, legislation was passed granting soldiers the right of appeal to the Court of Appeal.<sup>227</sup>

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<sup>226</sup> Forum of Conscience V Sierra Leone, Communication 223/98 (2000) AHRLR 293 (ACHPR 2000)

<sup>227</sup> Interview with Mr. Franciz, Supra note 49

At times, the Commission has incorporated follow-up measures as part of its findings in deciding individual communications by calling on state parties to enumerate in their next periodic report under Article 62 of the African Charter the measures taken with a view to complying with the Commission's recommendations. For instance, in the ***Purohit and Moore V The Gambia*** Case,<sup>228</sup> the Commission requested the government of Gambia to report to the Commission when submitting its next periodic report on measures taken to comply with the recommendations of the Commission.<sup>229</sup> During the examination of state reports, members of the Commission will also direct questions to government delegates about the implementation of its decisions on communications. However, these efforts have been few and have not developed into an established practice. Nevertheless, the Commission is in the process of developing guidelines.<sup>230</sup>

The lack of a follow-up provision in the Charter, which led to the ad hoc practice of exceptional follow-up, can therefore be described as a factor that has inhibited state compliance with the Commission's recommendations. These measures show that the Commission is trying to cultivate a culture of compliance thereby softening member states' attitude towards responding to human rights related complaints. Meanwhile, the fact remains that the regional legal system is still helpless in enforcing the Charter without resort to the good will of the states concerned.

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<sup>228</sup> Purohit and Moore V The Gambia, Communication 241/2001, 16<sup>th</sup> Annual Activity Report

<sup>229</sup> Ibid, Para.86

<sup>230</sup> Interview with Mr. Franciz, Supra note 49

## **Conclusions and Recommendations**

In this research, attempt is made to critically look into workings of the African Commission on Human and Peoples' Rights. After describing its organizational structure and jurisdictions under Chapter two and three respectively, I have seen the legal mechanisms through which the Commission operates and ensures the compliance of member states to the Charter. The different circumstances in which the Commission works towards encouraging, enabling and directing member states to comply with the Charter are equally explained in the appropriate places.

It has been found out that the Commission operates within the scope of its jurisdiction to effect compliance. The different cases in which the Commission is shown to deal with given human rights related matters show that, there is a good trend towards developing a workable regional system in the continent. In a number of cases, it is shown that the member states do comply with the decisions of the Commission. Individual petitioners and other non-state actors are also shown having reasonable degree of access to the Commission.

Having said this, it is also important to point out that there are limitations in the way the Commission is trying to ensure compliance with the Charter. One of these limitations, and probably the most apparent, is the fact that the Commission does not usually follow up what the states concerned do by way of implementing recommendations of the Commission.

The reason for this limitation may be lack of adequate procedure with which the Commission can follow up implementations. It appears that there is a need for developing a system to follow up till full implementation of its decisions by the state concerned. Other wise, it would appear that states pretend to have accepted the decision, usually as a means for face-saving, i.e. without having the genuine commitment to implement it.

For instance, as have been shown in the cases discussed in the appropriate places, individual African states tend to comply with the recommendation of the Commission in one case while avoiding compliance in another case. It appears that states exhibit some sort of “*double standard*” in dealing with the decision of the Commission. One possible explanation for this could be states choose cases, which are politically ‘soft’ and beneficial, in terms of securing a good reputation. Where as the same states avoid compliance where they seem to fear running a risk even where the finding of the Commission on the matter shows clear violation of the provisions of the Charter. In other words, in a good number of instances, the working of the Commission may depend on the convenience of the states concerned. This pattern is not compatible with the spirit and objectives of the Charter.

Based on the concluding remarks, I would like to make the following recommendations by way of upgrading the Commission to the extent possible within the scope of the Charter.

First, its position and status within the AU should be more adequately spelt out and duly recognized. For example, whether or not the Commission is a principal or a subsidiary organ need to be further considered in the light of the current need to promote human rights in the continent. Otherwise, AU can hardly be different from the OAU as far as human rights issues are concerned. Thus, it is hereby recommended that AU should secure the agreement of member states to accept obligation to promote and protect human rights as one prerequisite for membership.

Secondly, lack of procedural mechanism to follow up implementation seems serious limitation. It will be a self contradiction for the member states to pledge to faithfully observe the human rights provisions of the Charter and not to empower the Commission to have a more elaborate compliance to follow up the implementation of its recommendations on cases duly submitted to it. Thus, it is hereby recommended that the rules

of procedure may be amended to include a follow up mechanism with which the Commission can function better.

Thirdly, the existing practice of the Commission concerning the determination of remedial measures is not compatible with its responsibility to ensure the growth of a more adequate human right standard at a regional level. Thus, it is recommended that both the Charter and the Rules of Procedure may be amended to include a set of remedies which the Commission can readily award in the appropriate cases. This may be done in the best interest of the peoples affected by certain acts of states violating the Charter. For example, the way compensation is determined may be based on a uniformly applicable regional standard to which the Commission may resort.

Last, but not least, the Commission should be supported with adequate resources. Its present situation is not conducive for discharging its responsibility as provided by the Charter duly ratified by member states.

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## **E. Interview**

The following legal officers were interviewed on the relevant aspect of the research,

- Mr. Nadjita Francis Ngaritodjim, a Legal Officer for Protection in the African Commission on Human and Peoples' Rights at Banjul, Gambia. Interviewed in Addis Ababa on 16 October 2008.
- W/ro Ferdosa Abdulkadir, Second Secretary, International Law and Consular Affairs Directorate General, FDRE Ministry of Foreign Affairs. Interviewed on 10 October 2008.
- Ato Girma Kassaye, Acting Director of International Law Directorate, FDRE Ministry of Foreign Affairs. Interviewed on 10 October 2008.

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African Commission on Human and Peoples' Rights Center for Human Rights..... **[www.achpr.org/](http://www.achpr.org/) [www.](http://www.achpr.org/)**

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Institute for Security Studies..... **[www.iss.co.za](http://www.iss.co.za)**

University of Minnesota, Human Rights Library.....

**[www.1.unn.edu/humanrts/regional.htm](http://www1.unn.edu/humanrts/regional.htm)**

## Appendix

### AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

#### PREAMBLE

The African States members of the Organization of African Unity, parties to the present Convention entitled "African Charter on Human and Peoples' Rights

**Recalling** Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights, providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

**Considering** the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

**Reaffirming** the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

**Taking into consideration** the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

**Recognizing** on the one hand, that fundamental human rights stem from the attitudes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

**Considering** that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

**Convinced** that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be

dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

**Conscious** of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions;

**Reaffirming** their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

**Firmly convinced** of their **duty** to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa;

**HAVE AGREED AS FOLLOWS:**

## **PART 1**

### **RIGHTS AND DUTIES**

#### **CHAPTER 1**

#### **HUMAN AND PEOPLES' RIGHTS**

##### **ARTICLE 1**

The Member States of the Organization of African Unity, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

##### **ARTICLE 2**

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language,

religion, political or any other opinion, national and social origin, fortune, birth or any status.

### **ARTICLE 3**

1. Every individual shall be equal before the law
2. Every individual shall be entitled to equal protection of the law

### **ARTICLE 4**

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

### **ARTICLE 5**

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

### **ARTICLE 6**

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

### **ARTICLE 7**

1. Every individual shall have the right to have his cause heard. This comprises:
  - a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
  - b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
  - c) The right to defence, including the right to be defended by counsel of his choice;



d) The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

### **ARTICLE 8**

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

### **ARTICLE 9**

1 Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

### **ARTICLE 10**

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

### **ARTICLE 11**

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

### **ARTICLE 12**

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country.

This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

### **ARTICLE 13**

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of the country.

3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

### **ARTICLE 14**

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

### **ARTICLE 15**

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

### **ARTICLE 16**

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick

## **ARTICLE 17**

1. Every individual shall have the right to education
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

## **ARTICLE 18**

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

## **ARTICLE 19**

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

## **ARTICLE 20**

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

## **ARTICLE 21**

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.

1. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

## **Article 22**

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

## **ARTICLE 23**

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, State Parties to the present Charter shall ensure that:

- a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present Charter;

b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

#### **ARTICLE 24**

All peoples shall have the right to a general satisfactory environment favourable to their development.

#### **ARTICLE 25**

State Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

#### **ARTICLE 26**

State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall 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.

### **CHAPTER 11**

#### **DUTIES**

#### **ARTICLE 27**

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

#### **ARTICLE 28**

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

## ARTICLE 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is strengthened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

**PART 11**

**MEASURES OF SAFEGUARD**

**CHAPTER 1**

**ESTABLISHMENT AND ORGANISATION OF THE AFRICAN  
COMMISSION ON**

**HUMAN AND PEOPLES' RIGHTS**

**ARTICLE 30**

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

**ARTICLE 31**

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.

2. The members of the Commission shall serve in their personal capacity.

**ARTICLE 32**

The Commission shall not include more than one national of the same State.

**ARTICLE 33**

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the State Parties to the present Charter.

**ARTICLE 34**

Each State Party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the State Parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

### **ARTICLE 35**

1. The Secretary General of the Organization of African Unity shall invite State Parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections;

### **ARTICLE 36**

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

### **ARTICLE 37**

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

### **ARTICLE 38**

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

### **ARTICLE 39**

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for

the remaining period of his term, unless the period is less than six months.

#### **ARTICLE 40**

Every member of the Commission shall be in office until the date his successor assumes office.

#### **ARTICLE 41**

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear cost of the staff and services.

#### **ARTICLE 42**

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

#### **ARTICLE 43**

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

## **ARTICLE 44**

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

## **CHAPTER II**

### **MANDATE OF THE COMMISSION**

## **ARTICLE 45**

The functions of the Commission shall be:

1. To promote human and peoples' rights and in particular:
  - a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, 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 and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.
  - c) Cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

## **CHAPTER 111**

### **PROCEDURE OF THE COMMISSION**

#### **ARTICLE 46**

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

### **COMMUNICATION FROM STATES**

#### **ARTICLE 47**

If a State Party to the present Charter has good reasons to believe that another State Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This Communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the Communication, the State to which the Communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible, relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

#### **ARTICLE 48**

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

#### **ARTICLE 49**

Notwithstanding the provisions of Article 47, if a State Party to the present Charter considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African unity and the State concerned.

#### **ARTICLE 50**

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

#### **ARTICLE 51**

1 The Commission may ask the State concerned to provide it with all relevant information.

2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

#### **ARTICLE 52**

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report to the States concerned and communicated to the Assembly of Heads of State and Government.

### **ARTICLE 53**

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

### **ARTICLE 54**

The Commission shall submit to each Ordinary Session of the Assembly of Heads of State and Government a report on its activities.

### **ARTICLE 55**

1. Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of State Parties to the present Charter and transmit them to Members of the Commission, who shall indicate which Communications should be considered by the Commission.

2. A Communication shall be considered by the Commission if a simple majority of its members so decide.

### **ARTICLE 56**

Communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission shall be considered if they:

1. Indicate their authors even if the latter requests anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,

4. Are not based exclusively on news disseminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter, and
7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

#### **ARTICLE 57**

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

#### **ARTICLE 58**

1. When it appears after deliberations of the Commission that one or more Communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.

3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

## **ARTICLE 59**

1. All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.
2. However the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

## **CHAPTER IV**

### **APPLICABLE PRINCIPLES**

## **ARTICLE 60**

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the Parties to the present Charter are members.

## **ARTICLE 61**

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

## **ARTICLE 62**

Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

## **ARTICLE 63**

1. The present Charter shall be open to signature, ratification or adherence of the Member States of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the Member States of the Organization of African Unity.

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant provisions of the present Charter.

2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

#### **ARTICLE 65**

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of the instrument of ratification or adherence.

#### **ARTICLE 66**

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

#### **ARTICLE 67**

The Secretary General of the Organization of African Unity shall be responsible for the deposit of the instruments of ratification and adherence of the members of the Organization of the deposit of each instrument of ratification or adherence.

## **ARTICLE 68**

The present Charter may be amended if a State Party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the State Parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the State Parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.