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THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: ELEVEN YEARS AFTER

*Udeme Essien**

The African Commission on Human and Peoples' Rights (The Commission) is a treaty-based mechanism established by the Organisation of African Unity for monitoring the implementation of the African Charter on Human and Peoples' Rights (The African Charter)¹. The 23rd Assembly of Heads of State and Government of the OAU inaugurated the Commission on 2nd November 1987 in Addis Ababa, following the election of its members (Commissioners) in July of the same year. It consists 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"². Its day-to-day activities are handled by the Secretariat based in Banjul, The Gambia, and is headed by the Secretary to the Commission.

Although the Secretariat is located in The Gambia, the Commission holds its biannual ordinary sessions in different states that are parties to the Charter³. Proceedings of the ordinary sessions are conducted both in public and in camera (private)⁴. In the discharge of its functions, the Commission has close collaboration with several national, regional and international non-governmental organisations (NGOs) to whom it has granted observer

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¹ See article 30 of the Charter. The Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. OAU DOC.CAB/LEG/67/3.REV.5, 21 I.L.M. 58. As of today, all Member States of the OAU have ratified it.

² African Charter, *supra* note 1, art. 31. See also Rules 11 and 12 of the Rules of Procedure.

³ Rule 2 of the Rules of Procedure of the Commission mandates it to hold two ordinary sessions a year each lasting for about two weeks. Due to financial constraints however, the Commission's biannual ordinary sessions have each lasted for ten days. Although Ethiopia was not a State Party in 1993, it hosted the Fourteenth Ordinary Session of the Commission. Also by virtue of Rule 3 of the Rules, the Commission may decide to hold extra-ordinary sessions (a) at the request of the majority of the members of the Commission or (b) at the request of the current Chairman of the Organisation of African Unity. There have been two of such sessions in Banjul, The Gambia from 13 - 14 June 1989 and in Kampala, Uganda from 19 - 19 December 1995 on the human rights situation in Nigeria.

⁴ See Rule 32 of the Rules of Procedure

status in accordance with Rule 75 of its Rules of Procedure⁵. In recent times, there has been an increase in the number of national institutions attending or wanting to participate in the activities of the Commission. This has subsequently generated series of discussions on the kind of role to be assigned to them by the Commission, to the extent of its featuring on all the agendas of the ordinary sessions for the past two years⁶

GUARANTEED RIGHTS AND FREEDOMS

In content, language, and organisation, the African Charter owes much to prior international human rights instruments, notably the Universal Declaration of Human Rights⁷, the International Covenant on Civil and Political Rights⁸, the International Covenant on Economic, Social and Cultural Rights⁹. On the other hand, the Charter contains distinctive categories of rights, which were hitherto not protected under any human rights regime.

Thus, the Charter contains provisions for civil and political rights¹⁰, it lists economic, social and cultural rights in article 14 through 18. It however blazes new ground by including rights of peoples (collective rights)¹¹ and duties¹². Unlike other major international human rights instruments, the provisions of the African Charter cannot be derogated from even in times of emergencies. It does however contain limitation clauses or what is termed the "claw-back clauses". For instance, the right to freedom of conscience

⁵ So far, the Commission has granted observer status to 230 NGOs. However, following the directive of the OAU, the Commission has suspended consideration of applications for observer status pending the completion of the review of its guidelines and its subsequent adoption.

⁶ See for instance, item 8 (f) of the Agenda of the 24th Ordinary Session of the Commission held in Banjul, The Gambia from 22nd - 31st October 1998 and item 8 (h) of the Draft Agenda of the upcoming Session to be held in Burundi. At the 24th Ordinary Session, the Commission adopted a Resolution granting affiliated status to National Human Rights Institutions.

⁷ G.A. Res. 217A (III), UN Doc. A/810 at 71 (1948)

⁸ G. A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U. N. Doc. A/6316 (1966)

⁹ *Id.* See an article-by article comparison of the African Charter with the Universal Declaration on Human Rights, the two International Covenants, and the European Convention on Human Rights and Freedoms compiled by Robert C. Wigton in: Welch and Meltzer, *Human Rights and Development in Africa*, Albany: State University of New York Press, 1984, pp. 331 - 37.

¹⁰ African Charter, *supra* note 1, arts. 3 - 14.

¹¹ *Id.*, arts. 19 - 24.

¹² *Id.*, arts. 25 - 29.

and of religion and the freedom to practise the professions are "subject to law and order"¹³. These provisions have been variously criticised as tending to give in one hand and taking from the other. Particularly, it has been criticised for lack of standard for the laws that may contravene those rights, as they tend to give States parties leeway against compliance with their Charter obligations.

MANDATE OF THE COMMISSION

By the provisions of article 45 of the African Charter, the Commission is empowered to exercise four basic functions to wit:

1. to promote human and peoples' rights
2. to ensure the protection of human and peoples' rights under the conditions laid down by the Charter
3. to interpret all the provisions of the Charter at the request of a State party, an institution of the OAU or an African Organisation recognised by the OAU, and
4. To perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

In the performance of these functions, the Commission "may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organisation of African Unity or any other person capable of enlightening it"¹⁴.

PROMOTIONAL MANDATE

Under its promotional mandate, the Commission is to: collect documents, undertake studies and researches on African Problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and in appropriate cases, give its views or make recommendations to Governments; 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 Government may base their legislation and to co-operate with other African

¹³ See also article 9 (right to receive and impart information), article 10 (right to free association), article 11 (right to assembly) article 12(1) (right to freedom of movement), article 12(3) (right to asylum), etc.

¹⁴ African Charter, *supra* note 1, art. 46, see also Rules 71 - 75, particularly, Rule 72

and international institutions concerned with the promotion and protection of human and peoples' rights¹⁵.

In practice, there is a huge gap between the anticipated goals of the Commission as enumerated above and the achievements on the ground. The reasons for this marked difference as will be discussed later are not far-fetched. Suffice it to say that despite these odds, the Commission has made some progress. Not much has been achieved in the field of researches and organised studies. Eight years ago, the U. N. Centre for Human Rights had suggested that "the African Commission could launch a major research project on 'African cultures and human and peoples' rights'¹⁶. Unfortunately, till date the suggestion have not been given serious thought.

The Commission has established a Documentation Centre at its Secretariat to enable it execute its mandate of collecting documents on African problems in the field of human and peoples' rights. The Commission has also published or collaborated in the publication of the following: Review of the African Commission on Human and Peoples' Rights; Annual Activity Reports; Mission Reports, the African Charter and the Rules of Procedure; Guidelines on the Submission of Communications, State Reporting Procedure; the Tenth Anniversary Celebration: One Decade of Challenge; etc. With respect to organisation of seminars, symposia and conferences, the Commission has been involved in the organisation of the following:

- Seminar on the National Implementation of the African Charter in the Internal Legal Systems in Africa, Banjul, 26 - 30 October 1992
- Conference on the Journalist and Human Rights in Africa, Tunis, 31 October - 1 November 1992
- Seminar on State Reporting for English Speaking Countries, Harare, 23 - 27 August 1993
- Seminar on State Reporting for Francophone, Arabophone and Lusophone Countries, Tunis, 24 - 27 May 1994
- Seminar on Refugees and Internally Displaced Persons in Africa, Harare, 16 - 18 February 1994
- Seminar on Human Rights education in South Africa, Durban, 24 - 27 September 1994
- Seminar on Human Rights of the African Women and the African Charter on Human and Peoples' Rights, Lomé, 8 - 9 March 1995
- Workshop on Impunity in Africa, Ouagadougou, 22 - 23 March 1996

¹⁵ *See generally* African Charter, *supra* note 1, art. 45 (1) (a) - (c)

¹⁶ UN Centre for Human Rights, Plan of Action for the Promotion and Protection of Human Rights in Africa, Geneva 16 (1991)

- Brainstorming on Mechanism for Early Warning in Emergency Situations under Article 58 of the African Charter, Nairobi, 23 - 25 July 1996
- Conference on Prisons in Africa, Kampala, 19 -21 September 1996
- Experts Meeting on the draft Protocol on the Establishment of An African Court, Cape Town, 6 - 12 September 1995 and Nouakchott, 11 - 14 April 1997
- Consultation on the Draft Protocol concerning the Rights of Women, Nouakchott, 13 - 15 April 1997.
- There are also plans for Seminars on the Rights to Education and Development and on the Right to Recourse to Fair Trial.
- It is worth remarking that all these seminars and conferences have been organised in conjunction with African and international NGOs/ Institutions.
- Also since 1991, the Commission has, in collaboration with the International Commission of Jurists organised various workshops preceding its ordinary sessions.

The commission has not achieved much in the area of dissemination of information, even concerning its existence and work. People need to be enlightened through radio and television programmes about the activities of the Commission. They need also to read in the newspapers, magazines and other publications in their states about the Commission and its relevance to their lives. Students and pupils need to be taught about the usefulness of the Commission to their careers and life generally. In this regard, the Charter has to be integrated into the school curriculum at all levels of education. The public needs to know how to approach the Commission whenever their rights or those of others are being or have been violated. Journalists, Lawyers and other professionals need to enlighten the people on their rights and duties. All these have to be championed by the Commission in collaboration with national, regional and international NGOs/ institutions.

One of the innovative steps taken by the Commission in respect of its promotional mandate is the appointment of responsibility to each Commissioner. This effort is complemented by the assignment of legal officers to them. The Commission has so far conducted missions to Senegal (1 - 7 June 1996); Mauritania (19 - 27 June 1996); Sudan (1 - 7 December 1996) and Nigeria (7 - 14 March 1997).

It must however be acknowledged that the problem here is that of limited financial resources at the Commission's disposal. Most expenses in this regard are borne by foreign donors. It is time Africans wake up to the reality that the Commission is theirs and that they have to do everything legally feasible for it to exist. The commission must be given its pride of place as we turn into the third millennium. It is hoped that more and more organisations and institutions will be willing to collaborate in this regard.

The Commission has also in accordance with the Charter given its views and made some recommendations to Governments. It is apposite here to mention some of the important recommendations. They include: Recommendation on Periodic Report, Recommendation on Some Modalities for Promoting Human and Peoples' Rights. Some resolutions have also been adopted on specific countries such as Resolution on the Situation in Rwanda (2), Resolution on South Africa, Resolution on Sudan, Resolution on Nigeria (2), Resolution on The Gambia, Resolution on Liberia, and Resolution on Burundi.

The following resolutions have also been adopted as a means of solving legal problems relating to human and peoples' rights: Resolution on the Establishment of Committees on Human Rights or Other Similar Organs at National, Regional or Sub-Regional Levels, Resolution on the Integration of the Provisions of the African Charter on Human and Peoples' Rights into National Laws of the States, Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples' Rights, Resolution on Anti- Personnel Land Mines, Resolution on Prisons in Africa, etc. The Commission has by adopting the following resolutions tried to formulate some principles and rules: Resolution on the Right to Recourse and Fair Trial, Resolution on the Right to Freedom of Expression, Resolution on Human Rights Education, Resolution on the Respect and the Strengthening of the Independence of the Judiciary, Resolution on the Role of Lawyers and Judges in the Integration of the Charter and the Enhancement of the Commission's Work in National and Sub-Regional Systems and Resolution on Electoral Process and Participatory Governance. Unfortunately, these resolutions are rarely used. They however remain veritable source for strengthening the work of both the Commission and complainants/legal representatives under the individual communication and state reporting procedures.

Part of the assistance received by the Commission from African and International institutions concerned with the promotion and protection of human rights are aspects of the co-operation between the two as provided under the Charter. It is necessary that such co-operation and collaboration should continue positively beyond present terms in order for the Commission to be more efficient and effective.

STATE REPORTING

Article 62 of the Charter provides:

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 recognised and guaranteed by the present Charter*¹⁷.

This obligation as observed by Philip K. A. Amoah is a major implementation strategy underscoring the joint responsibility of the Commission and States Parties¹⁸. The comments by the Commission on the reports could influence legislation and law reform in the State concerned. It may also be useful to the Commission in the consideration of individual communication. Over the years, the Commission has developed on the procedure for consideration of State reports¹⁹. In spite of these innovations, not much has been achieved. This is in part due to the unco-operative attitude of some States Parties²⁰. Neither the Charter nor the Rules of Procedure of the Commission appears to have any remedy for this²¹. In some instances, such reports are scanty. Yet in others State representatives are not at the session to respond to the questions put by the Commissioners in the consideration of such reports.

It is necessary for States to be encouraged to live up to their obligation under the Charter. State reporting should not be viewed negatively as inquisitorial but as a positive promotional step towards a state's attempt to harmonise the provisions of the Charter with its own domestic legal system. NGOs must also be brought on board to make some input into such reports.

The Commission has, in recent years appointed three Special Rapporteurs to complement its work in the areas of the rights of Women in Africa, Prisons and conditions of Detention in Africa, Summary, Arbitrary and Extra-Judicial Executions.

¹⁷ See also Rules 78, 81, 82, 83

¹⁸ Philip Amoah, Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights, ICJ Workshop on NGO Participation in the African Commission, Banjul, The Gambia, 5 - 7 October 1991, p.6

¹⁹ See State Reporting Procedure

²⁰ As of 31 October 1998, only Algeria, Angola, Benin, Burkina Faso, Cape Verde, Chad, Egypt, The Gambia, Ghana, Guinea, Libya, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Sudan, Tanzania, Togo, Tunisia and Zimbabwe had submitted their initial reports. Only Zimbabwe, Tunisia, Senegal, Rwanda and The Gambia have submitted their second reports, while only Zimbabwe has submitted its third report.

²¹ The Commission is to send, through the Secretary, to the State Party a report or reminder Rule 84(1); failure to honour the reminder attracts its mention in the yearly report to the Assembly, Rule 84 (2)

THE SPECIAL RAPPORTEUR ON THE RIGHTS OF WOMEN IN AFRICA²²

The following are her terms of reference:

- adopting a method or procedure that will enable him or her gather maximum information on the situation of women's rights within their respective countries.
 - working in collaboration with the official authorities, national and international NGOs, the different international organs established to monitor the implementation of CEDAW
 - making recommendations to the Commission regarding Member States of OAU ratifying the CEDAW and urging those who signed with reservations to withdraw them
 - Reporting to the Commission and making inputs into the drafting of the Additional Protocol on the Rights of African Women
 - Providing the Commission, for its Documentation Centre, with all the pertinent documents collected within the period of the mandate.
- The mandate is to last until the year 2002. However, the Special Rapporteur will have two years in which to complete the work and to propose future prospects.

So far the Special Rapporteur has been involved with other members of the Expert Working Group on the Draft Additional Protocol on the Rights of Women in Africa in drafting the said Protocol. Consideration of the Draft Protocol by the Commission will be made during the 25th Ordinary Session scheduled for Burundi.

Also during the 24th Ordinary Session the Special Rapporteur presented her preliminary report with proposals for a programme of activities for the period 1999 to 2001. However, as with the general activities of the Commission, the Special Rapporteur has witnessed a lull in the execution of her programmes due to lack of funds, human expertise, co-operation from relevant institutions, etc. This is what prompted her during the 24th ordinary Session to call on NGOs, especially those, which had promised providing funding assistance for the realisation of her mandate to do so.

THE SPECIAL RAPPORTEUR ON PRISONS AND CONDITIONS OF DETENTION IN AFRICA²³

The Special Rapporteur's broad mandate is to examine the situation of persons deprived of their liberties within the territories of States Parties

²² She is Mrs. Julienne Ondziel-Gnelenga

²³ Professor E. V. O. Dankwa is the Special Rapporteur. He was appointed at the 20th Ordinary Session and had his mandate renewed during the 24th Ordinary Session.

to the Charter. The Special Rapporteur however has mandate priorities for the first two years of his tenure. They include:

Making an evaluation of the conditions of detention in Africa highlighting the main problem areas, such as health issues, arbitrary or extra legal detention or imprisonment, conditions of detention of vulnerable groups, etc.

Making specific recommendations with a view to improving the prisons and conditions of detention in Africa, including possible early warning mechanisms in order to avoid disasters and epidemics; and

Promoting the implementation of the Kampala Declaration.

The mandate is for an initial period of three years and subject to renewal. He has so far visited prisons in Cameroon, Kenya, Uganda, Lesotho, Malawi, Mozambique, Namibia, Zimbabwe and Mali²⁴. In line with his mandate, the Special Rapporteur has always made recommendations to States visited and some of them have resulted in positive changes²⁵. Presently, plans have been concluded for the Special Rapporteur's visit to the Gambia prisons.

It is worth stating that over these years, the Special Rapporteur has encountered many problems in the discharge of his mandate. They include lack of political will on the part of State Parties to approve of his visits, and where such permission have been sought and obtained, lack of co-operation, lack of financial and human resources, etc.

THE SPECIAL RAPPORTEUR ON SUMMARY, ARBITRARY AND EXTRA-JUDICIAL EXECUTIONS²⁶

His mandate covers the following areas: setting up of a system allowing for the establishment of a list of extra-judicial, summary or arbitrary executions in Africa States, through compiling of a register with all the important information on the identity of the victims; Conducting in collaboration with the official authorities or in their absence, international, African

²⁴ Some of these visits have been published. For example, see Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, Series IV No.1 & 2

²⁵ In his report to the Commission during the 24th ordinary session, the Special Rapporteur informed the Commission that Mali has agreed to a follow-up mission and also that the Government of Mali has, following his recommendations, adopted some measures for improved prisons conditions in the country.

²⁶ The Special Rapporteur is Mr. Hatem Ben Salem. He was appointed during the 16 Ordinary session (October 1994)

or national NGOs, all investigations likely to lead to the discovery of the identity and determination of the level of involvement of the perpetrators and initiations of extra-judicial, summary or arbitrary executions; Suggesting ways and means of timely informing the African Commission on Human and Peoples' Rights about likely extra-judicial, summary and arbitrary executions to enable the latter to intervene at the OAU Summit Conference; intervene with States for the judgement and punishment of perpetrators of extra-judicial, summary or arbitrary executions and the rehabilitation of the victims of these executions; examine the modalities of the setting up of a mechanism of compensation for the families of victims of extra-judicial, summary or arbitrary executions.

The duration of the mandate is two years. The Special Rapporteur has made some progress on the preliminary investigation on Rwanda and Burundi. However, his work has been hampered by many problems such as lack of financial and human resources to conduct investigations, etc. He has presented his progress report on Rwanda and Burundi to the Commission and also made some proposals for other countries.

PROTECTIVE MANDATE

The Charter provides for the exercise of this function through interstate communications procedure, and "other communications" procedure.

INTERSTATE COMMUNICATION PROCEDURE

Article 47 of the Charter empowers the Commission to receive communications from State Parties to the Charter. However, such communications must meet the conditions provided in the Charter²⁷. So far the Commission has received only one communication on the interstate procedure²⁸. The Charter requires the aggrieved party to have exhausted all existing local remedies, unless it is obvious that the procedure of achieving

²⁷ The violating State is to be informed, in writing; the communication must be addressed to both the Secretary General of OAU and the Chairman of the Commission; the State to which the communication is addressed must give the enquiring State, written explanation or statement elucidating the matter; if within three months of receipt of the communication the matter is not settled amicably, either State has the right to submit the matter to the Commission, see generally African Charter, *supra* note 1, arts. 47 and 48. However, article 49 empowers the submission of such communication directly to the Commission.

²⁸ The communication which is dated 24 February 1999 is brought by the Democratic Republic of Congo against Burundi, Uganda and Rwanda alleging massive violations of human and peoples' rights within its territory.

these remedies will be unduly prolonged²⁹. In its consideration of such communications, the Commission may ask the States concerned to provide it with all relevant information and such States may be represented before it³⁰. The Commission is expected to take a decision on the matter within a reasonable time and draw up its report, including its recommendations, if any for transmission to the Assembly of Heads of State and Government³¹.

The provision of article 50 of the Charter requiring exhaustion of local remedies seems confusing. On its plain meaning, it implies that such violation must have occurred within the territory of the violating State. That the complaining State institutes a cause of action directly or through the victims and prosecutes it to its logical conclusion in the local courts of such a State. The problem here is whether the first option is practically possible. It would seem that the better interpretation would be for the victims of such violation to avail themselves directly of such available remedies. The situation is even more complicated as in the above case where the violations complained of occurred within the territory of the complaining State. The question is can the requirement of exhausting local remedies be met? There are two options: either the complaining State sues the violating State or through the victims in its courts or in the courts of the violating State. The more reasonable option is the former. Yet both options are the devil's alternative. It stands to reason that this requirement ought to be discontinued, or more appropriately, that this provision be amended to accommodate the above situation.

“OTHER COMMUNICATIONS” (NON-STATE COMMUNICATIONS) PROCEDURE

The Commission is empowered by article 55 of the Charter to consider communications received from other than those of States Parties. There are however arguments to the effect that “the Commission lacks a mandate to remedy an individual human rights violations. . . a remedy is provided only for ‘special cases’ which reveal the existence of ‘ a series of serious or massive violations of human and peoples’ rights. . .’ Only then may the AHSB [Assembly of Heads of State and Government of the OAU] request the Commission to undertake an ‘in-depth study’ and make a factual report with its findings and recommendations”³². This, in my view, is a

²⁹ African Charter, *supra* note 1, art. 50.

³⁰ *Id.* art. 51

³¹ *Id.* arts. 52 and 53.

³² Wolfgang Benedek, *The African Charter and Commission on Human and Peoples’ Rights: How to Make it More Effective*, 11 NETH. Q. HUM. RTS. 25 (1993)
31. See also Rachel Murray, *Decisions by the African Commission on Individual*

misinterpretation of the clear wordings of this provision. Article 55 provides:

1. *Before each session, the Secretary of the Commission shall make a list of the communications other than those of States Parties to the present charter and shall transmit them to the members of the Commission, who shall indicate which communication the Commission should consider*
2. *A communication shall be considered by the Commission if a simply majority of its members so decide.*

It is to be noted that the procedure to be adopted by the Commission in the consideration of communications submitted under article 58 is spelled out thereunder. Such communications must relate to special cases, which must reveal the existence of series of serious or massive violations of human and peoples' rights. Here, the Commission is expected to draw the attention of the Assembly of Heads of State and Government to these special cases³³. The Assembly of Heads of State and Government may then request the Commission to make an in-depth study and make a factual report, accompanied by its findings and recommendations³⁴. On the other hand, the procedure for consideration of communications submitted under article 55 of the Charter is clearly spelled out in article 56 of the Charter. Article 56 provides in part:

Communication relating to human and peoples' rights referred to in article 55 received by the Commission, shall be considered if they:

It stands to reason that the specific reference made in this regard to communications received under article 55 of the Charter clearly makes these sets of communications different from those of article 58. It also, without doubt removes them from the categories of interstate communications, as the Charter provides for '*a list of communications other than those from State Parties (emphasis mine)*'. In other words, it is reasonable to infer that the procedural requirement stipulated in article 56 is not applicable to communications received under article 58. Further, the condition for consideration of communications under article 58 is that they "*relate to special cases which must reveal the existence of series of serious or massive violations of human and peoples' rights*". Such conditions are not required of

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³³ African Charter, *supra* note 1, art. 58 (1)

³⁴ African Charter, *supra* note 1, art. 58 (2)

communications 'other than those of State Parties'. They must conform to the conditions stipulated under article 56 of the Charter. It is however reasonable to say, as it sometimes does happen, that communications under article 55 of the Charter may reveal characteristics of article 58 communications. In that case, the Commission has to adopt the steps stipulated thereunder for their consideration³⁵.

Finally, the provisions of articles 55, 56, 57 of the Charter, Rules 102 and 103 of the Rules of Procedure and the practice of the Commission, clearly demonstrate that the Commission is empowered to adjudicate on individual communications.

So far, the Commission has received 226 communications³⁶. In accordance with the provisions of the Charter, such communications may be considered by a vote of a majority of Commission members³⁷, though as indicated earlier, only if several conditions are met: authors must be indicated; communications are compatible with the Charter of the OAU and the African Charter; communications must not be written in disparaging or insulting language directed against the State Party and its institutions or to the OAU; communications must not be based exclusively on news disseminated through the mass media; local remedies are exhausted, if any unless such a procedure will be unduly prolonged; communications must be submitted within a reasonable period of time; and communications do not deal with cases already settled by the States involved.³⁸

WHO MAY FILE COMMUNICATIONS?

The right to submit a communication to the Commission is governed by the provisions of article 55 of the Charter. This provision is complemented by article 56, which stipulates the requirement for consideration of such complaints. However, neither article 55 nor 56 provide a list of who may file a complaint. The Rules of Procedure of the Commission is also

³⁵ For instance, the Commission in considering communications 25/89 - Free Legal Assistance Group; 47/90 - Committee For Human Rights; 56/91 - Les Témoins De Jehovah Witness; 100/93 - Union Inter-Africaine Des Droits De L'Homme (Consolidated) v Zaire, held that the communications 'taken together, evidenced a grave and a massive violations of human rights in Zaire' and informed the Assembly of Heads of State and Government of the OAU in December 1995 under article 58 (1) of the Charter.

³⁶ Of this number, 137 have been finalised and made public, 50 have been declared inadmissible, 6 resulted in friendly settlements, 5 withdrawn, 88 pending, 16 closed without decision and 1 double registration.

³⁷ African Charter, *supra* note 1, art. 55

³⁸ *Id.*, art. 56

silent on this vital issue³⁹. However, Old Rule 114 complemented article 55 by providing a list of who may file a complaint⁴⁰. This list suggested and practice bears this out, that anyone can submit a communication to the Commission. Most of the communications received by the Commission have been submitted by NGOs, both African and foreign on behalf of individuals. In practice, the Commission receives communications from any person or organisation. The significance of this practice cannot be over-emphasised, especially in a continent like ours, where due to illiteracy rate a greater percentage of the population are generally unaware of their rights or the mechanisms by which they may be enforced. Again this is of importance where the affected victims are under detention or are being persecuted by the authorities. Furthermore, it is important to note that in cases of serious or massive violations of human and peoples' rights, communications need not be filed on behalf of specific individuals.

In the exercise of its mandate, the Commission is required to 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 UN, etc⁴¹.

It is necessary to consider some precedents so far developed by the Commission's evolving case law.

ADMISSIBILITY

The Commission has held on the issue of exhaustion of local remedies that this requirement should not be applied literally. Following this the Commission declared a communication admissible as it considered that based on "the vast and varied scope of the violations alleged and the general situation prevailing in the country, this was a case 'where it is impracticable

³⁹ Old Rule 114 has been replaced by Rule 116 which simply states 'The Commission shall determine questions of admissibility pursuant to Article 56 of the Charter.

⁴⁰ Old Rule 114 states in part: '1. Communications may be submitted to the Commission by: a) an alleged victim of a violation by a State Party to the Charter of one of the rights enunciated in the Charter or, in his name, when it appears that he is unable to submit the communication himself; b) an individual or organisation alleging, with proofs in support, a serious or massive cases of violations of human rights. 2) The Commission shall accept such communication from any individual or organisation irrespective of where they shall be.'

⁴¹ African Charter, *supra* note 1, art. 60. *See also* art. 61

or undesirable for the complainant to seize the domestic courts in the case of each violation⁴²

In *Constitutional Rights Project v. Nigeria*, the Commission when faced with the question of whether the remedies available were of a nature requiring exhaustion, in the light of the provision of the Robbery and Firearms (Special Provisions) Decree empowering the Military Governor of a state to confirm or disallow the conviction of the Special Tribunal held:

This power may be described as a discretionary, extraordinary remedy of a non-judicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist that the Complainants seek remedies from sources, which do not operate impartially and have no obligation to decide according to legal principles. This remedy is neither adequate nor effective.⁴³

In the same breath, the Commission has held that "the African Charter is distinctive in that, while it requires that communications indicate their authors, these authors need not be the victims or their families.⁴⁴ The Commission has also held that the author of a communication need not be a national of a State Party to the Charter⁴⁵. In this regard, several communications have been submitted by international NGOs outside Africa⁴⁶.

⁴² Communications No. 25/89- Free Legal Assistance Group; 47/91 - Committee for Human Rights; 56/91 - Les Temoins Jehovah; 100/93 - Union Inter-Africaine Des Driots De L'Homme (consolidated) v Zaire, 7th, 8th and 9th Annual Activity Reports; Decision adopted at the 18th Session 1995

⁴³ Communication No. 60/91. Similarly, communication No. 64/92 Krishna Achuthan on behalf of Aleke Banda v. Malawi, the Commission held that "where the remedy is at the complete discretion of the executive, the existence of local remedies is futile and to exhaust them would be ineffective. However in communication N. 45/90 Civil Liberties Organisation, where in spite of the non-compliance of the State party to interim court orders made in favour of the complainant and the various cause of actions instituted prior to the submission of the communication, the Commission declared it inadmissible for failure to exhaust local remedies. See also, communication 135/94 - Kenya Human Rights Commission v. Kenya.

⁴⁴ Communication No. 25/89 - World Organisation Against Torture v Zaire, communication No. 47/90 - Lawyers Committee for Human Rights v Zaire.

⁴⁵ See communication No. 31/89 Maria Baes v Zaire. This communication was submitted by a Danish on behalf of a Zairian.

⁴⁶ See communications No. 207, 208, 209/97 Africa Legal Aid v The Gambia, communication No. 69/92 Amnesty International v Tunisia, communication No. 55/91 - International PEN v Chad, etc.

CONSIDERATION OF SOME SUBSTANTIVE PROVISIONS OF THE CHARTER

The Commission has also made remarkable pronouncements concerning the substantive provisions of the Charter. In *Civil Liberties Organisation v. Nigeria*, the complainant alleged violations of articles 7 and 26 of the Charter by the Decrees passed by the military government. The Decrees concerned the suspension of the Constitution preventing decrees promulgated after December 1983 from being examined in national courts⁴⁷, the dissolution of political parties, the ousting of the jurisdiction of the courts and the revocation of the domestic effect of the Charter⁴⁸.

The Commission held with respect to the violation of article 7 thus: The ousting of the jurisdiction of the courts of Nigeria over any decree enacted in the past ten, years and those to be subsequently enacted, constitutes, an attack of incalculable proportions on article 7. The complainant refers to a few examples of decrees which violate human rights but which are now beyond review by the courts. An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed. On the revocation of the domestic effect of the Charter, the Commission held that "The Commission must emphasise, however, that the obligation of the Nigerian government to guarantee the right to be heard to its citizens still remains, unaffected by the purported revocation of domestic effect of the Charter, and notwithstanding the Political Parties Dissolution Decree, the government has the same obligations under the Charter. These obligations include guaranteeing the right to be heard"⁴⁹.

Despite these sound pronouncements, the Commission has yet to expound fully on the components of this right. At its Eleventh Ordinary Session, the Commission adopted a Resolution on the Right to Recourse Procedure and Fair Trial. It is unfortunate that till date the Resolution has not been applied in the consideration of communications. Neither has it elaborated further on the components of the right as stated in the Resolution.

In most cases, complainants alleging violation of article 7 have also alleged violation of article 26⁵⁰. The Commission in interpreting article 26

⁴⁷ Constitution (Suspension and Modification) Decree No. 107 1993

⁴⁸ Political Parties(Dissolution) Decree No. 114 of 1993

⁴⁹ Communication No. 129/94, para. 23

⁵⁰ Article 26 provides: States 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.

has held that 'while article 7 focuses on the individuals' rights to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of power'⁵¹.

Another area which the Commission has pronounced on is on article 5 of the Charter⁵². Most of the communications alleging violation of this provision have touched on torture, and the Commission has oftentimes adopted its views based on such allegations without any attempt at delineating the components of such rights. For example, in *Free Legal Assistance Group v. Zaire*⁵³, the complainant made allegations of the torture of 15 individuals by a military unit in January 1989 and the subsequent arrest and indefinite detention of others who objected to such treatments. Following the failure of the Zairian authorities to make a substantive response to any of the allegations against it, the Commission held that "The beating of detainees with fists, sticks, and boots, the keeping of prisoners in chains and subjecting them to electric shock, physical suspension and submersion in water, as detailed in communication 47/90, offend the human dignity. *Such acts, together and separately, constitute a violation of Article 5* emphasis added).

The Commission has also been innovative in its interpretation of the limitation provisions of the Charter. For instance, in *Dawda Jawara vs. The Gambia*, the Commission in deciding on the argument proffered by the government that its action was in conformity with regulations *previously laid down by law*, relied on its case law and Resolution on the Right to Freedom of Association found that: "The regulation of the exercise of the right to freedom of association should be consistent with States' obligations under the African Charter on Human and Peoples' Rights. It follows that any law which is pleaded for curtailing the enjoyment of any of the rights provided for in the Charter must meet this requirement".

Few communications have been filed concerning social, economic and cultural rights such as right to education (arising from closure of

⁵¹ Communication No. 129/94, paras. 17 and 18 - Civil Liberties Organisation vs. Nigeria

⁵² Article 5 states: 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.

⁵³ *Supra*

schools, article 17⁵⁴). The Commission has held that the failure of the government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicines in the country constitute a violation of the right to the best attainable state of physical and mental health guaranteed under article 16 of the Charter⁵⁵.

It has also decided cases concerning group or collective rights. For example, in *Dawda Jawara vs. The Gambia*⁵⁶, the Commission upheld the complainant's argument that the military government which overthrew the duly elected government was in violation of Gambians right to freely determine their political status guaranteed by article 20(1) of the Charter. The Commission however rejected the Katangese peoples' claim to self-determination as lacking merit under the Charter⁵⁷, having regard to the fact that Katanga was still part of the Republic of Zaire.

From the above samples of the decisions, it could be seen that the Commission has over the years developed its own jurisprudence. Much however needs be done. The Commission must inform itself of the benefit of the jurisprudence developed by other systems of human rights regimes. This is can do by invoking the provisions of Article 60 and 61 of the Charter. It is also necessary for it to continue to adopt resolutions, similar to the Human Right Committee' General Comments, aimed at expounding the guarantees provided in the Charter. It is also not in doubt that in order for the Commission to perform effectively in this regard, it needs collaboration with both States Parties and NGOs. The Commission needs to be furnished with adequate information and sound legal arguments to be able to adopt sound decisions.

The Commission is however still bogged down with many problems. This understandably affects its performance. For instance, communications submitted since 1990, that is nine years ago, are still pending. Procedurally, it would be appropriate for the Commission to stipulated a specific period of time within which communications other than those from States Parties are to be decided, as provided for in respect of interstate communications⁵⁸.

⁵⁴ See communication 100/93 - Union Inter-Africaine des Driots de L'Homme vs. Zaire (violation held) and communication 220/98 - Law Office of Ghazi Suleiman vs. Sudan (still pending)

⁵⁵ *Ibid* communication 100/93

⁵⁶ See Communication 147/96 and 149/96 (consolidated)

⁵⁷ Communication 75/92 - Katangese Peoples' Congress vs. Zaire

⁵⁸ See Rule 101 of the Rules of Procedure, particularly Rule 101 (1) and (3)

It is necessary for legal officers to have constant and direct access to the Commissioners to be able to keep them abreast with developments concerning pending communications and the human rights situation in the States Parties they are designated to cover. In this regard, the Secretariat should be provided with e-mail services, phones and faxes to ease communication problems. Since all the Commissioners are on part-time basis, it is of great necessity that duplicate files be opened on communications and made available to them for follow up activities during the inter-session period. The benefit of this is that it would keep them abreast of the status of communications, which in turn will facilitate their consideration during the ordinary sessions.

The task of the Commission based on its mandate is onerous. Regrettably, most of the staff of the Commission as of now are on short term contracts funded by external donors. This, it must be emphasized, does not figure well for the Commission as there is hardly room for continuity. It is hoped that the latest arrangement between the Commission and the Danish Centre for Human Rights for a three year contract for some of the staff will come to fruition. Be that as it may, it is necessary as a long term solution that the OAU makes provision for more permanent staff for the Commission.

CONCLUSION

Eleven years ago, the OAU established the African Commission on Human and Peoples' Rights and shouldered it with the responsibility of monitoring the implementation of the African Charter. Since its inception, the Commission has tried in various ways to achieve this goal. It has, in this wise made some progress. However, lots of criticisms have been levelled against it.

There is great optimism that the Commission will be more efficient and effective in the discharge of its functions with the co-operation and collaboration of States Parties to the Charter, individuals, national, regional and international organisations and institutions. The establishment of the African Court is also expected to reinforce the role of the Commission, especially with respect to its protective mandate.

