

**‘THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS  
AND  
THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS’**

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General

The African Charter on Human and Peoples’ Rights<sup>2</sup> entered into force on the 21<sup>st</sup> October 1986 and was a significant step in the terms of the recognition and implementation of human rights in Africa. Not only does the Charter provide for the rights that should be guaranteed within African States, but it also facilitates the creation of a body, the African Commission on Human and Peoples’ Rights,<sup>3</sup> to monitor the implementation of the rights contained therein. The Charter includes many of the fundamental rights laid down in other international treaties and UN Charters, such as civil and political rights<sup>4</sup> as well as economic, social and cultural rights.<sup>5</sup> Article 22 should be highlighted in this respect as clear reference is made to the 'right to economic, social and cultural development' and a duty is placed upon State Parties to take all necessary measures to ensure the exercise of this right to development. Furthermore, the Charter also places particular obligations upon individuals, not merely the State Parties.<sup>6</sup>

The Commission was established by virtue of Article 30 of the Charter and its mandate, essentially the *promotion* and *protection* of human and peoples’ rights in Africa, is stated in Articles 30 and 45.

The Commission consists of 11 part-time members who have been successfully nominated and elected by States parties in the OAU Assembly and the permanent Secretariat that is based in Banjul, The Gambia. There has been a significant improvement in the geographical representation of the Commissioners over recent years and presently there are two members each from West, Central, East and Southern Africa and three from North Africa. The Commission generally meets for two weeks twice a year, usually March/April and October/November, although there are provisions enabling it to meet extraordinarily if necessary. It is at these sessions that the bulk of the work of the Commission is done, not only reporting on activities undertaken during the inter-session period, but also interacting with Non - Governmental Organisations (NGOs) and State Parties present at the meeting in terms of the immediate human rights situation in Africa. An NGO forum usually takes place immediately before the session.

In order to fulfil the first half of its mandate, namely the *promotion* of human rights in Africa, the Commission aims to create an awareness and understanding of human rights amongst the African people as well as disseminating information to all interested parties and stakeholders. Commissioners undertake 'promotional missions' to Member Countries in order to meet with the Government, NGOs and human rights defenders at a national and local level, thereby assessing the human rights situation in the Country.<sup>7</sup> This not only heightens awareness of the existence of the Charter and the Commission at a 'grass-roots' level but it also provides some form of accountability, albeit limited, that the Government should respond to. As a result of these missions, specific recommendations can be made to the Government. Moreover, the Commission collects documents and undertakes research on State Parties,

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<sup>1</sup> I was an intern within the Legal Office of the African Commission on Human and Peoples’ Rights from October 2000 – May 2001.

<sup>2</sup> Hereafter referred to as the Charter.

<sup>3</sup> Hereafter referred to as the Commission.

<sup>4</sup> Such as the Right to Life, Liberty and Freedom of Movement - Articles 4, 6 and 12 respectively.

<sup>5</sup> Such as the Right to Education and Health - Articles 17 and 16 respectively.

<sup>6</sup> For example see Articles 27, 28 and 29.

<sup>7</sup> Since 2000 missions have been undertaken to Uganda, Tanzania, Mozambique and Sierra Leone amongst others.

particular African issues affecting the recognition and implementation of human rights and, in addition, organises seminars in partnership with NGOs in relation to such.<sup>8</sup>

Where an individual, group of individuals or an NGO feels that a State Party has violated rights contained within the Charter, a complaint or 'communication' can be brought to the Commission.<sup>9</sup> This is one of the mechanisms that exist that enables the Commission to fulfil its *protective* function. State Parties can also bring complaints against other States if it reasonably believes that that State Party has violated any of the provisions of the African Charter.<sup>10</sup> Presently, there are 26 'communications' at various stages of consideration before the Commission, the oldest outstanding of which is from 1996 and there is one inter-state communication.

Outlined in Article 62 is the State reporting procedure under which States Parties are required to submit reports containing information on the human rights situation within the country, as well as details of measures that they have taken to facilitate the recognition and implementation of the rights contained within the Charter. The initial report is due two years after ratification of the Charter, with periodic reports due every two years thereafter. In practice, however, States Parties have failed to submit their reports and consequently, in order to encourage compliance, the Commission has permitted Member states to combine overdue reports. There are still, however, several States Parties who are yet to submit their initial reports, some of which are Botswana, Cameroon, Kenya, Lesotho, Malawi, Sierra Leone and Zambia. Upon submission of the report to the Commission, a Commissioner or 'Rapporteur' is assigned to read the State Report and draft questions based on such to be put to the state representative presenting the report at the next session. The State Report must be presented by a Government representative in order for the report to be considered at the session. Even if a report is scheduled for consideration and the state representative fails to attend the session it will not be considered.<sup>11</sup> Further concerns have been raised as to the lack of follow - up undertaken by the Commission once a report has been presented. Steps have been taken to address this issue and, during the 29<sup>th</sup> Ordinary Session held in April/May 2001, the comments and concerns of the Rapporteur on the initial or periodic report and responses given by the State Representative to the questions posed at the session will be notified to the Government of the State concerned for their further information and action.<sup>12</sup>

Investigative missions in cases of serious and massive human rights violations are permitted in terms of Article 58(1) but rather than utilise this provision the Commission has interpreted Article 46 broadly and undertaken investigative missions as a result of numerous communications filed containing allegations of such violations.<sup>13</sup>

A Special Rapporteur mechanism exists for prisons and conditions of detention in Africa, the rights of women, and extra-judicial, summary or arbitrary executions. This enables specifically appointed members of the Commission to monitor the human rights situation therein by undertaking missions with the purpose of gaining further information and assessing the reality surrounding these rights in the Member States. Collaboration with local and international NGOs working in the related areas of human rights is also facilitated. Special Rapporteurs are selected from the existing members of the Commission but do not have to be proven experts in the field concerned. Each Rapporteur presents a report of their activities at each session.

#### Non - Governmental Organisations (NGOs)

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<sup>8</sup> The most recent of which was on Freedom of Expression and the African Charter, organised in collaboration with Article XIX that was held in January 2001.

<sup>9</sup> See Article 55.

<sup>10</sup> See Article 47.

<sup>11</sup> The Seychelles submitted its initial report September 1994 and although scheduled for consideration at each session thereafter it has consistently failed to send a representative to present the report. One of the reasons it has cited for this failure is a lack of financial resources.

<sup>12</sup> At the 29<sup>th</sup> Ordinary Session the Commission considered the State Reports of Namibia, Ghana, Congo (DRC) and Algeria.

<sup>13</sup> The countries that were visited in this respect were Sudan, Senegal and Mauritania.

Central to the fulfilment of its mandate to promote and protect human rights in Africa is the co-operation between NGOs and the Commission itself. NGOs provide vital information as to the actual human rights situation prevailing in the countries where they operate and thereby provide what is effectively a 'second opinion' to that which may or may not have been given by the Member State. Information as to the human rights situation and their management in other countries and regions of the world is also given to the Commission by NGOs which, therefore, enables it to make both relevant and informed decisions. NGOs have also been essential to the effective functioning of the Special Rapporteur mechanism through the provision of funding and the publications of reports.<sup>14</sup> In addition, NGOs can furnish their own reports in connection with the initial or periodic reports that have been submitted by States Parties in compliance with their reporting obligations under the Charter. Clearly, this is very useful as it provides the Rapporteur with alternative information that serves as guidance as to particular areas and questions that may need to be considered or clarified. NGOs can bring communications against State Parties to the Charter on behalf of individuals or a group of claimants.

Nevertheless, before any such contributions can be made, the NGO must have 'observer status' with the Commission. Such status not only enables the NGOs to attend the sessions and make oral contributions during the proceedings of the public sessions but also obliges them to submit a report of their activities to the Commission every two years. Failure to comply with these requirements can result in the withdrawal of observer status. In spite of this, however, the Commission has failed to take any action against NGOs that have not submitted their reports or contributed to the work and functioning of the Commission in any way whatsoever.<sup>15</sup> The availability of financial resources is invariably cited as the reason for this failure.

In accordance with the '*Resolution on the Criteria for the Granting of and for Maintaining Observer Status with the African Commission on Human and Peoples' Rights*' the NGO must have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter and African Charter on Human and Peoples' Rights.<sup>16</sup> Other legal requirements, such as the submission of copies of the organisation's statutes, financial statements, sources of funding, list of members and constituent organs must be satisfied. The application must be submitted at least three months before the next session in order to facilitate processing by the Secretariat. Proof of the legal existence of the organisation and a statement on its activities are also essential before the Commission can consider the application.<sup>17</sup>

What benefits are there for NGOs with observer status before the Commission? Unfortunately, very few. As previously mentioned, NGOs with observer status have access to the Commission during public sessions and can also bring communications to the Commission. Attendance at the Sessions also provides a useful opportunity to meet and liaise with other NGOs. In theory, NGOs with observer status should automatically receive a copy of the Commission's publications, in practice, however, primarily as a result of a lack of resources, but also due to outdated records, this is not the case. NGOs who attend the sessions invariably collect the materials then. NGO participation at the sessions is limited to oral statements and interventions on particular items on the agenda and these are reflected in the report of the session, although this is not a public document. It is up to the Commission to decide what action it will take in response to these contributions as well as any urgent human rights situations that may arise both whilst the session is taking place and during the inter-session period. There is no financial benefit attached to observer status with the Commission either as it cannot provide any financial assistance to NGOs or, indeed, facilitate the attendance of 'needy' NGOs or individual complainants at the sessions.

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<sup>14</sup> Eg Penal Reform International working with the Special Rapporteur on Prisons and Conditions of Detention in Africa.

<sup>15</sup> As of May 2001 over half of all NGOs with observer status before the Commission were yet to submit their initial report.

<sup>16</sup> See 2(a).

<sup>17</sup> A copy of the Resolution is available on request.

In view of the aforementioned, there is clearly not a great deal that NGOs can gain from having observer status with the Commission at present, however several points should be highlighted. Firstly, it does not cost anything to apply, and should the application be successful, the NGO has the opportunity to participate in the work of the Commission should it wish to do so. The Commission is gradually improving, due in part to the improved recognition by Member States of their obligations under the Charter, as well as the increasingly proactive approach of NGOs to human rights in Africa. In the light of these changes, NGO participation would make a valuable contribution to the continued development of the Commission and, ultimately, to the recognition and implementation of human rights in Africa. Surely such a contribution is the least that any NGO hopes to achieve through its work?

As of May 2001, there are 258 NGOs with observer status before the Commission. Over half of these are NGOs based in Africa and approximately a third are NGOs from Commonwealth countries.

It must be noted that it has been suggested that the Commission itself relies too heavily on NGOs, particularly in relation to the partnership for funding, seminars and the Special Rapporteur mechanism resulting in inaction by the Commission on account of the 'lack of support from NGOs'.<sup>18</sup> Indeed, of the 9 senior members of staff of the Secretariat, only two are funded by the OAU, the remaining 7 are funded by various donor agencies. Funding from donor agencies has resulted in the development and expansion of the documentation centre at the Secretariat in Banjul, The Gambia, as well as facilitated the attendance of legal officers at relevant conferences and seminars.<sup>19</sup>

#### National Human Rights Institutions

The Commission also has criteria for the granting of 'affiliate status' to National Human Rights Institutions. Essentially, these are national bodies established by Governments to monitor the promotion and protection of human rights in the country. These institutions are obliged to comply with the Paris Principles<sup>20</sup> and also submit a report to the Commission every two years. There are 7 National Human Rights Institutions with affiliate status before the Commission, namely Algeria, Chad, Malawi, Niger, Rwanda, Senegal and Sierra Leone. The benefits arising out of 'affiliate status' are no different to those arising as a result of 'observer status', effectively amounting to little more than access to the Commission and a right to participate at its public sessions, as well as the right to receive copies of its publications.

#### Conclusion

It must be noted that there are numerous problems that hamper the effective operation of the Secretariat and, consequently, the Commission as a whole. The lack of adequate financial, human and technical resources is arguably the primary difficulty. Obviously, this 'filters down' and affects all other aspects of the Commission's work, not only in relation to fulfilling its mandate to *promote* and *protect* human rights in Africa, but also the day to day running of the Secretariat. The apathy of States Parties towards fulfilling their obligations under the Charter in terms of implementation of the Charter at a national level and the submission of periodic reports. The non-observance of decisions rendered against Member States in Communications as well as general recommendations that have been made by the Commission. The absence of an enforcement mechanism to ensure compliance with the

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<sup>18</sup> See R.Murray 'The African Charter on Human and Peoples' Rights 1987 - 2000: an overview of its progress and problems' African Human Rights Law Journal No 1 - 2001 p1-17;

<sup>19</sup> The establishment of a framework for further co-operation between NGOs, the Secretariat and the Commission was discussed at the 29<sup>th</sup> Ordinary Session that was held in Tripoli, Libya from the 23<sup>rd</sup> April - 7<sup>th</sup> May 2001. A working group was created to look into the issue.

<sup>20</sup> Principles Relating to the Status of National Institutions - UN General Assembly Resolution 48/144 20<sup>th</sup> December 1993.

provisions of the Charter, as well as decisions taken by the Commission.<sup>21</sup> The absence of an adequate communication system to facilitate interaction between the Commission and States Parties, NGOs and individuals interested in the ongoing work of the Commission.

In relation to the Secretariat and Commission itself several facts must be highlighted. Firstly, legal officers are responsible for the supervision and direction of interns at the Commission, thus the quality of the contribution made by the intern, as well as the experience that the intern gains from the placement are dependent upon the legal officer concerned. Furthermore, there is also a need for the provision of adequate funding from the Commission itself to encourage interns to consider an internship with the Commission as there is a great deal that both can gain from the internship. In addition, the fact that the Commissioners work part-time significantly affects the Commission's work, particularly in relation to the quality and volume of work completed at each session. The selection of the Commissioners is the result of nomination and lobbying by the Member States of the OAU and although it is not as independent as it might be, it may also, more importantly, not result in the selection of the best candidate for the position. Once again, this affects the progress of the Commission in the promotion and protection of human rights throughout Africa.

Clearly, the aforementioned are problems facing many organisations, but the importance of the Charter and the Commission in terms of its potential to deal with the problems that the continent faces should not be forgotten.

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<sup>21</sup> There is a Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights. However only three states have ratified the protocol to date and 15 ratifications are necessary for the Protocol to come into effect.