

SOCIO-POLITICAL AND INSTITUTIONAL FRAMEWORK FOR HUMAN RIGHTS PROTECTION IN AFRICA: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

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ABSTRACT

This article discusses the institutional framework for the protection of human rights in Africa. The main focus is on the emergence, development and organisational and structural delineation of the African Commission on Human and Peoples' Rights. The analysis also highlights the historical circumstances of human rights violations on the African continent from the earliest times to the present day during four different phases (pre-colonial, colonial, post-colonial and modern). It then discusses the establishment, selection and replacement of the Commission, as well as the duties and rights of the candidates, their immunity and the possibility of terminating their membership. Particular attention is paid to the independence of Commission members and, where appropriate, their conflicts of interest. Then, the structure of the Commission is explained, defining its functions, as well as those of the Chairman, the Vice-Chairman and the role of the Secretariat. The study finally analyses the working procedures of the Commission and its relations with the African Union. It can be concluded that, due to the lack of democratisation in African countries, there is not enough political will among the ruling elites to respect human rights in these countries.

KEYWORDS

African Commission on Human and People's Rights
African human rights
working procedure

1. Introduction

The African continent, comprising 54 countries, remains a region where gross violations of human and civil rights are still pervasive. The inhumane behaviour of the colonisers towards the indigenous population started in the 17th–19th centuries, when the slave trade reached its peak and resulted in the virtual depopulation of large areas of Africa. Despite banning slave trade, the treatment of Africa's indigenous populations by

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colonisers did not improve. Some of the earliest documented instances of an entire people being subjected to genocide are the Herero and Nama uprisings in German Southwest Africa (present-day Namibia) between 1904 and 1907. During this genocide, 55,000 of the 80,000 Herero and half of the 20,000 Nama died.² The British in South Africa (Zulu Wars, Boer Wars) were similarly brutal towards the African indigenous population. Indeed, the British army was the first in the world to implement concentration camps, forcibly herding the Boer population into a confined and army-guarded area.

Several indigenous uprisings in the Belgian Congo, Kenya, Somalia, Angola, Mozambique and other African countries in the inter-war period were suppressed by brutal force to intimidate and deter indigenous populations from similar protests. This was done to maintain the status quo and prevent further unrest. The situation remained unaltered following the Second World War. Uprisings in Madagascar, Somalia, Kenya and Algeria were suppressed by brute military force, resulting in a significant loss of civilian African lives. As recently as the 1950s, the UN General Assembly addressed the appalling cases of slave labour in the Belgian Congo, a colony of a full member of the organisation.³ At the UN, Portugal purposefully opposed the decolonisation policy, which resulted in a bloody national liberation war of the peoples of Portuguese colonies (Angola, Mozambique, Portuguese Guinea).

Many African countries (17) achieved political independence in 1960, which has become known as the Year of Africa. In the subsequent years, other former British, French and Belgian colonies gained political emancipation, with Sierra Leone becoming independent in 1961. The following countries attained political independence in the aforementioned period: Tanganyika (now Tanzania) in 1961; Algeria, Rwanda, and Uganda in 1962; Kenya and Zanzibar in 1963; Malawi in 1964; and Mauritius in 1968. In the mid-1970s, five additional African countries gained political independence, following the dissolution of the Portuguese colonial empire, namely Angola, Mozambique, Guinea-Bissau, Cape Verde, and São Tomé and Príncipe. The process of decolonisation continued in the 1980s, Zimbabwe achieving independence in 1980, and in the early 1990s, Namibia gaining its independence in 1990.

The initial political development of the newly independent African countries was characterised by highs of political instability, with a significant number of military and attempted coups. These were often accompanied by the brutal treatment of political opponents and, in some instances, entire ethnic groups. As such, ethnic conflicts and the struggles for political power have become a common occurrence on the African continent. Between January 1956 and December 2001, there were a total of 80 successful military and coup d'états, 108 failed military coup attempts and a further 139 planned and failed coups were prevented by the security forces of individual African countries.⁴ The countries with the highest rates of political instability in Africa were Sudan (32 instances), Ghana (22), Uganda (17), Sierra Leone (16), Benin (15) and Burundi (14), among others.⁵

In addition to the numerous military coups, often characterised by violence, civil wars were also frequently driven by ethnic or separatist tensions. These conflicts often resulted in the murder of civilians, rape of women and children and brutal mutilation of

2 | Gewald, 2000, pp. 167, 209.

3 | Hrbek, 1966, pp. 518–521.

4 | McGowan, 2003, pp. 339–370.

5 | Thomson, 2002, pp. 132–133.

victims. For example, the civil war in Nigeria in the late 1960s resulted in tens of thousands of casualties, the genocide in Rwanda (1994) involved up to 800,000 victims from the Tutsi and moderate Hutu ethnic groups, and there were also civil wars in Sierra Leone and Liberia and the so-called 'wars of the Congo'. The latter is sometimes referred to as Africa's first world war, as it involved nine neighbouring African countries and 25 armed groups.⁶ It is also important to mention the civil war in Sudan (1983–2005), which resulted in over two million deaths and was characterised by significant levels of violence.⁷

The 21st century has thus seen a proliferation of military and civil conflicts across numerous African countries, characterised by a pervasive culture of violence against innocent populations. The countries in West and Central Africa, including Burundi, Burkina Faso, Sudan, Gabon, Mali, Niger, Chad, Guinea, Guinea-Bissau and the Central African Republic, have been particularly prone to prolonged instability. A further civil war in Ethiopia between the central government and the Tigray province has been recently concluded, with the neighbouring country of Eritrea joining the conflict (the official Ethiopian government is reported to have invited Eritrea to assist in suppressing the Tigray rebellion).⁸ These conflicts have resulted in, and continue to result in, considerable loss of human life, as well as violence against the civilian population, including numerous cases of rape, torture and murder of women and children. Additionally, the political and civil rights of the African population have been suppressed, while entire ethnic groups and peoples have been forcibly displaced and compelled to flee to neighbouring areas or countries.

This concise historical overview explains the prolonged and tragic experiences of the African population, not only during the colonial era and the struggle for political independence but also in the period following the political independence of African countries up to the present day. From this perspective, the protection of human and civil rights for African populations may appear as an entirely futile endeavour. However, the adoption of the African Charter on Human and Peoples' Rights (henceforth, the Charter) by the Organisation of African Unity in 1981 and the subsequent establishment of the African Commission on Human and Peoples' Rights (henceforth, the Commission) marked a pivotal turning point in the pursuit of their protection.

The Charter, which defines a substantial number of socio-economic, civil and human rights, came into force in 1986 and was followed in the subsequent year by the establishment of the Commission. As of 2016, 53 of the 54 member states of the African Union had ratified the Charter. The African Commission on Human and Peoples' Rights, which is officially based in The Gambia, oversees compliance with the Charter. The Commission is one of the many organs of the African Union, which was created by the transformation of the Organisation of African Unity in 2002. The Commission's work is complemented by the existence of the African Court on Human and Peoples' Rights, which began its work in 2004 under a 1998 protocol.

The following chapter, which primarily concerns the institutional framework for human rights protection in Africa through the establishment and operation of the African Commission on Human and People's Rights (ACHPR), is divided into two main subchapters. The first addresses the path to the establishment of the Commission and

6 | Nugent, 2004, pp. 460–464.

7 | For details, see LeRiche and Matthew, 2012.

8 | Nicholls, 2023.

the second deals with the legal background, scope of competence and procedure of the Commission. The remainder of this article will also focus on other issues related to the composition of the Commission or its basic agenda.

A large number of Euro-American authors, but also African ones, very often former members of the Commission or African lawyers (e.g. Fatsah Ouguergouz, U. Oji Umozurike, Vincent O. Orlu Nmehielle), have dealt with the issues of the Charter and the Commission.⁹ In particular, the Commission's official websites and various databases that focus on the analysis of complaints and cases before the Commission and the African Court of Human Rights are of significant utility. One such database is the African Human Rights Case Law Analyser,¹⁰ which is a freely accessible compilation of all decisions based on African supranational human rights mechanisms. It offers the most comprehensive access to African human rights law and the adopted relevant case law. Rather than merely offering a list of decisions and instruments, it presents them as interacting and interconnected texts, thereby facilitating research and enhancing comprehension of the complex textual and jurisprudential interactions within the African human rights system.¹¹

Another noteworthy database is the website Data for Governance Alliance – African Voices for African Policy,¹² which is hosted by one of five partner organisations, namely 'Laws.Africa'. This organisation's objective is to digitise legislation and policy and promote free access to African legislation from across the continent. 'Laws.Africa' also aims to provide all users with free access to existing African legislation and judicial decisions, including those of the Commission and the African Court on Human and Peoples' Rights. However, additional information on African human rights compliance can be found in other databases, such as International Amnesty, Freedom House, V-Dem Democracy Indices, Polity IV and the Africa-only Ibrahim Index of African Governance.

2. The road to the African Charter on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights

As previously stated, violations of human and peoples' rights on the African continent can be traced from the earliest times to the present day. If we were to attempt a categorisation of the historical periods in question, the main milestones are the period preceding European colonisation and the one following the attainment of political independence. In

9 | See Section Literature.

10 | African Human Rights Case Law Analyser [Online]. Available at: <https://caselaw.ihrda.org> (Accessed: 22 October 2024).

11 | As of 1 September 2024, the database comprises 863 cases and 1,159 documents. The largest number of cases are linked to human rights violations in Nigeria (117 documents), followed by Tanzania (111 cases), Togo (38), Mali (37) and Côte d'Ivoire (35). Only a handful of cases were linked to Namibia, Madagascar, Congo, Lesotho, and Swaziland. Notably, no documents addressed the Central African Republic and South Sudan, where human rights violations are prevalent.

12 | Data for Governance Alliance [Online]. Available at: <https://dataforgovernance.africa> (Accessed: 22 October 2024).

light of the characteristics of African post-colonial states, which have been shaped by the political culture of colonisers, it is possible to distinguish between two distinct phases in the post-political independence era: up to 1990 and after 1990. The latter period has been characterised by the advent of democracy and the near-total decline of single/one-party states across the continent. The aforementioned temporal milestones permit the division of this extensive period into the pre-colonial, colonial, post-colonial and modern periods of African societal functioning.

Setting precise temporal markers for these periods (with the exception of 1990) represents a significant challenge, primarily due to the fact that African regions were subjected to colonial rule over several centuries. The term 'Scramble for Africa' is used to describe the process of European colonialism in Africa, which is often thought to have begun in the 1880s and ended at the end of this century, but in fact extended into the 1920s, with the final control and consolidation of Portuguese colonial territories in Africa.¹³ Additionally, the political independence of African states occurred between the 1950s and the 1990s, such as Libya in 1951, Morocco and Sudan in 1956, Ghana in 1957, Namibia in 1990, and Eritrea in 1993. However, South Sudan achieved political independence in 2011.¹⁴

The paucity of documentary evidence of African history, which has largely been transmitted orally from generation to generation, renders it challenging to document the suppression of human and peoples' rights in the pre-colonial period. Some African historians posit that pre-colonial Africa was structured according to a hierarchical caste system, but unified by a common set of mythical beliefs. The first to elaborate on the concept of human rights in the pre-colonial period is I. Nguema, who identified four basic groups: gregarious society, familial society, hierarchical society and the society en route to statehood.¹⁵ However, there are also other concepts of the division of African pre-colonial society according to the nature of human rights in the literature.¹⁶

It is important to note that pre-colonial Africa was comprised of a diverse array of peasant agricultural, pastoral and fishing communities shaped by a multitude of environmental, topographical, climatic, vegetative and other prevailing factors. These conditions exerted varying influences on lifestyles even within the same ethnic groups. The practice of organising African societies into kinship groups undoubtedly influenced their specific behaviours with respect to human rights and the establishment of norms.¹⁷

Umozurike posited that pre-colonial Africa can be divided into two broad categories of societies. The first category comprises societies with advanced systems of government, exemplified by African kingdoms such as Yoruba, Benin, Ashanti, Monomotapa, the Zulu, Swazi and Lesotho. In these societies, executive, legislative and judicial power was typically concentrated in the hands of individual rulers. The second category encompasses the majority of Africa, which was comprised of small communities headed by chiefs, elders and other traditional leaders.¹⁸

Members of both such societies were typically afforded the full range of human rights, including the right to life and property. These rights were safeguarded by the kings

13 | For example, see Chabal et al., 2002.

14 | Compare Nugent, 2004; Meredith, 2005; LeRiche and Matthew, 2012.

15 | Nguema, 1990, pp. 261–277.

16 | For example, Busia, 1992, pp. 29–48.

17 | Closed clusters were formed based on extended family principles.

18 | Umozurike, 1997, p. 14.

or local tribal chiefs of both basic social groups. In contrast, the term 'outsiders' usually referred to members of different tribes or ethnic groups. This highlights the significant distinction between the universal concept of human rights in pre-colonial and modern times. It is also important to acknowledge that slave labour, typically involving captives from inter-tribal conflicts, was prevalent in pre-colonial Africa. Additionally, primitive customs such as human sacrifice during natural disasters to appease deities or ensure a bountiful harvest, the killing of newly born twins (mothers were expelled) and the persecution of individuals with albinism only ceased with the advent of colonial rule.

This relatively idyllic period was replaced by colonial expansion and the conquest of Africa by both Europeans and Arabs, which resulted in the direct involvement of these groups in the slave trade. It also led to the most egregious violations of human rights and freedoms on the African continent. As a result of the slave trade, young men, women and children became a scarce and valuable commodity. It is estimated that during the long period of slave trade, up to 80 million people from the African continent were lost,¹⁹ with some estimates suggesting a figure as high as 70% of those transported from the African interior to the coast and then to the Americas did not survive the journey.²⁰

The colonial conquests on the African continent, largely motivated by the pursuit of a new maritime route to India circumventing the African continent, precipitated a new era of severe human rights violations and the curtailment of freedoms on the African continent. The inhumane slave trade, which was initially tacitly endorsed by the Catholic Church, subsequently came under mounting pressure from European public opinion. In response, the world's dominant maritime power at the time, the Great Britain, initiated the persecution of slave ships in 1833. France did not join the ban on slavery until 1848. The first multilateral treaty, the Treaty of Berlin of 1885, which primarily served to divide the power interests of European countries on the African continent, was the first international treaty to declare slave trade illegal. However, the slave trade did not cease immediately. Indeed, Article VI of the treaty promised the indigenous peoples a limited protection of human rights, including freedom of religion, by the colonial authorities.²¹

As could be expected, the reality diverged significantly from the written promises of the colonial powers. This included the complex ideology of exporting the benefits of civilisation to the underdeveloped African population, which became a prominent political mantra for European political elites throughout the 19th century and beyond. In French, Portuguese and Belgian colonies, the concept of direct rule (the complete implementation of political and administrative administration in accordance with the 'mother' country) permitted selected individuals to acquire full citizenship under specific conditions (completion of comprehensive French or Portuguese education, completion of military service, monogamous marriage, payment of taxes, permanent residence, employment etc.). However, full political rights and access to public office remained inaccessible. A similar situation prevailed in German, Spanish and Italian colonies.²²

In contrast to the approach taken by the British in their colonies, referred to as indirect rule, the British accepted the administration of local African chiefs subject to the control of colonial officials. This approach also involved the non-interference of the

19 | See, for example, Davidson, 1961.

20 | Curtin, 1964.

21 | Umozurike, 1997, p. 20.

22 | See, for example, Klíma, 2012.

British in the internal affairs of African communities, including the application of traditional customary law, the acceptance of local judicial systems, traditional ways of life, polygamy, and other practices. However, non-interference was only maintained unless it directly threatened British colonial interests.²³

The primary objective of European colonisers, whether using direct or indirect rule, was to maximise the profits derived from the exploitation of human and material resources. The colonial legislation enacted by French, Belgian, Portuguese and other European powers permitted the utilisation of so-called forced labour in the public interest, which was used to increase the wealth of European settlers and facilitate the exportation of goods from the colonies to Europe.

The principles of freedom of speech, assembly, association and the right to self-determination became a source of contention with the colonial power when they were perceived as a potential threat to the colonial system. A considerable number of prominent African intellectuals and politicians were incarcerated (e.g. Kwame Nkrumah of Ghana, Jomo Kenyatta of Kenya, Nelson Mandela in South Africa, Agostinho Neto of Angola). All political activities in the Portuguese, Belgian and Spanish colonies were strictly forbidden and brutally persecuted. A significant number of political activists were imprisoned or forcibly conscripted to labour on plantations or to harvest tropical timber, which was essential for the European industry and shipbuilding sectors. In the 1950s, the international community was horrified by the images of black workers in shackles on Belgian plantations.²⁴

The publicly proclaimed civilising role of European countries in Africa resulted in a select few dozen African students (predominantly from prominent collaborating African families) being permitted to pursue their studies at European universities. The education system in the colonies was severely inadequate and was primarily driven by the Roman Catholic and Protestant Churches through the provision of classes at their mission stations. The primary schools in towns were mainly for white settler children and civil servants, as were hospitals and other public services.

The general political, social and economic oppression of the indigenous African population, which had virtually no human civil and political rights or freedoms, had a detrimental impact on African traditional society, its existing way of life, African culture, religion (forced Christianisation) and led to deepening underdevelopment and reducing the development of African society as a whole.

The establishment of the UN after the Second World War and the subsequent adoption of the UN Charter, which enshrined the right to self-determination for oppressed people,²⁵ provided a crucial catalyst for the emergence of national liberation struggles across regions of the world where people were subject to colonial domination. The surge of national liberation movements in Southeast Asia culminated in the proclamation of independence in the Philippines, India, Pakistan, Burma, Sri Lanka, Indonesia and elsewhere. In the early 1950s, internal armed resistance precipitated the collapse of French colonial rule in Vietnam, Cambodia and Laos (1954).²⁶

23 | See, for example, Curtin, 1964.

24 | Hrbek, 1966, pp. 518–521.

25 | United Nations Charter I, Article 1.2.

26 | Mrázek, 1980.

The success of the national liberation movement and the emergence of independent states in Southeast Asia gradually disseminated to other colonial countries, particularly in the Middle East and North and Sub-Saharan Africa. Furthermore, the direct involvement of African soldiers in World War II, particularly within the French army (e.g. the so-called Senegalese Rifles), was instrumental in the post-war national liberation struggle. In addition to military training, the majority of these soldiers received fundamental education, a range of technical skills, a more extensive international political outlook and were exposed to European political culture.²⁷ The declaration of political independence in a number of African countries was accompanied by considerable optimism regarding the potential for the restoration of African society, traditional culture and religion, the protection of human rights and freedoms and, most importantly, the restoration of African dignity, respect for life and equality. The new political elites have typically attained power through multiparty, free and democratic elections, adopting democratic constitutions based on the constitutional documents of their former 'mother' countries. Notably, former French colonies have even implemented the 1948 Declaration on the Right of Man and the Citizen and the Universal Declaration of Human Rights. At a first glance, the African people, seemed to have entered a new phase of their development.

It soon became evident that this assumption was erroneous. In most independent African countries, the emergent political elites effectively adopted the political culture of the former colonisers' rule. In the name of national unity, they began to gradually eliminate political opposition and ethnic minorities. This resulted in the banning of opposition political organisations, persecution of political opponents and declaration of one-party systems (single/one-party state). The ruling political party not only exercised control over all existing political institutions, including the presidency, government, parliament, and local governments, but also became the dominant force in all other areas of African society, such as the economy, civil society, and culture. The term 'post-colonial African society' has become a widely used concept in African studies literature.²⁸

Corruption also became pervasive in political and economic life. Without the requisite political connections, it was impossible to engage in business or commerce. The financial gains from vast mineral and natural wealth resources did not contribute to national growth, but rather became the spoils of political and economic elites.

The deterioration of the economic situation, scarcity of employment opportunities, intensification of poverty and decline in living standards were a stark contrast from the expectations of the African population in relation to the expulsion of the colonisers and the proclamation of political independence. The political and economic elites displayed a high degree of arrogance and there was virtually no political opposition; this was often based on ethnic, regional and local interests. Furthermore, the police, and even the military, were responsible for brutal repression of all public expressions of protest, including student protests, demonstrations and strikes. There were also restrictions and suppressions of human rights and freedoms, as well as murders and arrests. The persecution of opponents of the regime and representatives of minor ethnic groups (Central African Republic during 1966–1979, Equatorial Guinea during 1969–1979, Idi Amin's Uganda during 1971–1979 etc.), as well as ethnic pogroms in Nigeria, Burundi and Rwanda, resulted in mounting frustration and discontent among the African population.

27 | In detail see e.g. Nugent, 2004, pp. 41–49.

28 | See, for example, Meredith, 2005.

The African population was characterised by a pervasive sense of discontent, which frequently manifested in the highest echelons of the armed forces. Between 1960 and 1989, members of these forces were responsible for either successful or unsuccessful military coups on hundreds of occasions.²⁹ The post-colonial history of the majority of African states is inextricably linked to the rise of military regimes. Some military coups were carried out with minimal civilian casualties and were met with enthusiasm by the domestic population. Conversely, other coups have been accompanied by violent clashes between different military factions, often resulting in prolonged and bloody civil wars and conflicts. The Congo crisis in the early 1960s is a notable example. The 1960s also saw military coups in Nigeria (1967–1970), Angola, Mozambique and Ethiopia, which resulted in hundreds of thousands of civilian casualties, famine and disease.

The UN Security Council, African Union and human rights organisations, which have been unable to prevent these incessant manifestations of brutal repression of human rights and freedoms on the African continent, have merely stood by and issued general verbal condemnations. The world powers at the time, the USA and the Soviet Union (Cuba), have also played roles in the political instability on the African continent (and not only) by providing military and material support to one of the warring parties in a number of civil conflicts (Congo, Nigeria, Mozambique, Angola, Ethiopia) and wars (Ethiopia–Somalia, South Africa–Angola). The Organisation of African Unity (OAU), founded in 1963 and committed to the protection of human rights and freedoms in its founding charter, has also played a negative role in this process. However, its declared policy of 'non-interference in the internal affairs' of its member states did little to prevent national political and military elites from brutally intervening against their own populations.

After the end of the Cold War in the late 1980s and the subsequent collapse of the Soviet Union, a new phase in the protection of human rights and peoples' rights started, which had an impact of the internal political developments on the African continent. The ruling political elites suddenly found themselves without the support of the strong world powers (USSR, USA) or the necessary financial resources to maintain an overstretched state apparatus and, above all, to meet the needs of members of the armed forces and the police. Both the International Monetary Fund and the World Bank linked their large financial loans to the political (also economic) conditions that the ruling political elites would abolish one-party systems in their countries, allow the formation of new political parties and hold free and democratic elections. Their conditions included developing the civil society, restoring the rule of law and ensuring the independence of the judiciary.³⁰

The process of democratisation, which began in the early 1990s in the vast majority of African countries, brought enormous optimism to the African society and renewed the hope for the rule of law and the protection of human rights and freedoms, as well as the rights of peoples and ethnic groups. New democratic constitutions were adopted in several African countries, with articles guaranteeing human rights and freedoms, including the instruments and institutions of the rule of law, as an integral part of the constitution.³¹

Although it initially appeared that the basic principles of the rule of law were fully operational in African countries for the first time in their long history, it has once again

29 | Decalo, 1976.

30 | See, for example, Chazan, 1999.

31 | Bratton and van de Walle, 1997.

become apparent that the tragic past, historical injustices and grievances, unfairness and inequality in African society remained deeply entrenched and have gradually been reflected in the policies of the new political elites. As a result, the 1990s saw rising political instability on the African continent, which gradually translated into civil wars in Sierra Leone, Liberia, the Democratic Republic of Congo, Angola, Mozambique, the genocide in Rwanda and even the African World War in Central Africa, involving nine neighbouring African states.³²

Political instability and the dissatisfaction with the old political elites have also led to dozens of successful and unsuccessful military coups, which have had a continuous negative impact on the politics of African states and the protection of human rights and freedoms (Gambia, Sudan, Mali, Niger, Burkina Faso, Chad, Zimbabwe, Central African Republic, Guinea-Bissau, Sierra Leone, Equatorial Guinea etc.).

The less-than-positive picture of the protection of human rights and freedoms in African countries, not only in the pre-colonial and colonial periods, but also after the attainment of political independence and the beginning of a promising democratisation process in the early 1990s, suggests that there has been little interest on the part of political elites on the African continent in accepting the basic principles of the rule of law, including the protection of the rights and freedoms of their people.

Despite the less than positive picture of the state and respect for human rights on the African continent, there have been attempts to address the situation since the 1960s. In 1961, the International Commission of Jurists held an important conference in Lagos, Africa, attended by 194 lawyers from 32 countries, including 23 African countries. In his opening address, the then Governor-General of Nigeria, Nnamdi Benjamin Azikiwe, who was subsequently the first President of Nigeria, called on African states to adopt the Human Rights Convention as an integral part of their belief in the rule of law. A year later, he articulated his position in his publication, 'The Future of Pan-Africanism'.³³

The 1963 OAU Charter briefly mentions the importance of human rights in its preamble:

Conscious of our responsibility to harness the natural and human resources of our continent... persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among states.

This idea was further developed by the so-called Lusaka Manifesto of 1969, which stated that renewed

faith in the belief that all men are equal and have equal rights to human dignity and respect, regardless of colour, race, religion or sex. We believe that all men have the right and duty to participate as equal members of the society, in their government.³⁴

Other important documents on the protection of the human rights of refugees were defined by the OAU in the late 1960s.

32 | Stys, 2012.

33 | Azikiwe, 1962.

34 | Quoted from Hamalengwa, Flinterman and Dankwa, 1988, pp. 104–110.

During the 1960s and 1970s, a large number of international conferences were held to discuss human rights issues in Africa (Cairo: 1969, Addis Ababa: 1971, Dar-es-Salaam: 1973, Dakar: 1978, Monrovia: 1979). As a result of these, a special committee was set up in Dakar in 1978, whose members summarised the results of the previous meetings and prepared recommendations for the OAU to be presented by the Senegalese President, Leopold Senghor, at the Monrovia session in 1979. Following the discussion of these recommendations, the Monrovia Proposals for the Establishment of an African Commission on Human and Peoples' Rights were drawn up.³⁵

The, a working group chaired by E. K. Wiredu (Ghana) prepared a document which was discussed at the OAU Ministerial Conferences in Dakar (1979) and Banjul (1980, 1981) and adopted as the Banjul Charter on Human and Peoples' Rights at the Nairobi Summit in 1981.³⁶ The Charter, which entered into force on 21 October 1986, included articles establishing the African Commission on Human and Peoples' Rights.

3. The African Commission on Human and Peoples' Rights

As mentioned above, the African Commission on Human and Peoples' Rights was established on the basis of the adopted Charter on Human and Peoples' Rights, Article 30, and inaugurated on 2 November 1987 in Addis Ababa, Ethiopia; its secretariat was located in Banjul, The Gambia. By virtue of the manner in which it was established, it must be regarded as a specialised commission and organ of the OAU/AU.³⁷

As its name suggests, the Commission is concerned not only with the protection of human rights but also with awareness-raising and information activities and the interpretation of the African Charter on Human and Peoples' Rights as the fundamental document guaranteeing human rights on the African continent. The Commission thus acts primarily as a mediation body, offering individuals and non-profit organisations the opportunity to bring to its attention cases of human rights violations by signatories to the African Charter.³⁸

The Commission is composed of 11 members elected by secret ballot by the members of the AU Assembly of Heads of State and Government from among experts nominated by the signatories to the Charter.³⁹ At least four months before each election, the AU Secretary-General invites all Signatory States to nominate candidates.

The AU Secretary-General then draws up an alphabetical list of the persons so nominated and transmit it to the Heads of State and Government at least one month before the election, who then elect them by secret ballot.⁴⁰ The candidates with the highest number of votes are elected to the Commission.⁴¹

35 | Ramcharan, 1992, pp. 307–413.

36 | Umozurike, 1997, p. 26.

37 | Nmehiele, 2001, p. 171.

38 | Chapter 30, African Charter on Human and Peoples' Rights.

39 | Chapters 31 and 33, African Charter on Human and Peoples' Rights.

40 | This election by the OAU/AU Assembly is specific compared to the European or American system, where the members of their human rights commissions are elected by the plenary of the regional organisations. See Ouguergouz, 2003, p. 487.

41 | Chapter 35, African Charter on Human and Peoples' Rights.

The proposed candidates (only one national of the same nationality may be a member of the Commission⁴²) must be eminent African personalities of the highest repute, known for their high moral character, integrity, impartiality and competence in human rights and people's rights issues, with special consideration being given to individuals with legal experience.⁴³

The wording of this article shows the intention of the signatories of the Charter to include among the candidates not only retired and experienced politicians or diplomats but, above all, key experts in human and political rights issues. According to this article, preference should be given to the candidates who have a long track record of working on human and political rights issues in their practical work (e.g. in national, regional or international human rights organisations), in judicial institutions or in academia. At the same time, this article suggests that preference is to be given to members of the Commission with a legal background and a focus on human rights or international law.

Between 1987 and 1995, a total of 16 jurists served on the Commission, including judges of the highest judicial and appellate institutions, advocates-general, lawyers, university professors, lawyers in various ministerial positions or in the state or local service, many of whom held diplomatic posts.⁴⁴

The Assembly of Heads of State and Government also considers the geographical and gender balance when electing Commission members. However, it was not until 1993 that the first woman was elected. Even after that, this requirement was not always met. The situation began to change gradually at the beginning of the 21st century (e.g. the Commission had four female Commissioners starting in 2002); the current Commission (2024) includes six women and five men.

Article 34 of the Charter provides for the right of each State to nominate a maximum of two candidates, only one of whom may be a national.⁴⁵ This means that each country can nominate a candidate from another signatory country. The usual practice in the selection of members is to ensure equal representation, not of individual African states, but of all regions, North, West, East, Central and South, as well as the African islands. This requirement is based on the existence of different legal cultures in different parts of Africa.

Looking at the nationalities of the Commissioners, there were more than 30 countries represented per region, with some countries having double representation during the lifetime of the Commission (e.g. Egypt, Botswana, Zambia, Uganda, The Gambia, Nigeria, Mauritius); it is also not uncommon for some Commissioners to be re-elected for two six-year cycles. Somewhat surprisingly, representatives from Namibia, Morocco, Côte d'Ivoire, Madagascar, Niger, Chad etc. have never sat on the Commission.

The absence of representatives from countries with the worst crimes against humanity, such as Equatorial Guinea, Eritrea, the Central African Republic, Somalia, South Sudan, Guinea-Bissau and a few others, is not surprising. Representatives of smaller African states (Lesotho, Swaziland, Togo, Djibouti, Burundi etc.) have most likely failed in the past to gain the necessary diplomatic support from AU member states.

42 | Chapter 32, African Charter on Human and Peoples' Rights. It is interesting to note that other similar institutions (American Convention, European Convention, European Court of Justice etc.) do not have such restrictions.

43 | Chapter 31, African Charter on Human and Peoples' Rights.

44 | Umozurike, 1997, p. 67.

45 | Chapter 34, African Charter on Human and Peoples' Rights.

The two basic legal traditions in Africa are the common and civil law, which are based on the legal traditions of Africa's colonial authorities. Those countries who were under British rule imbibed the common law tradition, while the others adopted civil law.⁴⁶

The Commission's use of several working languages is also linked to the legal culture, the choice of which was influenced by the colonial history (originally English, French, Arabic, Portuguese and Spanish). The most widely used languages in the Commission are English and French.⁴⁷

Once the final list of candidates has been announced, the individual representatives of the signatory governments discuss among themselves the most suitable candidates and seek support for these candidates among other representatives of African governments. As such, the final election of the members of the Commission can be described as the result of previous complex political negotiations between individual signatory states, often resulting in difficult compromises and agreements.

Article 36 states that the members of the Commission are elected for a term of six years and be eligible for re-election.⁴⁸ In the first term (since 1987), four members retired after two years and the other three members served for four years. The remaining four elected Commissioners served for six years. The division of the elected members of the first Commission into these three groups was immediately decided by lot.⁴⁹ At the end of the two-year, four-year and six-year terms, new members are elected in two-year increments (four members, three members, four members etc.). The aim of this electoral system is to ensure the continuity of the Commission's existence and activities.

Upon election, members take a solemn oath to perform their duties impartially and faithfully and to exercise their functions in a personal capacity, not as representatives of their countries. The members of the Commission must act with complete independence in their dealings with representatives of the various parties to a conflict (states, national institutions, individuals). However, political practice has shown that their independence (especially for former and contemporary politicians) may be called into question because of their political backgrounds.

As the Commission is not full-time, its members may continue to work in their previous occupations. The Charter itself does not specify what professions members of the Commission may pursue or what government or state positions they may hold during their term. In practice, it holding a high-level government position (e.g. minister) could positively influence the Commission's agenda in promoting human rights in a particular African country.

However, the Charter clearly defines the full independence of the Commissioners, including the exercise of their functions independently of the country that nominated them. As noted above, the Commissioners speak for themselves, not for the state that nominated them and negotiated their election to the Commission through diplomatic channels.

46 | However, one needs to note that the notion of personal law is growing to be a major legal tradition in Africa. This class includes customary law or what is generally referred to as native law and customs. Sharia law is seen as personal law, being considered customary law in areas where common or civil law are predominant. There are also Islamic states in Africa, where Sharia is the main or major legal tradition. See, for example, Nmehiele, 2001, p. 174.

47 | Nmehiele, 2001, p. 174.

48 | Chapter 36, African Charter on Human and Peoples' Rights.

49 | Chapter 37, African Charter on Human and Peoples' Rights.

Since its inception, the independence of the Commission has been compromised to some extent by the fact that some of its members have previously held senior political positions at the national level. This political practice, that is, the appointment of retired or active politicians to Commission posts, has often been questioned since, with reference to the political history of leading national governments in suppressing the human and political rights of their country's citizens.

For example, Moleleke D. Mokama (Botswana) and Alexis Gabou (Congo), also served as their respective countries' Attorney General and Minister of the Interior while on the Commission. In the 1990s, Dr. Ali Badawi El-Sheikh was Egypt's ambassador to the Netherlands. Similarly, Mohammed Hatem Ben Salem was Tunisia's ambassador to Senegal. Other members were either presidents of their countries' constitutional courts or members of their supreme courts.

The general view on these retired and active politicians and judges was that such members could hardly act as independent experts in carrying out their functions. Moreover, as Nmehiele pointed out, the demanding nature of their roles in the Commission and their home countries complicates the work of the Commission. It is not uncommon for up to four or five Commissioners to be absent from some of the Commission's meetings.⁵⁰

The participants at the second workshop on the participation of NGOs in the work of the African Commission, held in Tunis in February/March 1992 and organised by the International Commission of Jurists and the Commission, considered that the holding of high state and government positions (Prime Minister, Minister for International Affairs etc.) was contrary to the statute of the Commission.

Indeed, in the context of the Commission's agenda (complaints by individuals or interest groups about the suppression of human rights), situations in which a member of the Commission would be in an open conflict of interest could arise. The Charter does not provide rules for such a potential conflict (e.g. the actual decision to withdraw from a meeting because of an apparent conflict of interest). These and other procedural issues were subsequently addressed in the February 1988 and October 1995 revisions of the Rules of Procedure.

However, the situation did not change significantly in the following years. In response to this common reality, the AU issued a note verbale to member states in April 2005, setting out guidelines for nominating Commissioners.⁵¹ This note suggested that senior civil servants and diplomats be excluded from national nominations. The Commission discussed this note and other proposals to improve the rules of procedure at its 47th Ordinary Session in Banjul (Gambia) in May 2010.⁵²

At this meeting, the Commission members adopted a general amendment to the Rules of Procedure, which provides in Article 7 that the office of a member of the Commission is incompatible with any activity which may impair the independence or impartiality of

50 | Nmehiele, 2001, p. 173.

51 | African Commission on Human and People's Rights [Online]. Available at: <https://web.archive.org/web/20241021210759/www.achpr.au.int/en/commission/overview/> (Accessed: 21 October 2024).

52 | This was the third amendment to the Rules of Procedure. The first Rules of Procedure were adopted by the African Commission on Human and Peoples' Rights during its 2nd ordinary session held in Dakar (Senegal) from February 2 to 13, 1988 and it was revised during its 18th ordinary session held in Praia (Cabo-Verde) from 2 to 11 October 1995. The last fourth amendment to the Rules of the Procedure ACHPR was made on 4 March 2020.

that member or the requirements of the office, such as being a member of a government, a minister or an under-secretary of state, a diplomatic representative, a director of a ministry or one of his subordinates, or a legal adviser to a foreign ministry, or performing any other politically binding function or any activity of such a nature as to impair independence and impartiality.⁵³ In case of incompatibility, the Commission Chairperson informs the African Union Commission Chairperson, who declares the seat vacant.⁵⁴

The election of the members of the first Commission took place on 29 July 1987 at the 23rd ordinary session of the Assembly of Heads of State and Government in Addis Ababa.⁵⁵ Commissioners were elected for each region: North Africa: Ali Mahmoud Abou Hadiyah (Libya) and Badawi Ibrahim El Sheikh (Egypt); Southern Africa: M. D. Mokama (Botswana) and Mubanga-Chipoya C. L. C. (Zambia); Eastern Africa: Ibingira Stuart Grace (Uganda) and Robert Habesh Kisanga (Tanzania); Central Africa: Gabou Alexis (Congo) and Nguema Isaac (Gabon); West Africa: Blondin Beye Alioune (Mali), Youssoupha Ndiaye (Senegal) and Sourahata B. Semega Janneh (The Gambia).⁵⁶

The Commission is headed by a Bureau consisting of a Chairperson and a Vice-Chairperson who exercises the functions provided for in the African Charter and the rules. The Chairperson and the Vice-Chairperson are elected by the members of the Commission from among their number. The election is by secret ballot and only members present vote. A member who receives a simple majority of the votes of the members of the Commission present and voting is elected. In accordance with Article 42, the Commission elects its Chairperson and Vice-Chairperson for a period of two years, renewable once. The Chairman and the Vice-Chairman are members of the Commission.⁵⁷

The Bureau coordinates the activities of the Commission and prepares and approves the Commission's work programme. The Bureau also supervises and evaluates the work of the Secretariat of the Commission. The Bureau is also empowered to decide on urgent matters between meetings of the Commission. However, it is required to present a situation report to the members at the Commission's next meeting.

The Chairperson carries out the functions assigned to him or her by the Charter, the Rules of Procedure and the decisions of the Commission and the Assembly. In the exercise of his or her functions, the Chairperson is under the authority of the Commission.

The Chairperson presides over the meetings of the Commission; submit the assessment report referred to in Rule 13(3) to the competent organs of the African Union Commission, supervises the preparation of the budget by the Secretariat and its adoption by the Commission, presents and defends the budget before the relevant African Union bodies, presents a report to the Assembly and the Commission on the activities carried out during the intersession, performs any other functions that may be conferred upon him or her in the Rules of Procedure or other tasks entrusted to him or her by the Commission or the Assembly and delegates, when necessary, to the Vice-Chairperson or, if

53 | Rule 7.1 of the Rules of Procedure of the African Commission on Human and Peoples' Rights. Banjul, May 12 to 26, 2010 (hereinafter, the Rules of Procedure), p. 8.

54 | Rule 7.3 of the Rules of Procedure, p. 8.

55 | Nmehiele, 2001, p. 171.

56 | OAU DOC AFR/COM/HPR.2 (1), Annex II.

57 | Chapter 42, African Charter on Human and Peoples' Rights.

the Vice-Chairperson to is not available, another Commissioner, the abovementioned powers.⁵⁸

The 2010 Rules of Procedure also clearly define the powers of the Vice-Chair:

If the Chairperson is temporarily unable to perform his or her duties, the Vice-Chairperson shall perform the duties of the Chairperson. The Vice-Chairperson, acting in the capacity of the Chairperson, has the same powers and functions as the Chairperson. The Vice-Chairperson shall perform any other function delegated to him or her by the Commission or the Chairperson of the Commission. If both the Chairperson and the Vice-Chairperson are unable to carry out their duties at the same time, the duties of Chairperson shall be carried out by another Commissioner according to the order of precedence laid down in Rule 6.⁵⁹

If a member of the Bureau of the Commission resigns from his or her position or ceases to be a member of the Commission, the remaining member represent the Bureau until the next session, when the Commission fills the position for the remainder of the term of office.⁶⁰

According to Article 41, the AU Secretary-General appoints a Secretary of the Commission, who provides the staff and services necessary for the effective implementation of the mandate of the Commission.⁶¹

The activities of the Commission are ensured by the Secretariat of the Commission, whose members are selected and appointed by the President. The members of the Commission propose the organisational structure of the Secretariat and place it before the African Union for approval.

The Secretariat of the Commission is composed of the Secretary and the Commission's professional, technical and administrative staff. The Secretary is appointed by the Chairperson of the African Union Commission pursuant to Article 41 of the African Charter after consultation with the Chairperson of the African Commission. The African Union Staff Rules and Regulations govern the Status of the Secretary and the staff.⁶²

The main task of the Secretariat is to provide the necessary conditions for the successful performance of the duties of the members of the Commission and provide administrative, technical and logistical support for the day-to-day running of the Commission. The members of the Secretariat are responsible to the President of the Commission for their activities.

In addition to ensuring day-to-day operations, the members of the Secretariat, in consultation with the Chair, prepare a draft agenda for each session; the Commission's strategic plan, annual work plan and annual budget; guidelines on missions for adoption by the Commission; present a written report to the Commission at the beginning of each session on the activities of the Secretariat since the preceding session; implement the decisions entrusted to him or her by the Commission or the Bureau; make available to the general public documents which are not confidential, including States Reports, by ensuring that they are posted on the website of the Commission; ensure the maintenance

58 | Rule 14 of the Rules of Procedure, 2010, p. 9.

59 | Rule 15 of the Rules of Procedure, 2010, p. 10.

60 | Rule 16 of the Rules of Procedure, 2010, p. 10.

61 | Chapter 14, African Charter on Human and Peoples' Rights.

62 | Rule 17 of the Rules of Procedure, 2010, p. 10.

and regular updating of the website of the Commission; and assess the performance of the staff of the Commission.⁶³

The Secretariat has currently 13 staff members who provide administrative, legal (Senior Legal Officer, Legal Officer), archival, records management and technical services. The Secretariat also includes a Senior Administration and Human Resources Officer and is headed by the Acting Secretary of the Commission, who provides a full range of services to the President of the Commission. AU bears the cost of staff and services, including other support staff.

The Commission meets twice a year in ordinary session, which may be held at the headquarters of the Commission or, at its invitation, on the territory of another State Signatory. The host country bears all additional financial costs (e.g. travel expenses of members, accommodation) associated with this meeting on the basis of a contract concluded with the Commission.

With the approval of the Chairperson of the African Union Commission, meetings of the Commission may also be held at the headquarters of the African Union. The sharing of the costs for such a meeting is agreed with the Commission of the AU.

The length of each session varies from 10 to 15 days, depending on the needs and financial resources. The date of the ordinary session is fixed by the Commission on a proposal from the Chairperson of the Commission after consultation with the Secretary of the AU. The Secretary of the African Commission notifies the members of the date and venue of the ordinary session at least 60 days before the session.

The Commission may hold concurrent extraordinary sessions, which is convened by the Secretary of the Commission at the request of the Chairperson of the ACHPR Commission or a majority of the members of the Commission. An extraordinary meeting should be sent to members as soon as possible before the meeting.

In addition to attending regular and special sessions of the Commission and actively participating in the consideration of the Commission's agenda, members are expected to participate actively in raising the profile of the Commission's work between sessions and to speak out in defence of human rights and peoples' rights at various human rights conferences, seminars, in discussions in professional journals and the public and private media (television, radio, daily press etc.).

During their six-year mandate, the members are expected to be active instruments for the promotion of the human and political rights of the African population and to direct all their public activities towards the fulfilment of this primary objective.

The Commission is governed by its own rules of procedure and has a quorum when seven members are present. Decisions of the Commission are taken by a simple majority (in theory, the Commission is quorate when seven members are present and a majority of four votes can take a binding decision). In the event of a tied vote, the Chairperson has the casting vote.

The Secretary-General of the AU may attend meetings without the right to vote but may be invited to speak by the Chairperson of the Commission. His remuneration and allowances are part of AU's regular budget.⁶⁴

In performing their duties and missions, the members of the Commission enjoy the diplomatic privileges and immunities provided for in the General Convention on the

63 | Rule 18f of the Rules of Procedure, 2010, p. 11.

64 | Chapter 44, African Charter on Human and Peoples' Rights.

Privileges and Immunities of the AU.⁶⁵ Complete immunity applies not only to activities carried out in the course of a specific mission in accordance with the Commission's agenda but also to Commissioners travelling to and from meetings.

The members of the Commission, similar to diplomatic representatives, share immune from detention, arrest, investigation or interrogation, search, seizure or confiscation of their personal effects and are issued diplomatic passports by the AU for the exercise of their functions.⁶⁶ In general, these privileges are not for personal gain, but in the interest of the organisation they represent.

For these reasons, the Commissioners should use these documents and privileges only in the performance of their duties under the Commission's agenda. In the exercise of their functions and duties, Commissioners are not agents and cannot authorise any person outside the Commission to invoke their immunity or to carry out on-the-spot investigations on their personal behalf.

It is not only the members of the Commission who enjoy immunity, but also the Commission itself. In the 1989 agreement between the OAU/AU and the host country (The Gambia), the host country undertakes to fully respect the immunity of its members and the Commission as a whole and the inviolability of the Commission's headquarters and all its other facilities.

In accordance with Article 3 of this treaty, the archives of the Commission and, in general, all documents belonging to and in the possession of the Commission, wherever they may be, are inviolable. This immunity also applies to all publications and moving pictures, films and sound recordings.⁶⁷

In addition to the orderly termination of membership of the Commission at the end of a six-year term, the Charter provides for certain other circumstances which may lead to the termination of membership of the Commission, such as the resignation or removal of a member of the Commission. These matters are specified in Article 39 of the Charter, which deals with the early termination of the term of office of a member of the Commission.

There are several possibilities. A member of the Commission may resign at any time (often because of health problems, age or incompatibilities arising from taking up a public or government position). A Commissioner who wishes to resign of his or her own accord must do so in writing to the President of the Commission, with effect three months after the date of the letter of resignation.

Alternatively, in the event of the death or resignation of a Commissioner, the President of the Commission immediately informs the Secretary-General of the AU, who declares the post vacant from the date of death or the date on which the resignation takes effect.⁶⁸ Every seat declared vacant in conformity with the present Rules is filled in accordance with paragraph 3 of Article 39 of the African Charter.

If, in the opinion of the majority of the other Commission members, a member of the Commission has ceased to perform his or her duties for any reason other than temporary absence, the Chairperson of the Commission informs the Secretary-General of the AU, who declares the position vacant.

65 | Chapter 43, African Charter on Human and Peoples' Rights.

66 | Článek VIII of the General Convention on the Privileges and Immunities of the AU.

67 | Umozurike, 1997, p. 69.

68 | Rule 8.2 of the Rules of Procedure, 2010, p. 8.

In each of the above cases, the Assembly of Heads of State and Government replaces the member whose seat has become vacant for the remainder of his or her term of office, which is not less than six months. Each member of the Commission remains in office until his or her successor takes up his or her duties.⁶⁹

The Charter does not define the conditions for the removal of a member of the Commission on the grounds of insufficient or poor professional qualifications for the performance of duties, and the member can only be removed if he/she himself/herself establishes the circumstances set out in Article 39 (death, voluntary resignation, unexcused prolonged absence from meetings or failure to perform other tasks assigned to the Commission).

The Chairperson of the Commission, in cooperation with all members, establishes an internal procedure to ensure that all members perform their functions and duties in accordance with the Charter in a responsible manner and with the required quality.

The independence of a member of the Commission is also ensured by the fact that, in the performance of his or her essential duties, he or she cannot be removed from office by the Chairperson of the Commission or its members, by the AU Assembly of Heads of State and Government or by the national government that nominated him or her. Furthermore, the Assembly has no means of evaluating the performance of the members of the Commission or the Commission.

The main tasks and functions of the Commission, which may be further expanded by the Assembly of Heads of State and Government of the African Union, are primarily the protection of human and peoples' rights, the promotion of human and peoples' rights and the interpretation of the African Charter on Human and Peoples' Rights (Article 45 of the Charter). This mandate elaborates on Article 45 of the Charter, under which the Commission adopted its Rules of Procedure in 1988, revised them in 1995 and 2010 to fill in gaps, remove bottlenecks and correct errors.⁷⁰

At the beginning of each six-year cycle of the Commission (1987–1992, 1992–1997, 1997–2002 etc.), it has become customary for its members to adopt a six-year action programme to define the main priorities for the period in question.

While the first Commission had perhaps the most difficult task of implementing the basic articles of the Charter and launching the Commission's activities, opening the agenda, establishing the rules of procedure, making the OAU member states aware that a new institution had been created etc., the members elected in 1992 set priorities such as the creation of a documentation and information centre; the organisation of seminars, workshops, training courses; the publication of the Commission's annual reports; and the publication of the Review Bulletin, various promotional materials and brochures.

In October 1991, the first issue of the Review of the African Charter on Human and Peoples' Rights was published, all issues of which are available online to interested readers, as is the African Human Rights Law Journal.

At the same time, the Commission monitors human rights through annual reports on the current situation in territories prepared by the AU member states and submitted to the Commission. The Commission also sets up working groups and sends observer missions to assess the current situation of human rights violations in specific African countries and seeks to raise awareness of human rights in its work (promotion missions).

69 | Chapter 40, African Charter on Human and Peoples' Rights.

70 | Dankwa, 1990, pp. 29–34.

Cases that cannot be resolved out of court (by negotiation, resolution, elimination of the problem etc.) are referred by the Commission to the African Court on Human and Peoples' Rights.

If we take a closer look at the main functions and tasks of the Commission, the interpretation or interpretation of the provisions of the African Charter at the request of a State Party (signatory to the Charter), an organ of the AU (formerly the OAU), or any other institution recognised by that international organisation is probably one of the most important functions and tasks of the Commission.

Another important function of the Commission is promoting human and peoples' rights. The Commission collects documents, undertakes studies and research on African human and peoples' rights issues, organises seminars, symposia and conferences, disseminates information, supports national and local institutions dealing with human and peoples' rights, issues opinions or recommendations to governments where appropriate, and works closely with national and international institutions dealing with human rights issues.

In the decades since its establishment, the Commission has organised dozens of international conferences and seminars in cooperation with UNESCO, the International Commission of Jurists and the Raoul Wallenberg Institute for Human Rights and Humanitarian Law. Its representatives took part in the Second World Conference on Human Rights in Vienna in 1993, among others.

Otherwise, the Commission works closely with a wide range of African human rights NGOs that collect complaints and grievances about human rights violations in their countries and help individuals successfully bring these complaints and grievances to the Commission. These human rights NGOs are in close contact with the African people, being thus crucial to the Commission's advocacy work.

The Commission grants observer status to human rights NGOs, allowing their representatives to attend the public meetings of the Commission. Amnesty International, with which the Commission works closely, plays a major role in the ongoing documentation of human rights violations in African countries.

According to one of the members of the Commission, later its chairman, Umozurike, to spread awareness of human rights, in the 1990s, the Commissioners divided up the various member countries (including those that had not ratified the Charter) and, within the limits of their financial resources, undertook promotional visits to African countries between the regular and special sessions of the Commission, explained the importance, objectives and functions of the Commission in various meetings with key government and state officials, as well as made presentations on the work of the Commission at public seminars and conferences. However, this project has long been hampered by a lack of funding and the large number of countries on the African continent.⁷¹

Commission members have urged national governments to make human rights and freedoms an integral part of the school curriculum and focus on working closely with local human rights NGOs, which are in closer contact with their citizens and are much more credible institutions than some government agencies (e.g. the police).

The Commission also constantly appeals to African governments, which control the public media (radio, television, newspapers) in their countries, to use these media to raise awareness of human rights and civil liberties. Obviously, it is much easier to obtain

support for these activities in liberal democratic or more or less democratic African countries than in non-democratic ones with autocratic or outright dictatorial governments where human rights violations are commonplace.

The dissemination of information about the Charter and the Commission's activities in non-democratic countries is thus limited because the political elites of these countries are not interested in their citizens complaining about their human rights violations (arbitrary arrests, imprisonment, torture, unfair trials, restrictions on political freedoms, freedom of speech, assembly, association etc.).

However, it is important for the members of the Commission to maintain the pressure on these non-democratic countries in accordance with their international obligations and attempt to change the political climate step by step.

Some authors have criticised the work of the Commission, pointing out that promotional activities greatly dominate the work of their Commissioners and the Commission itself.⁷² Unlike them, we believe that this activity is very important, perhaps more important than the adoption of unenforceable recommendations and verbal statements about the non-observance of human rights in some signatory countries when the AU intervenes, which are often not even made public.

The lack of the knowledge and awareness of human rights among African populations is often the reason why African governments can be lax in implementing and upholding human rights in their countries. The importance of the Commission's promotional role is well highlighted by Fr. Dankwa.⁷³

The agenda for evaluating the protection of human rights in individual states is more complicated. The biennial reports of the signatory states on the status of human rights and progress in this field, which were submitted after the 5th session of the Commission, form the basis for the evaluation of the human rights record of individual states.

The members of the Commission thus responded to an earlier request and preliminary approval by the Assembly of Heads of Government of the OAU. As a result of this meeting, a document setting out how the annual report should look and what it should contain was published.⁷⁴

According to the methodology, the annual reports should contain complete information on the human rights situation in each country during the previous two years, the constitutional enshrinement of human rights and the judicial decisions affecting human rights. The reports should also include information on the activities of state institutions to promote respect for human rights, a list of measures taken to ensure respect for human rights or the identification of problems in this area or the implementation of individual articles of the Charter.

In return, the Commission offers assistance and advice in dealing with these issues. It even organised several workshops and seminars in Banjul and Harare (1993), Tunis (1994) etc., at which the participants, representatives of the signatory countries of the Charter, explained the procedure for the preparation of annual reports.⁷⁵

The annual reports are intended not only to provide an informative overview of the human rights situation in individual African countries over a given period but also

72 | Bello, 1988.

73 | Dankwa, 2003, pp. 335–352.

74 | AHG/1659(XXV), Annex XII, AFR/COM/HPR.5 (IV).

75 | Umozurike, 1997, p. 72.

become the basic working documents for the Commission's negotiations with the signatory countries. Based the information contained in the annual reports, the members of the Commission believed that it would be possible to discuss their human rights problems with the representatives of the member countries to suggest possible solutions and to offer assistance.

The annual reports were intended to become a basis for constructive dialogue between the Commission and the political representatives of the African states, with the common aim of implementing the Charter and contributing to the improvement of the human rights situation.

However, the exercise of the Commission's monitoring function in this area has been greatly hampered by the fact that signatory States have very often failed to submit reports and continue to do so despite the Commission's requests. In April 1995, only 16 African countries had submitted annual reports (Libya, Rwanda, Tunisia, Egypt, Tanzania, Gambia, Senegal, Zimbabwe, Togo, Nigeria, Benin, Ghana, Cape Verde, Mozambique, Mauritius and the Seychelles).⁷⁶ Perhaps unsurprisingly, the annual reports for this period (the 9th to the 17th sessions of the Commission) were mainly presented by representatives of the countries represented on the Commission during this period.

Although the guidelines specifying the content and formalities of the annual reports became part of the annexes to the Charter, no sanctions or mechanisms were established to enforce the annual report against signatory countries.⁷⁷ In particular, African states with a history of flagrant human rights violations have not complied with this requirement and have not submitted reports. The Commission's subsequent practice of tolerating summary reports over a longer period has become a kind of concession to this obligation. In fact, reports from signatory countries covering a 10-year period are no exception.

The evaluation process has several stages and results in a recommendation from the Commission, which a given State should implement in the following period. Unfortunately, the Commission has no powers to enforce and monitor this implementation, so the concrete impact of these recommendations is very problematic and generally questionable.⁷⁸

The Commission members are not mere verbal critics of human rights but offer a series of recommendations to raise awareness of human rights in individual African countries. In particular, they attach great importance to the inclusion of the protection of human rights in the curricula of primary, secondary and higher education.

The Commission also recommends the incorporation of the articles of the Charter into the basic constitutional documents of each African country and encourages nation states to establish human rights commissions at the national, regional and local levels to effectively ensure human rights awareness among broad segments of the African population.

Since 21 October has been designated as African Human Rights Day, the members of the Commission call upon states and their political representatives, as well as existing human rights organisations, to pay special attention to human rights issues in the public media, schools and government institutions on that day.⁷⁹

76 | Umozurike, 1997, p. 73.

77 | Viljoe, 2000, pp. 110–118.

78 | For details, see Murray and Long, 2015.

79 | The Charter entered into force on 21 October 1986.

Probably the most important function and work of the Commission at its ordinary and extraordinary sessions is the evaluation of complaints (so-called communications) from states or individuals, which is regulated by Articles 47 et seq. of the Charter. In the case of complaints from member states and individuals, all national remedies must already have been exhausted, but while the Commission examines all complaints from member states, complaints from individuals are only considered if a majority of the members of the Commission agree.

If the Commission is unable to resolve a dispute amicably, it issues a report stating whether the right in question has been infringed. It can also recommend certain measures to be taken in the event of an infringement and propose that the state pays appropriate compensation. However, this decision is not legally enforceable and, if the state refuses, the situation can only be reported to the Assembly of Heads of State and Government of the African Union.

According to the statistics on ACHPR decisions and recommendations, the most typical cases are related to fair trial (47.5%), equality before the law (28.85%), arbitrary arrest and detention (27.4%), cruel and degrading treatment (26.07%), freedom from discrimination (24.91%), right to property (22.01%), compensation and reparation (21.08%), torture and ill-treatment (21.08%), right to life (20.74%), personal liberty (20.39%) etc. Most cases fall into one of the above categories.⁸⁰

Articles 46–59 of the Charter set out the working procedures of the Commission. Under Article 46, the Commission may use any appropriate method of investigation, including interviewing the AU Secretary-General or any other person who may provide information. Article 47 sets out the procedure for a written complaint by a signatory state of a violation of the Charter by another member state, to be addressed to the AU Secretary-General and the Chairperson of the Commission.⁸¹

Within three months of the receipt of the communication, the accused State needs to provide a written explanation or statement clarifying the matter. It should include as much relevant information as possible concerning the law and procedural rules applied and applicable and the remedies already granted or available. If the state fails to do so within three months of the lodging of the complaint, or if the matter is not resolved to the satisfaction of both states concerned through bilateral negotiations or other peaceful means, the complaining state can refer the matter to the Commission through the Chairman and informs the other states concerned.⁸²

However, under Article 49, if a state considers that another state has violated the provisions of the Charter, it may, notwithstanding the provisions of Article 47, refer the matter directly to the Commission by sending a communication to the Chairperson, the Secretary-General of the AU and the state concerned. The Commission does not deal with a matter referred to it until it is satisfied that all local remedies have been exhausted, unless it is clear that the process of obtaining such remedies would be unduly protracted.⁸³

80 | African Human Rights Case Law Analyser [Online]. Available at: <https://caselaw.ihrda.org> (Accessed: 22 October 2024).

81 | Chapter 47, African Charter on Human and Peoples' Rights.

82 | Chapter 48, African Charter on Human and Peoples' Rights.

83 | Chapter 50, African Charter on Human and Peoples' Rights.

Articles 51 and 52 set out the procedure to be followed by the Commission, which may request the concerned state to provide it with all relevant information, which may be represented by the concerned states and may make written or oral submissions during the examination of the case.⁸⁴

After obtaining from the concerned states and from other sources all the information it considers relevant and necessary, and after seeking by all appropriate means an amicable solution based on respect for human and peoples' rights, the Commission, within a reasonable time after the notification referred to in Article 48, prepares a report to the states concerned and transmit it to the Assembly of Heads of State or Government. In submitting its report, the Commission may make recommendations to the Assembly of Heads of State or Government as it deems useful.⁸⁵

The agenda and the order of business of an ordinary session of the Commission are normally prepared by the Secretary of the Commission after consultation with the Bureau of the Commission, in particular based on requests and complaints from the member states. Items proposed at the previous session are also included in the proposal, and the Chairperson, members of the Commission, States Parties, AU organs, NHRIs, NGOs and any UN specialised agency may propose additional items to be included on the agenda.

However, the Bureau of the Commission has the final say in deciding which items will ultimately be placed on the provisional agenda. The members of the Commission decide by majority vote which items will be considered by the Commission at the relevant session.⁸⁶

Article 56 defines the nature and content of communications from member states and other institutions. Communications relating to human and peoples' rights are considered if they conform with the AU Charter or the African Charter on Human and Peoples' Rights; are not written in defamatory or insulting language directed against the State and its institutions or the AU, are not based solely on reports disseminated through the mass media, are submitted after local remedies have been exhausted, are submitted within a reasonable time after the exhaustion of local remedies or after the date on which local remedies were exhausted, are submitted within a reasonable time after the exhaustion of local remedies or the date on which the Commission took up the matter, and do not deal with cases that have been resolved by the States concerned in accordance with the principles of the Charter of the United Nations or the Charter of the AU or the provisions of the African Charter on Human and Peoples' Rights.⁸⁷

For extraordinary meetings, only the items listed in the invitation issued by the President are included on the provisional agenda. The provisional agenda is circulated to the members of the Commission at least 60 days before the meeting and to other interested parties at least 45 days before the meeting. However, certain items on the provisional agenda and related documents may be circulated 30 days before the meeting.

According to Article 58 of the Charter, if, after consideration by the Commission, one or more communications appear to relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the

84 | Chapters 51 and 52, African Charter on Human and Peoples' Rights.

85 | Chapter 53, African Charter on Human and Peoples' Rights.

86 | Chapter 55, African Charter on Human and Peoples' Rights.

87 | Chapter 56, African Charter on Human and Peoples' Rights.

Commission brings these special cases to the attention of the Assembly of Heads of State or Government.

The Assembly of Heads of State or Government may then request the Commission to examine such cases in depth and prepare a substantive report, accompanied by its findings and recommendations. An exceptional case duly brought to the attention of the Commission is submitted to the President of the Assembly of Heads of State or Government, who may request an in-depth study.⁸⁸

Any action taken pursuant to the provisions of this Chapter remains confidential unless the Assembly of Heads of State or Government decides otherwise. However, the report is made public by the President of the Commission following a decision by the Assembly of Heads of State or Government. The report on the activities of the Commission is made public by the President of the Commission after consideration by the Assembly of Heads of State or Government.⁸⁹

Each year, the Commission reports to the Ordinary Session of the AU Assembly on its activities during and between sessions.⁹⁰ The report submitted by the Chairperson of the Commission or his/her representative is considered by the Executive Council on behalf of the AU Assembly.

The Commission may not publish the report until the Executive Council and the Assembly have adopted it. The Executive Council has withdrawn its authority to publish the Commission's last two activity reports. Prior to the adoption of the Activity Report by the AU Assembly, the Commission normally issues a communiqué immediately after the meeting.

Articles 60 to 63 of the African Charter on Human and Peoples' Rights also set out the basic premises, documents and instruments on which the Commission bases its work and takes its decisions. Article 60 provides that the Commission is inspired by international law on human and peoples' rights, in particular the provisions of the various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the African Union, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and African countries in the field of human and peoples' rights, as well as the provisions of the various instruments adopted within the framework of the United Nations specialised agencies of which the parties to the Charter are members.

According to Article 61, the Commission also considers, as an aid to the determination of legal principles, other general or specific international conventions which lay down rules expressly recognised by the Member States of the African Union, African practice which is consistent with international human and peoples' rights standards, customary practices generally recognised as law, general principles of law recognised by African States, as well as legal precedents and doctrine.

Article 62 requires each State Party to report every two years from the date of entry into force of the Charter on the legislative and other measures taken to give effect to the

88 | Chapter 58, African Charter on Human and Peoples' Rights.

89 | Chapter 59, African Charter on Human and Peoples' Rights.

90 | African Commission on Human and Peoples' Rights. 'Reports'. [Online]. Available at: <https://achpr.au.int/en/documents/reports> (Accessed: 20 September 2024).

rights and freedoms recognised and guaranteed in the Charter. Finally, Article 63 deals with ratification and the deposit of instruments of ratification.⁹¹

4. Conclusions

It is very difficult to objectively assess the work of the African Commission on Human and People's Rights given the current political environment on the African continent. Over the past almost 40 years, the members of the Commission, in collaboration with other organs of the AU, have defined the main objectives; functions and purpose of the Commission; established a solid structure; clearly defined the composition, competencies, selection of members, duration of mandate, circumstances of termination, working procedures etc.; and repeatedly addressed their revision according to suggestions from within and outside the Commission. On the face of it, the Commission has been institutionalised in the necessary manner and has taken a firm place in the architecture of the AU and in the structure of international human rights institutions.

Unfortunately, the human rights situation in Africa remains poor. The main weakness of the Commission is the lack of an enforcement mechanism, which means that its members can only make recommendations, draw attention to violations by signatory states, issue alarming reports on human rights violations or, in the most flagrant cases, refer them to the African Court of Human and Peoples' Rights. In short, its decisions are not legally binding.

The current state of the respect for human rights by the signatory countries is absolutely abysmal and shows that, despite the good intentions of the AU when the Commission was established, it is failing to achieve its main objectives of improving the quality and preventing violations of human rights in African countries. We could mention a certain negative double track, whereby two AU institutions (the Commission and the African Court on Human and Peoples' Rights), both mandated to interpret the African Charter, are dealing with the issue and situations can arise where there are multiple interpretations or jurisprudence. Any individual can virtually approach the Commission with a complaint of human rights violations, while the African Court does not allow individuals to do so. As the work of both institutions is hampered by a lack of funding, it is common for members to derive their main source of funding from other jobs. This also slows down the decision-making processes of the two institutions.

Another major problem is the partial curtailment of the independence of the Commission by the AU, which has the ultimate authority to decide whether to publish the measures taken under the Charter's provisions on the Commission's procedures.⁹² Considering the selection and recruitment of the members of the Commission, the appointment of the Secretary of the Commission and the fact that the AU decides on the full funding of the Commission and its activities (members of the Commission regularly point to the lack of funds to carry out their duties), it is fair to conclude that the

91 | Chapter 62, African Charter on Human and Peoples' Rights.

92 | Nmehiele, 2001, p. 170.

Commission is in a completely subordinate position to the AU, as the political body, which severely limits the effectiveness of the Commission.⁹³

Addressing these problems would not be too difficult, but it would most likely not improve the performance and outcomes of the Commission (or the African Court). As we have argued in the introduction and in the following sections, the main problem with human rights in Africa is the current political culture and the lack of political will on the part of African political elites to create a truly effective and enforceable human rights protection system. The prevalence of non-democratic governments on the African continent (by our estimate, more than 80% of all African countries) means that their leaders are often only willing to sign up to a control mechanism that is not legally enforceable.

The lack of the sufficient political will on the part of the rulers of these undemocratic regimes complicates the established system of human rights protection, which may be well defined or structurally set up, but is completely ineffective in current African political practice. Moreover, the legal unenforceability of the Commission's recommendations or the African Court's ruling is one of its weakest points.

The incompetence of the AU institutions and the lack of mechanisms to take action against the full members that do not comply with the articles of the Charter are alarming. Recent political developments on the African continent (military coups in Niger, Central African Republic, Mali, Burkina Faso, Guinea etc.) indicate that the situation is unlikely to change in the short term. The human rights situation (not only in these two countries) continues to deteriorate, as demonstrated by the political elites in some signatory countries (Rwanda and Tanzania), who in 2016 and 2019, respectively prevented individuals and NGOs from bringing cases before the Commission.

The promising start of the democratisation process in the early 1990s raised expectations not only among the global and African public but also among the representatives of human rights organisations, academics, political scientists and Africanists. However, it gradually became apparent that the new African political elites were, for the most part, 'inflecting' the word democracy only to secure their political ambitions and positions of power.

As political practice in functioning European and American societies shows, the respect for human rights is closely linked to the functioning of the rule of law and closely intertwined with the basic principles of a democratic society. This is one of the main reasons why the respect for human rights in Africa cannot possibly work and why the activities of the Commission and the African Court are doomed to failure.

93 | Welch, 1992, pp. 47–49.

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