

Studies and Researches

The African Commission on Human and Peoples' Rights (A Brief Study)

**Councilor Ashraf Hany Sorour
President of the Court of Appeal**

The African Charter on Human and Peoples' Rights, ratified in the 18th session of the Organization of African Unity (OAU) held in Nairobi in June 1981, has adopted a mechanism to monitor the States Parties implementation of the Charter. This mechanism, entitled to the African Commission on Human and Peoples Rights, includes the protection of the rights of the African people enshrined in the Charter at the level of the African continent. As entrusted by the Charter, the role of the African Commission on Human and Peoples' Rights is the protection and promotion of the rights of the African people and the dissemination of the culture of respect for human rights principles, in addition to other tasks that will be emphasized later. Despite the multiple obstacles faced by the Commission while practicing its work, including the poor potential logistics and the ignorance of some States of their obligations namely the periodic reports submitted by State Parties on state of human rights and freedoms and the implementation of the Charter as well, the Commission exerts remarkable and fruitful efforts to spread the awareness of the African rights guaranteed by the Charter significantly. Moreover, several committees have been established focusing on monitoring the protection and promotion of human rights and dealing seriously with the complaints on the violations of those rights. The Charter also established a mechanism for reviewing those complaints, in addition to the fruitful cooperation with the human rights non- governmental organizations, as well as its pivotal role in the establishment of the African Court of Human and Peoples' Rights and the upholding of the integrated relationship between them to back the principles of human rights and to prosecute the perpetrators of human rights violations. In this context, efforts of the Commission can be discussed as follows:

1. The Role of the Commission in Receiving the State Parties' Reports

In accordance with Article 62 of the African Charter on Human and Peoples' Rights, each State Party is obliged to submit biennial report on the legislative measures and other measures taken by those States in the pursuit of the realization of the rights and freedoms stipulated in the Charter and also, to submit a preliminary report to the Commission as soon as they ratify on the African Charter enters into force. In spite of the obligation of the reporting mechanism, many States Parties, nearly eight countries, do not commit totally to pre-



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sent their preliminary reports, while thirty nine countries have failed to submit their periodic reports in a timely manner, compared to nine countries only submit their periodic reports without delay.

2. The Role of the Commission in Receiving Correspondences (Complaints)

At the 50th ordinary session held in Banjul from October 24 to November 5, 2011, the Commission issued resolution no. 194 on the establishment of a panel to deal with correspondences (complaints). The resolution is based upon Article 97/2 of the Rules of the Procedure which provided for the possibility to establish one or more working group or team to consider the issue of admissibility and the criterion of receiving and dealing with complaints and correspondence. This team shall submit recommendations and observations to the Commission on those complaints.

It is noteworthy that in the last two years 2016/2017 the Commission has received about 30 complaints alleging the violation of human rights contained in the Charter. Two complaints on Egypt have been received and ended with the rejection of the Commission. Besides, the Commission has proved the illegibility of fourteen complaints; while approved to investigate twelve complaints, in addition to two complaints have not yet reviewed.

3. The Cooperation of the Commission with Non-Governmental Organizations

Around 514 non-governmental organizations have been granted the observer status by the Commission who granted this virtue to the NGOs that can contribute to play important role in the framework of the Commission and its objectives of protecting and promoting human rights. These organizations have played a prominent role in the activities of the Commission through drawing its attention to the violations of the rights stipulated in the African Charter, as well as sending complaints to the Commission on behalf of individuals. Also, they monitor and follow up the extent of the commitment of the States Parties to the protection of the rights enshrined in the Charter. Besides, they work on increasing the awareness of the Commission's activities through convening conferences and other activities, along with the submission and circulation of shadow reports on the implementation of the States parties of the rights contained in the Charter and to circulate the concluding recommendations of the Commission. It should be noted that granting the observer status to non-governmental organizations have started in 1988.

4. The Integrated Role of the Commission with the African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights was established under Article 1 of the Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights, which was adopted by the Assembly of Heads of State and Government of the Organization of African Unity held in Ouagadougou, Burkina Faso in June 1998 and entered into force in January 25, 2004. The aim of the Court is to ensure the protection of human rights in Africa, to prosecute violators of those rights and to integrate and



strengthen the functions of the African Commission on Human and Peoples' Rights.

The integrated cooperation between the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights can be emphasized in the referral of the Commission of received complaints relevant to the flagrant violation of the rights enshrined in the Charter to the Court. The Commission shall enclose a memorandum with such complaints containing recommendations and observations. Also, the Court has the right to refer complaints to the Commission to review the eligibility of these complaints.

Moreover, the Court has worked to harmonize its internal procedures with the Commission's bylaw, and even corresponded with them to a great extent for further interaction and integration. The Court has depended, for a period of time, on the Commission's bylaw until the finalization of its internal regulations in June 2010.

In addition, the two bodies meet at least once a year to discuss the continuous activation of aspects of joint cooperation and to increase the area of integration in their respective work for the protection and promotion of human rights guaranteed by the African Charter.

Finally, it should be noted that the court has received about 147 petitions filed until August 30, 2017, and has already reached final decisions concerning 32 cases.

5. The Sub-Mechanisms Established by the Commission

It is worth mentioning that the Rules of Procedure of the African Commission on Human and Peoples' Rights in Chapter 6, Articles 28 and 29, has allowed the Commission to set up its subsidiary bodies, including Special Rapporteurs to deal with five specific human rights themes as follows:

- Freedom of expression and access to information in Africa,
- Human rights defenders,
- Prisons and conditions of detention,
- Refugees, asylum-seekers, migrants and internally displaced persons, and
- Women's Rights, where the Rapporteur has certain responsibilities relevant to the implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Furthermore, nine working groups and committees have been established to monitor and examine various issues fall within the competence of the Commission and to submit a progress report at each ordinary session of the Commission. They are:

- Committee on the Prevention of Torture in Africa,
- Working Group on Indigenous Peoples / Communities in Africa,
- Working Group on Economic, Social and Cultural Rights,
- Working Group on the Death Penalty,



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- Panel on the Rights of Older Persons and Persons with Disabilities,
- Working Group on Violations in Extractive Industries, the Environment and Human Rights,
- Committee on the Protection of the Rights of Persons Living with HIV and those at Risk, Vulnerable and Affected by HIV,
- Working Group on Communications, and
- Reporting Group.

6. The Historical Background of the Commission, the Legal Status and Terms of Reference

The African Commission on Human and Peoples' Rights is a mechanism that plays an important role in the protection of African human rights. The African Charter contains, for the first time in regional human rights charters, rights of peoples as well as obligations of States along with rights and duties of individuals. Therefore, the African Charter would not have been effective without the mechanism of the Commission as an executive body to defend the rights contained in the Charter. In July 1987, the Commission has been established during the twenty-third session of the Conference of the Assembly of the Heads of State and Government of the Organization of African unity, held in Addis Ababa. The conference has identified its headquarters in Banjul, Gambia and the working languages of the Commission were approved to be Arabic, English and French. The executive regulations of the Commission was adopted in a Conference in Dakar, Senegal in February 1988. Given the importance of the Commission, the Charter has singled out more than thirty articles from 30 to 62 for the competences and mandate of the Commission.

First: The Legal Status and Competences of the Commission

1- Legal status

The Commission is included within the structure of the African Union AU (formerly the Organization of the African Unity). It was established to promote and protect the rights enshrined in the Charter and to monitor their implementation. Despite the legal status of the Commission, it is unclear whether it is part of the AU Secretariat or one of the specialized commissions stemmed from the AU in accordance with Article 20 of the Charter. Nevertheless, whatever the ambiguity of its legal status, considering the Commission an organ of the African Union is logical and in consistent with the fact that the membership of the African Charter on Human and Peoples' Rights is confined to the member States of the Organization and that the Commission is responsible for ensuring and promoting human and peoples' rights in Africa.

2- The Terms of reference of the Commission

One of the most important objectives of the Commission is to protect and care for human rights in Africa and to promote the culture of human rights on the African continent through advocating for these rights and disseminating the human rights culture. During its second meeting in Dakar, Senegal, February 1988, the Commission has developed the action plan for the years 1988



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and 1989 which focused on the publication and distribution of the African Charter, the work on the establishment of an African library and a documentation center for human rights, the issuance of an African magazine dealing with human rights and the preparation of human rights curriculum to be included to the academics of the secondary stage. In the meantime, the meeting has recommended the establishment of national committees on human rights, in addition to launching a campaign to urge African countries to ratify on the African Charter, and other international treaties as well and to include the provisions of the Charter to the constitutions of African countries.

3– The Cooperation with international entities and joint entities between countries and governments relevant to human rights such as the European Commission on Human Rights, the American Commission on Human Rights, the United Nations Commission on Human Rights and human rights NGOs among them the Amnesty International, as well as the African non-governmental organizations such as the African Union of Lawyers, the Association of African Law and the African Society of International Law

However, one of the most important tasks of the Commission is to review the periodic reports on human rights submitted by the States Parties.

Important note: In spite of the great tasks entrusted to the Commission, its budget and the remuneration of its members are included in the regular budget of the African Union which has weakened the effectiveness of the Commission and impacted its independency. Accordingly, the poor financial resources and the dependency to the countries that finance the Commission or those provide significant financial contributions have led to the confinement of the Commission's activity that would have been much greater, if more financial resources were allocated or if the Commission had an independent budget.

On reviewing the competence of the Commission, we can find a sort of diversity, and broadness, and sometimes a lack of clarity. The Commission plays two key roles; they are the promotion and protection of the African human rights and the interpretation of the African Charter, in addition to other tasks entrusted to it, such as the reinforcement and protection of human rights. However, the expansion of its scope of action would lead to negative results, such as working hard on one issue on the expenses of the other, as many entities are incapable of playing more than one role, especially when the other roles are not basically one of its entrusted mandates. In fact, the basic role of the Commission, that is to protect human rights in the African continent, seems an elusive goal that is postponed at the present, given the authoritarian governments that do not accept the criticism of their actions that may be contradicted with the protection of human rights and will necessarily undermine the performance of the Commission. We really hope that this problem will be overcome and the Commission could keep up with all its extensive and respectful areas of action on human rights issues on the African continent.

As stated above, the African Charter defines the terms of reference of the Commission in Article 45 as follows:



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- (A) The promotion of human and peoples' rights and also the commission is to compile documents, conduct studies and research on African problems in the field of human and peoples' rights and to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which the African Governments may base their legislations. In the meantime, the Commission is allowed to cooperate with African and international organizations concerned with the promotion of human rights.
- (B) The Commission shall guarantee the protection of human and peoples' rights in accordance with the provisions of the Charter.
- (C) The Commission shall interpret all the provisions of the African Charter.
- (D) The Commission shall carry out other tasks that may be entrusted to it by the Assembly of Heads of State and Government.

From a cursory reading of the content of this term of reference, it is evident that the Commission can be considered an observatory mechanism, since it works to monitor the extent of the commitment of States Parties to the obligations entrusted to them as a result of their accession to the Charter.

Since the role of the Commission is to interpret the provisions of the African Charter, the international law has become one of the main pillars in establishing the rules of the Charter and activating them in a way that may not be available if the Commission adopts a rigid doctrine for the provisions of the Charter. In addition to the international law, the Commission may be guided by the decisions of the United Nations Organization and its specialized agencies, which have the credibility to assist the Commission in its work.

These terms of references are of great importance, especially when taking into account the painful reality of the African continent that suffers from extremely complex and crucial problems such as underdevelopment, illiteracy and the spread of epidemics and poverty in many regions of Africa. This bears the Commission a hard responsibility of addressing the total ignorance of the African people of human rights knowledge. To do that, the Commission shall establish a link between human rights issues and the ancient positive African traditions and shall work to spread this knowledge among governments and not just peoples and individuals.

The Commission can play an important role in the promotion of human rights by clarifying the limits of the restrictions and freedoms embodied in the African Charter and the objective of imposing them so as not to be challenged or ignored. Furthermore, the Commission shall emphasize the duties that would contribute to the development process.

On the other hand, the Commission can build a new history for Africa in the field of human rights, through sorting out the African documents related to human rights, especially that the ancient African civilization contains many brilliant humanitarian principles that can serve as a cornerstone of several new human rights conventions.



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As for the monitoring role, the Commission is mandated to observe effectively the implementation of the human rights principles contained in the Charter and to ensure the States Parties fulfillment of their obligations as a result of their accession through studying the biennial reports they submit in accordance with Article 62 of the Charter . This is an important mechanism for monitoring the progress of the countries and to figure our shortcomings in the field of human rights. In this regard, we shall also mention the important role of the Commission in receiving human rights complaints from individuals, governmental bodies, States or NGOs that is considered a highly important mechanism in the field of human rights protection.

2. Formation of the Commission

- The African Commission consists of 11 members of African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights. Each member of the Commission serves in his own personal capacity, with giving especial attention to experts in the field of law (Article 31 of the Charter), however, the membership of the Commission is not confined to legal expertise. The Commission does not include more than one national of the same State (Article 32). A cursory reading of the formation of the Commission as stipulated in the Charter shows the insufficient number of members compared to the number of African countries - goes beyond fifty- that fall within the scope of the Commission, the issue which caused the inability of the Commission to address effectively many problems that may arise in those countries and cannot be addressed by such number of members even they are doubled. This brings into light the need to increase the number of members, although this basically depends on the ability and the resources of the African Union.
- It is also noticeable in the formation of the Commission that the African Charter is not giving much attention to the geographical representation of the various regions of the African continent within the Commission that indicates the fair and equitable representation of all the regions of the continent. Dealing with many political regimes whose approaches differ and doctrines vary, in addition to various cultural and legal systems, the Commission should have taken into account the representation of this diversity and differences and shall endeavor to keep up with them.
- Besides, Article 31 of the African Charter did not confined the membership of the Commission to persons with legal background despite its legal role which requires individuals with prominent legal skills, particularly in the field of human rights, so it is necessary for the Commission to take into account the selection of its members and to give priority to persons who have served as judges in their own countries or delegates to international or regional organizations. These persons own the required qualifications and the human rights experience to serve in the Commission.



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- Furthermore, Article 33 of the African Charter describes how the members of the Commission are elected by the Assembly of Heads of State and Government, the issue that indicates the importance of the membership. However, this mechanism calls into question the extent of independency and impartiality of the Commission in carrying out its work without bias or fear of review of the Assembly of the Heads of State and Government.
- As for the Secretary of the Commission, the Charter determines that the appointment shall be through the Secretary-General of the Organization of African Unity. However, if his selection was by the Assembly of Heads of State and Government, this would have provided him great importance instead of being a mere Secretary. He would become a source of information through drawing upon the circle of contacts supposed to be formed by virtue of his office and accelerate the handling of the issues submitted to the Commission.
- In addition, Article 35 of the African Charter sets forth the method of selection of members of the Commission. The Secretary-General of the Organization of African Unity invites the States Parties to nominate their candidates four months before the election. Then, the Secretary-General submit a complete list of nominees arranged in alphabetical order a month before the election to the Assembly of the Heads of State and Government to cast their votes.

It is noted in this Article that all African countries have the right to vote in the process of selecting the members of the African Commission even if they are not parties to the African Charter on Human and Peoples' Rights. Recently, the Non-State Parties to the Charter can, in addition to vote, nominate candidates to run for the elections of the membership of the Commission. Therefore, the Commission can be considered one of the organs of the African Union which gives the right to the member States of the Union to vote without submitting candidates.

(In accordance with Article 34 of the Charter, each State Party shall nominate more than two candidates, provided that one of them is a non-citizen, although it would have been more effective to increase that number to three persons, like the American Commission on Human Rights. This would be more effective for the Commission and help achieving concrete results in line with the tasks assigned to the Commission).

- Members of the Commission shall be elected for six years and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of the three others at the end of the four years (Article 36 of the Charter). The President of the Assembly of Heads of State and Government shall draw lots, immediately after the first elections, to decide the names of those members whose terms expire after two or four years (Article 37).
- Moreover, Article 39 of the Charter stipulates –in three paragraphs- the measures that shall be taken in case of death or resignation of a member of



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the Commission. The Chairman of the African Commission shall inform the Secretary-General of the Organization of the African Unity, who shall declare the seat vacant from the date of death or resignation of the member or from the date he stopped the practice of his duties for any reason other than temporary absence. The Assembly of the Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months. Finally, each member shall practice his duties until the date of his successor assumes office (Article 40 of the Charter).

- The Secretary-General of the Organization of African Unity (now the African Union Commission) appointed the Secretary of the Commission, who shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. (Article 41 of the African Charter).
- The process of electing the members of the Commission and how they perform their work -as set forth in Article 38- demonstrates the commitment of the members to perform their duties in a distinctive and integrated manner. In fact, there is no article corresponding to this one in the American Convention on Human Rights. Additionally, Article 16 of the Rules of Procedure of the Commission states that each elected member of the Commission shall take the oath in a general session before the assuming his office.
- The tasks of the Commission can be summarized in two important tasks, as follows:

1- The Commission as a Mechanism for the Promotion of Human Rights

To achieving this role, the Commission compiles documents, conduct studies and researches on the human rights problems of the African continent. It also organizes conferences, symposia and forums and disseminate information on human rights, along with encouraging local and national human rights organizations to provide views or make recommendations to governments and cooperating with other African and international organizations concerned with human and peoples' rights. Besides, it formulates principles and rules designed to resolve legal issues relevant to human rights and fundamental freedoms upon which the African governments can rely on to establish their domestic legislations.

In fact, according to this mission, the African organizations are enabled to cooperate with the Commission and to invite its members to take part in events dedicated to the promotion of human and peoples' rights as well. Besides, Article 68 of the African Charter requires each State Party to the Charter to submit a periodic national report every two years on the legislations and measures taken to implement the rights and freedoms recognized and contained in the African Charter. These reports could possibly help to promote the African human rights and to grow the sense of importance of human rights at the African level.



2. The Commission as a Mechanism for the Protection of Human Rights Contained in the African Charter

The Commission undertakes this task to emphasize the need for the protection of human rights under the Articles 47 - 59 of the Charter those set forth the mechanism of receiving the complaints of States and individuals to be examined by the Commission. These complaints may be filed by the States Parties against each other or complaints of individuals against their States or against any other State Party as set forth in Article 56 of the African Charter.

The African Charter determines two kinds of complaints that can be presented before the Commission; State-to-State complaints (Article 47 of the Charter) and other correspondence (Article 55). Once receiving the complaint, the Commission shall collect the information deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating facts and findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government (Article 52 of the African Charter). While transmitting its report, the Commission may submit recommendations it deems useful to the Assembly of Heads of State and Government .

3. A Mechanism for the interpretation of the Charter's Provision

The Commission's interpretation of the Charter can be considered a major task that could be undertaken at the request of a Member State or at the request of an organ of the Organization of African Unity (The African Union) or any other African organization recognized by the African Union. This task has raised problems with the delegations of some African countries such as Burundi, Kenya and Tanzania who thought the functions of the Commission would be limited and will not extend to the sovereignty of States and that the differences on the interpretation of the Charter's provisions should be resolved by the Organization of African Unity through diplomacy.

On other issue, some provisions of the African Charter are in contradiction with the provisions of the Charter of the Organization of African Unity, although some delegations believe that the Assembly of Heads of State and Government shall have the vital say in settling this problem and that the role of the Commission shall be secondary in this regard.

4. The Applicable Principles of the Commission:

The Commission code of conduct is inspired from the human rights international law, as well as the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, and other instruments adopted by some African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members (Article 60 of the African Charter).



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The Commission also takes into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, along with the African practices consistent with international norms on human and peoples' rights and the general principles of law recognized by African States as well as legal precedents and doctrine (Article 61 of the African Charter)

In fact, the formulation of these two articles, like the rest of the African Charter, is shrouded in a lot of ambiguity and lacks precision. Some of the phrases are not expressive, for example, using the phrase “draw inspiration” in Article 60 does not imply any specific obligation to the Commission. Additionally, many African countries did not ratify to some of the conventions and treaties referred to in that article as a reference of applicable principles that govern the work of the Commission, subsequently, the Commission can not apply the principles to countries that did not recognize those conventions from the beginning.

Also, the application of such principles on Non-State Party to the Charter will depend on whether they have developed their own principles and laws such as the customary law or not. Moreover, it is not clear whether realizing “the recognized traditional values” as a law is in reference to the customary African law or the international customary law. If it refers to the customary African law, so how come to configure the custom regional law before the application is guaranteed. Although the two aforementioned articles have tried to create a hierarchical order among both through the use of the phrase of “subsidiary reference” in Article 61 which is derived from the statute of the International Court of Justice.