

# **The Procedures of the African Commission on Human and Peoples' Rights for the Protection and Promotion of Human Rights**

by

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## **1. INTRODUCTION**

The African Charter on Human and Peoples' Rights was adopted at the Nairobi Conference on Heads of State and Government in 1981 and came into force on 21 October 1986, three months after its ratification by a simple majority of OAU members. The African Commission on Human and Peoples' Rights was inaugurated on 2 November 1986 and consists of 11 members elected by the Assembly of Heads of State and Government so as to represent the different parts of the continent. In 1988 the Commission adopted its Rules of Procedure consisting of 120 rules but these are in the process of being revised. The Commission's working languages are the same as the OAU's - English, French and Arabic.<sup>1</sup> The 10th anniversary of the signing of the Charter and the 5th of the inauguration of the Commission were celebrated at the Commission's 10th session held in Banjul 8 - 15 October 1991.

It is intended to divide the procedures of the Commission into:

- (a) protective
- (b) promotional
- (c) administrative.

## **2. PROTECTIVE PROCEDURES**

The protective process begins with a communication to the Commission that a party has committed a breach of the provisions of the Charter. Such communication may come from:

- (a) a state party
- (b) a non-state party.

### **(a) Communication from State Party**

Under Article 47 of the Charter, a state that considers that another state member has committed a breach of the Charter may address a communication to that state and send copies to the Secretary-General of the OAU and to the Chairman of the Commission. The state complained against has three months to give a written information on the matter including the action taken, the

- 1. Rule 34, Rules of Procedure.

relevant laws and procedure applied and the redress given. If the matter defies a peaceful and satisfactory settlement within three months, either state may refer the matter to the Commission. A state may however communicate directly to the Commission about a breach by another state as well as to the Secretary-General of the OAU and to the state concerned. The Commission is expected to ensure that all local remedies have been exhausted. The Commission then tries to reach an amicable settlement between the parties and makes its recommendations to the parties and reports to the Assembly.<sup>2</sup>

The Commission has not had the opportunity of testing its procedure on state communications for no state has as yet sought to utilise it. This is not unusual. Governments are usually reticent to pick up quarrels with other states on human rights issues except they have nothing to lose or something to gain. A confrontation with another state may call attention to the skeletons in its own cupboard or the complaint or non-complaint may be simply an instrument of diplomacy. From the number of governments on the continent that still have to learn about democratic governance - regular submission to the will of the electorate, the right of other parties to contest elections etc - a plethora of complaints against other states for breaches of human rights cannot be expected. Even in Europe with a long tradition of democratic rule, even if autocratic in dealing with non-Europeans and with a human rights convention that is over forty years old, the number of complaints by states is minimal and can be counted on the finger-tips of the hands.

The only occasion that the procedure could have been tested was misdirected during the 9th session in Lagos. The Libyan Ambassador in Lagos submitted a communication complaining that Libyan prisoners of war in the Republic of Chad were, on the change of Government from Higenne Habre to Col. Derby, taken under duress, first to Nigeria and then to Zaire and on to Kenya from where some had been compelled to go to the US. There was no complaint against Nigeria and Zaire, parties to the African Charter, nor against Kenya, a non-party but against the USA, a non-party both of the Charter and of the OAU. The communication was obviously incompetent. All the communications so far have come from non-states parties.

#### (b) Communications from Non-State Party

A non-state party is not defined either in the Charter or in the Rules of Procedure but the Commission interprets it to include individuals and organisations, including non-African ones. The Commission has received communications from non-governmental organisations concerned with human rights including Amnesty International, International Commission of Jurists, Africa Watch, Lawyers' Committee for Human Rights, Civil Liberties Organisation, Constitutional Defence Project as well as from individuals. It may be that a communication from a non-party, but member of the OAU, may be entertained as the principle of reciprocity is

## 2. Chapter XVI Rules of Procedure.

not required in human rights law and in humanitarian law.

On the receipt of a complaint, described innocuously as a communication in both the Charter and the Rules of Procedure, the Commission sends a copy to the state concerned for its comments and requests for more information from the complainant as to whether local remedies have been exhausted. A few cases are terminated on the receipt of the information that were confirmed that, for instance, the matter was still sub judice. That was the situation with the complaint by Civil Liberties Organisation that the Nigerian Government or its agents moved a large number of people from the Island of Maroko without sufficient notice and without adequate preparation on relocation. The complaint by the Constitutional Defence Project about the detention of the prominent Lagos business woman, Jennifer Madike and her cousin, suffered the same fate. It is necessary for non-governmental organisations to study the conditions of admissibility spelt out in the Charter.

A communication from a non-state party must pass a more stringent test to be admissible:

- (a) It must indicate its author even if he requests anonymity.
- (b) It must be compatible with the Charter and with the OAU Charter.
- (c) It must not be written in language disparaging or insulting to a state or its institutions or to the OAU. It is doubtful if the Commission will interpret this literally but will seek the substance rather than the shadow of the case.<sup>3</sup>
- (d) The complaint must not be based exclusively on the mass media. Indeed this may be the only source of information; the necessity to be an eye-witness or the direct victim will be too limitative. The general idea is to avoid action based on unsubstantiated hearsay evidence.
- (e) Local remedies must have been exhausted unless prolonged.
- (f) The communication must be submitted within a reasonable time.
- (g) And does not relate to a case that has been settled through other procedures.

On receiving the reply from the state and further information from the complainant, the Commission decides on admissibility and calls on the parties to give further oral evidence if they wish to do so. It then decides on the merits of the complaint.

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3. See also Ojo and Sessay, The OAU and Human Rights: Prospects for the 1990s and Beyond 8 H.R. Quarterly 1986 No.1 p.89 at 98.

At the 10th session, the Commission found from evidence received from two reputable NGOs the existence of a series of serious or massive violations of human and peoples' rights in Southern Sudan and in Rwanda in terms of Article 58 and decided to inform the Chairman of the Assembly. The Charter stipulates in that regard that the Chairman may ask for in-depth study.

Does this mean that the Commission cannot conduct in-depth study unless at the request of the Assembly or the Chairman? The Commission is expected to carry out some study before reporting a series of massive or serious violations. If it is necessary to conduct an in-depth study to come to that conclusion, it should do so proprio motu. These issues are yet to be definitively settled by the Commission although individual Commissioners have expressed various views. A reasonable finding of the Commission at any stage warrants a preceding study which may be in depth.

The Commission had in the past been delayed from taking action because a state failed to send its comments on a communication. Was the Commission to proceed on the basis of evidence from one side? Should the protective action be halted by the silence of the state in question? It was agreed at the 10th session that where a state delays to send its comments, it should be informed that the Commission will have no alternative than to proceed after two months on the basis of the information it has so far received. It is considered that this will expedite the process by quickening the response or proceeding with the action with the full knowledge of the state concerned.

Should the Commission act only on a complaint or can it act proprio motu? The Commission had in the past been criticised for failing to take action or at least make a statement when there were reports of alleged massive violations. There may not have been a communication to the Commission on the breach. During and shortly before the 7th session, there were news reports of massive violations of human rights by the two sides of the civil war in Liberia. Some extra-continental organisations had expressed their concern. In the absence of a communication, the Commission decided to act proprio motu and asked for details of the violations, if any, and the Chairman offered to visit to verify and report back to the Commission as well as offer his services with a view to a return to normalcy. There was no reply. In the same vein, the Chairman expressed the concern of the Commission with the trial and execution of 28 military officers within 24 hours following an alleged but failed attempt to overthrow the Government of Sudan. The Chairman asked for information and also to be invited to ascertain the facts and report back; but again, there was no reply. There was also no reply when information from the media alleged the massacre of hundreds of University students in Lumumbashi, Zaire in 1990. The only exception was the failed coup of 22 April 1990 in Nigeria when hundreds of people were arrested for complicity. The Chairman wrote a similar letter and expressed the hope that the suspects would be dealt with according to the Charter. There was a reply from the Government of Nigeria that the suspects would be tried according to law.

It is submitted that this cautious initiative by the Commission is justified. Often the only source of information is the media.

The situation may be too serious to await a communication and irreparable damage may be caused before one is received, if any. In the absence of its own observers in all states parties and in the absence of viable NGOs or individuals that may respond quickly to such situations, the Commission may draw inspiration from Article 46:

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

### 3. THE CONFIDENTIALITY CONUNDRUM

Article 5 provides:

- "(i) All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly .... shall otherwise decide.
- (ii) However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly ....
- (iii) The report of the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly ...."

The interpretation of this provision has been the hardest nut to crack and comes up frequently in the work of the Commission in promotional or protective activities or even in reporting to the Assembly. Quot sententiae tot homines. The Commission continues to grapple with the problem. Is it a breach of the confidentiality principle to discuss specific cases outside the Commission before an agreement has been reached on a report to the Assembly? To what extent should the complaints or the names of the states complained against remain confidential?

It makes sense that the Commission should not conduct negotiations or investigations in a blare of publicity. its powers are essentially diplomatic, administrative, reconciliatory and recommendatory. However, total confidentiality removes one of the potent sanctions of all human rights organisations. Not having a Police or Army and lacking even the power to make a binding recommendation, its mooted and unpublicised recommendation may not have an echo, may be totally ignored and may not have an impact. Should the facts of the complaint and the name of the states complained against be kept from the Assembly? How would the activities, including the recommendations, of the Commission be studied and assessed by the human rights public? How would the activities, including the recommendations, of the Commission be studied and assessed by the human rights public? Disagreement on how to report the cases of individuals released on the intervention of the Commission delayed the report of those events to the Assembly in 1991. In the event, the public was not informed for the published report contained no information on the cases. Although a summary of the activities of the Commission is issued at the end of a session, there are not enough facts on protection

to guide the public. The published annual reports have so far not been very helpful to the researcher or indeed to the public.

The principle of confidentiality must not be pushed so far as to be detrimental to human rights. The victims and the complainants are members of the public who must have passed on information about their plight to the immediate public. There is no compelling state security requirement that necessitates a blanket cover over protective activities. A distinction can be made between measures in the sense of recommendations actually made and the bare facts of human rights breaches as well as the states involved. Needless to say that the NGOs that enjoy observer status share the view that the Commission should be more open.

Human rights have become matters of greater international concern than they were in the past. Extra-continental powers are showing much more concern about breaches of human rights and democracy to the extent of making the grant of aid contingent on their implementation. This indicates the present status of human rights. The clothing of human rights breaches with secrecy is not compatible with the present status of human rights in international relations. The confidentiality principle in Article 59 should be restrictively interpreted in accordance with what Judge Huber referred to in Island Palmas Case<sup>4</sup> as inter-temporal law i.e. an international instrument should be interpreted in a way to accord not only with the law at the time of its creation but also with the law at the time of application including the developments that had taken place.

#### **4. PROMOTIONAL PROCEDURES**

The Commission has the duty of promoting the Charter through organising conferences, symposia and seminars and through the dissemination of information. The Commission is also expected to encourage and cooperate with African and international organisations concerned with human rights. This power is extensive; what the Commission lacks in protection through imprecision and vagueness, it gains in promotional power and yet these are not elaborated in the Rules of Procedure.

The Commission has not on its own funded a conference, symposia or seminar but it has collaborated with organisations, e.g. UNESCO, International Commission of Jurists, Friederich Naumann Foundation and Fund for Peace in organising such meetings.

At its 8th session, the Commission divided the members of the OAU, whether or not they have ratified the African Charter, among the eleven Commissioners for promotional purposes. Commissioners are expected to contact the governments intimating them in advance about their intention to visit. While in those countries, they are expected to make discreet inquiries about communications that may have been sent about their hosts from the government and  
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4. Report of International Arbitral Awards Vol.2 p.829; AJIL 1928 p.867.

others and establish contact with NGOs.

The Commission will have to collaborate closely with national and international human rights organisations in effectively promoting the Charter. In its judicial colloquium in Banjul on the national implementation of international human rights norms in 1990, the Commonwealth judges suggested the formation of national committees of the African Charter in each state to foster promotional activities and cooperate with the Commission. This suggestion had, in fact, been adopted earlier by the Commission although it had not been fully implemented. For our part efforts are being made to summon a meeting of Nigerian NGOs to consider the matter.

In 1990 the Raoul Wallenberg Institute, in cooperation with the Namibian Ministry of Justice, organised a national seminar for top officials on the implementation of international human rights norms in their activities. Both the human rights provision of the Namibian Constitution and the African Charter on Human and Peoples' Rights were thoroughly discussed. It is strongly recommended that this seminar should be replicated in every other African state.<sup>5</sup> Arrangements have been completed between the Wallenberg Institute and the Nigerian Federal Ministry of Justice in collaboration with the African Commission for a similar national seminar in Nigeria. At its 10th session, the African Commission chose as one of its priorities in the Programme of Action submitted by its consultants the implementation of the Charter in national legal systems.

The African Commissioners work part-time and meet twice a year for about 10 days. A substantial part of its function falls to be performed by its secretariat which has to be substantially strengthened. The non-governmental organisations must be encouraged for, without them, the high hopes of the Charter will not be realised.

## **5. ADMINISTRATIVE PROCEDURES**

The secretariat of the African Commission is an integral part of the OAU Secretariat. In fact the Secretary-General of the OAU appoints the Secretary of the Commission and provides the staff and services for the effective discharge of the Commission's duties. The administrative expenses of the Commission thus falls on the OAU. The Rules of Procedure provides that the Secretary of the Commission shall be appointed by the Secretary-General of the OAU in consultation with the Commission's Chairman<sup>6</sup>.

The Secretary is a most important person in the Commission and should have qualifications no less than those of a Commissioner. As its top permanent official, he should be in a position to advise and guide the Commission from his wealth of experience and  
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5. A similar seminar was organised in Togo in 1988 by the UN Centre for Human Rights, Geneva.

6. Rule 22(2).

competence. It is only proper that the Commission, through the Chairman, should make an input in his appointment.

The Secretariat of the Commission was inaugurated in Banjul in June 1989 with a headquarters agreement between the OAU and the host state, The Gambia. Official communications are sent to the Secretary. The Secretary maintains constant contact with the Commissioners especially the Chairman in the inter-session period.<sup>7</sup> There is a confusion both in the Charter and in the Rules of Procedure as to which functionary - the Secretary-General of the OAU or the Secretary of the Commission - carries out certain activities.<sup>8</sup> Even as an organ of the OAU it is desirable for the Commission to maintain sufficient autonomy politically and financially to perform its functions effectively. Inquiries are normally directed to the Secretariat and communications sent there-to.

## **6. CONCLUSION**

The African Commission has only been in operation for 5 years, a relatively short time to develop and confirm its procedures. The Inter-American Commission found it necessary to draw up its rules long after it began to function. The danger of drawing up the rules too early is that they may prove to be an impediment in certain respects. With regard to protective actions, the Rules have not produced results as soon as expected. Rule 120 provides for the temporary suspension of the Rules and this provision should be liberally used if they prove obstructive. The watchful eyes of the public and the NGOs will help the Commission in its arduous task. It requires more funds and needs to meet for longer periods to make thorough discussions possible. The strengthening of the Secretariat is absolutely necessary. It is necessary for Commissioners themselves to be available to carry out the onerous duties of protection and promotion. A determined effort must be made to develop procedures that will achieve early results and these must come from those operating the Charter - the Commissioners.

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7. The first Chairman was Mr Isaac Nguema of Gabon 1987-89; the second Prof U O Umozurike of Nigeria 1989-1991 and the third Dr I Badawi el Sheith 1991.

8. As in Article 47 of the Charter and Rule 7 of the Rules of Procedure. See also E V O Dankwa, 'Commentary on the Rules of Procedure of the African Commission on Human and People's Rights', Proceedings of the Second Annual Conference of the African Society of International and Comparative Law, 4-7 March 1990 pp.29-34.