

Pamphlet No. 6

**MINORITY RIGHTS UNDER THE
AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

Summary: The African Charter is a regional human rights instrument designed to reflect the history, values, traditions, and development of Africa. The Charter combines African values with international norms by not only promoting internationally recognized individual rights, but also by proclaiming collective rights and individual duties. This pamphlet outlines the rights contained in the Charter that are of particular interest to minorities and describes the work of the Charter's oversight body, the African Commission on Human and Peoples' Rights.

The Organization of African Unity

The Organization of African Unity (OAU) was created in 1963 as a regional organization, initially dedicated primarily to the eradication of colonialism. Today, all African States except Morocco are members of the OAU.

The entrenchment of the principle of non-interference in the internal affairs of States and the emphasis on State sovereignty in the OAU Charter meant that for many years the OAU took little or no notice of gross violations of human rights. In fact, the OAU Charter does not specifically identify the promotion of human rights as one of its objectives. The OAU adopted the African Charter on Human and Peoples' Rights in 1981 and it adopted a protocol to the African Charter in 1998 that will create an African Court on Human and Peoples' Rights when it enters into force. The OAU also convened a Ministerial Conference on Human Rights in 1999, putting human rights on its agenda for the first time.

The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (Charter), also called the Banjul Charter, was adopted by the Assembly of Heads of States and Governments of the OAU in 1981 and entered into force five years later. The Charter covers a wider range of rights than either the European Convention on Human Rights (described in Pamphlet No. 7) or the American Convention on Human Rights (described in Pamphlet No. 5). As its title indicates, it includes both individual and collective rights.

The African Charter makes no reference to "minorities" as such, although it does refer to the principle of non-discrimination. In 1994, the OAU Assembly of Heads of State and Government also called for "the protection of the ethnic, cultural, linguistic and religious identity of all our people, including national minorities, and the creation of conditions conducive to the promotion of this identity" (Declaration on a Code of Conduct for Inter-African Relations). In 1999, the African Commission on Human and Peoples' Rights (Commission) appointed three of its members to undertake research on the situation of minorities in Africa. A resolution was recently adopted on the rights of the indigenous

peoples/communities of Africa was adopted, establishing a Working Group composed of two members of the Commission and several African experts in indigenous peoples' issues. Its mandate is to examine the concept of indigenous peoples and community and to study, among other issues, the implications for the African Charter regarding the promotion of cultural development and identity (Art. 22 of the Charter) and self-determination (Art. 20).

As with other human rights instruments, there are a number of provisions in the Charter that may be of particular significance to members of minority groups.

Article 2 is the basic non-discrimination provision, stating that rights under the Charter must be guaranteed "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." In the only case dealing specifically with minority rights to date, the African Commission explained the significance of Article 2: "Article 2 of the Charter lays down a principle that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. The same objective underpins the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly of the United Nations...Consequently, for a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its Article 2".

Article 3 provides that everyone is equal before the law and is entitled to the equal protection of the law.

Article 17 states that everyone "may freely take part in the cultural life of his community" and goes on to provide that "[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State." In interpreting this provision, the Commission has noted, "Language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive an individual of such participation amounts to depriving him of his identity."

The next six articles in the Charter set forth the rights of peoples. The Charter does not define "peoples", and it cannot automatically be assumed that minorities and peoples are equivalent. The African Commission has stated, in the context of a communication concerning Katangese rights in Zaire, "There may however be controversy as to the definition of peoples and the content of the right [of self-determination]. The issue in the case is not self-determination for all Zaireans as a people but specifically for the Katangese. Whether the Katangese consist of one or more ethnic groups is, for this purpose, immaterial, and no evidence has been adduced to that effect."

Article 19 provides, "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another." The Commission has not yet interpreted this article; instead, allegations of "domination" have been dealt with under the non-discrimination provision in Article 2.

Article 20 declares the right of all peoples to existence and proclaims their "unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely

chosen." The second paragraph states, "Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community."

The African Commission has considered the right to self-determination in only one case, that mentioned above brought on behalf of the people of Katanga, in what was then known as Zaire. The communication alleged no other human rights violations, and the Commission ruled that, at least in such circumstances, self-determination could not be equated with secession. "In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question, and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire".

Article 22 sets forth the right of peoples to economic, social and cultural development "with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

Finally, the Charter includes three articles that set out the duties of individuals to their community.

Article 28 states that every individual "shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

Article 29 seems to attempt to balance the individual's duties to community and State, although the meaning is not always clear. It provides, among other things, that the individual has the duty "[t]o preserve and strengthen social and national solidarity, particularly when the latter is threatened... [t]o preserve and strengthen the national independence and the territorial integrity of his country... [and to] preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society."

Thus far, the African Commission has focused exclusively on the *rights* guaranteed by the Charter; it has not referred to the articles on duties as in any way diminishing the relevant rights.

The African Charter includes a number of "clawback clauses" that potentially restrict the scope of the rights set out in the Charter. These clauses provide that rights must be exercised "in accordance with provisions of the law", "within the law", "provided that [the individual] abides by the law", or "subject to law and order". The Commission has in fact, stated that "[t]he expression 'within the law' must be interpreted as reference to the international norms".

The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights is composed of eleven members "chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality, and competence in matters of human and peoples' rights." Members of the Commission serve in their individual capacities and are, therefore, expected to

act independently while serving as Commissioners. They are nominated by their governments and elected for renewable six-year terms by the OAU Assembly of Heads of State and Government.

The Commission is the monitoring body for the implementation of the African Charter. It meets twice a year in ordinary sessions and may convene extraordinary sessions if necessary. The ordinary sessions are normally held in March/April and October/November and last for 15 days. They have been held in a number of different African States, including Benin, Algeria, Rwanda and Burundi as well as The Gambia.

The Commission's Secretariat is based in Banjul, The Gambia, and it depends on the OAU for funding and other resources. The Secretary to the African Commission, who is appointed by the Secretary-General of the OAU, is accountable to the General Secretariat of the OAU on financial and administrative matters. The African Commission presents an annual report on its activities to the OAU Assembly each year and depends on this body to implement its decisions and resolutions.

Mandate of the African Commission

Article 45 of the Charter grants the Commission relatively broad powers to promote and ensure the protection of human and peoples' rights. The Commission may collect documents; undertake studies and research; organize seminars and conferences; formulate principles on which domestic legislation may be based; cooperate with other African and international human rights institutions; interpret provisions of the Charter on the request of an OAU member State, the OAU itself, or an African organization recognized by the OAU; and perform any other task that may be entrusted to it by the OAU Assembly of Heads of State and Government. It also works to "[e]nsure the protection of human and peoples' rights" as set forth in the Charter.

Promotional Activities

Promotional activities are at the heart of the Commission's mandate, and individual members report at each session on the initiatives they have taken to promote human rights in various African countries assigned to them. To date, the Commission has also appointed Special Rapporteurs on extra-judicial, summary, or arbitrary executions; prisons and conditions of detention; and the rights of women. A proposal to create another thematic procedure on the condition of human rights defenders is currently under consideration. The rapporteur on prison conditions has visited several countries.

The Commission has organized a number of seminars, conferences, and workshops on human rights topics of interest in Africa, including contemporary forms of slavery, the right to education and development, women's rights, freedom of movement and asylum rights, the rights of persons with disabilities, and freedom of expression. These events are dependent upon the availability of outside funding.

Periodic Country Reports

Article 62 requires every State Party to the Charter to submit a report every two years on the measures it has taken to give effect to the rights recognized in the Charter. The Commission invites States to meet with the Commission in public to consider reports that have been

submitted, but the Commission does not publish detailed comments or observations on the reports. The Commission is trying to encourage States to participate in the process. NGOs may submit comments on State reports; indeed, the Commission formally recognized the value of such "shadow" reports in a 1998 resolution.

Individual and NGO Complaints

The African Charter does not explicitly speak of "individual and NGO complaints" but uses the term "other communications" to distinguish these communications from those submitted by States. Detailed provisions for the latter are set out in Articles 47-54.

An individual or organization may submit a communication. You need not be African, a resident of the State complained against, or even a victim. Indeed, communications have been filed by international organizations and individuals based outside Africa. Individual members of a minority group may complain on their own behalf or on behalf of the group to which they belong.

Complaints may be filed on behalf of specific individuals or groups that have been the victims of human rights violations, or they may draw attention to a widespread practice of such violations. While Article 58 of the Charter gives the Commission specific authority to refer to the OAU "special cases which reveal the existence of a series of serious or massive violations" of rights, the Commission has held that its competence is not limited to only these kinds of cases.

Complainants need not have the permission of the alleged victims in order to submit a communication, but common sense suggests that you should seek such permission if later cooperation will be necessary. This permits NGOs or others to file complaints even when all the victims may not be known. The Commission has stated that "where the author of a communication is a non-governmental organization and the situation is one of serious or massive violations, it may be simply impossible for the author to collect the name of each individual victim. Article 56(1) requires only that communications indicate their authors, not the name of all victims, and the more massive the violation, the greater the likelihood that the victims will be numerous".

Naturally, only States that have ratified the African Charter are subject to its provisions. All 53 member States of the OAU are parties to the Charter, and the only State on the African continent that is not an OAU member is Morocco.

Every communication should be as detailed and comprehensive as possible, given the limitations of the kind of information available to the applicant. Where possible, you should submit statements or affidavits from the author(s) of the complaint, witnesses, family members, or others who have relevant information about the specific issues raised. If the authorities are involved, include information such as the number and kind of police or security services, details of any arrests or searches, etc. You should include as annexes texts of relevant laws and directives, legal judgements, and copies of any publications or documents that may have been seized. If the situation does not obviously constitute a human rights violation, you should try to refer to relevant international opinions to support your claim that the act violates the norms of the African Charter.

Criteria for Admissibility

Seven criteria provided under Article 56 must be satisfied for a complaint to qualify for the attention of the Commission, although compliance with most of them should not be difficult.

The communication must not be anonymous, although you may request that your identity not be disclosed. For practical reasons, the Commission must be able to contact the author.

The communication must allege violations of rights that are protected by the Charter and must be compatible with the OAU Charter. This provision could conceivably prohibit any claim for secession, which would be counter to the OAU Charter's reaffirmation of respect for the territorial integrity of States.

The communication must not have manifestly political motivations or be written in "disparaging or insulting language".

The communication should not be based *exclusively* on media reports, but reliance to some degree on the media is permissible. According to the Commission, "The issue... should not be whether the information was obtained from the media, but whether the information is correct." The complainant should attempt to verify the truth of media reports independently, where possible.

The communication must be submitted "within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter." The Commission has not yet rejected a communication for being submitted too late, and it once declared a communication admissible that was initiated after more than sixteen years of fruitless domestic proceedings. Nonetheless, you should normally submit a communication as soon as it is practicable to do so.

The Commission will not admit cases that have been *settled* by the States involved in some other manner. However, this provision applies only if the settlement concerns the same parties and the same facts as those before the Commission.

Exhaustion of Domestic Remedies

As with other international communication procedures, domestic remedies must be exhausted before submitting a case to the Commission, "unless it is obvious that this procedure is unduly prolonged." The Commission has stressed that theoretically available remedies must, in fact, be available, effective and sufficient. "A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."

The Commission also has distinguished between cases in which the complaint deals with violations against identified individual victims and those cases of serious and massive violations in which it may be impossible for the complainants to identify all the victims. In the latter case, there is no need to exhaust domestic remedies. "The Commission does not believe that the condition that internal remedies must have been exhausted can be applied literally to those cases in which it is 'neither practicable nor desirable' for the complainants or the victims to pursue such internal channels of remedy in every case of violation of human rights. Such is the case where there are many victims."

Procedures of Investigation

All communications received by the Secretariat are transmitted to the Commission, even if they may be obviously unfounded or beyond the Commission's jurisdiction. The Commission determines whether or not to consider a communication, based on the above criteria. While Article 55 empowers a simple majority of the Commission to make that determination, in practice the Commission usually acts by consensus. The Commission will inform the applicant if it does not take up a case. Individual communications are confidential documents and they are examined in closed sessions.

The Commission does not always distinguish clearly between admissibility and action on the merits, and a communication may be transmitted to the State concerned at any stage. The State is given the opportunity to respond to the allegations, and the complainant may reply in writing to the State's response. If the State does not respond or does not contest the allegations, the Commission may accept the allegations as true. If the applicant ceases to communicate with the Commission, the Commission may treat the author's silence as a wish to withdraw his/her communication. However, the Commission will try to establish whether the silence is indicative of a lack of interest or whether it reflects circumstances beyond the individual's control that prevent him/her from pursuing the application.

Article 46 of the Charter gives the Commission broad authority to "resort to any appropriate method of investigation" in the course of its work. The Commission normally invites all of the parties to attend or be represented at a hearing on the merits of those cases that have been declared admissible. An author, his/her legal representative, and the State are entitled to be represented at the hearing.

Since 1994, the Commission has undertaken a number of on-site investigations of communications, although these may only occur with the consent of the State concerned. The reports from such missions are adopted as part of the proceedings and may also be published by the Commission separately, prior to a final decision on the communications. The Commission also may take into account information provided by UN Special Rapporteurs in determining whether allegations contained in individual complaints are well founded.

After hearing the parties and completing any investigation, the Commission deliberates, reaches its decision, and adopts its report in the case. All of these actions are *in camera*. However, NGOs recognized as "Observers may be invited specially to be present at closed sessions dealing with issues of particular interest to them". The Commission's conclusions are not legally binding on States, but the Commission does reach direct conclusions that a State is (or is not) in violation of specific articles of the Charter. The Commission does not normally recommend that a State take specific actions, such as payment of compensation or releasing a person from detention, although it may do so in exceptional circumstances. In one decision for example, the Commission called on the State, *inter alia*, to create an independent enquiry to investigate disappearances, replace unjustly confiscated national identity documents, pay compensation to victims, and reinstate the rights of unjustly dismissed workers.

Article 58 of the Charter empowers the Commission to draw the attention of the Assembly of Heads of State and Governments to communications "when it appears, after deliberations of the Commission, that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights." The Assembly may then request the Commission to conduct an in-depth study and report back.

At any time, a case may be closed if the parties reach an amicable settlement. Although the Commission is not specifically directed under the Charter to seek such a "friendly settlement", the Commission has made it clear that this is the preferred course: "It is the primary objective of the Commission in the communications procedure to initiate a dialogue between the parties which will result in an amicable settlement to the satisfaction of both and which remedies the prejudice complained of."

If the Commission finds that a complaint reveals an emergency situation, it can request the State concerned to submit interim reports on its respect for the rights that appear to have been breached.

Impact of the Commission's Work

Until relatively recently, little was known about the initiatives undertaken by the Commission to protect human rights in specific cases or countries. Under Article 29 of the Charter, all actions with respect to non-State complaints are to be confidential, unless the OAU Assembly of Heads of State and Government decides otherwise. During the early years of its activities, the Commission never disclosed any information concerning the individual complaints it had examined.

Since 1994, however, the Commission has published its decisions (on both admissibility and the merits) on individual complaints as an annex to the Annual Activity Reports that it submits to the OAU. This practice is perhaps based on Article 59(3) of the Charter, which stipulates that "the report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government." Unfortunately, the Commission's reports and decisions are neither published when they are adopted nor when the Commission issues a communiqué at the end of each session; only statistical information is included at that stage.

The Commission's reports and jurisprudence can be obtained from the Commission's secretariat. Other good sources for recent decisions are the: Africa Centre for Democracy and Human Rights Studies in Banjul, the African Institute for Human Rights and Development also based in Banjul, The Gambia, which offers a Compilation of the Decisions on Communications of the African Commission from 1994 to 1999 (web site: www.africaninstitute.org).

The Role of NGOs

The African Charter makes no express reference to the role of NGOs, but the Rules of Procedures of the Commission authorize it to grant observer status to NGOs. As of mid-2001, some 300 African and international NGOs had been granted observer status with the Commission.

Criteria for Granting and Enjoying Observer Status

In May 1999, the Commission adopted a Resolution "on the Criteria for Granting and Enjoying Observer Status to NGOs working in the Field of Human Rights with the African Commission on Human and Peoples' Rights". NGOs applying for observer status should have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter and in the African Charter, and, naturally, work in the area of human rights. The

applying NGO must send a written application to the Secretariat of the Commission at least three months prior to an ordinary session of the Commission. The NGO must provide in the application "its statutes, proof of its legal existence, a list of its members, its constituent organs, its sources of funding, its last financial statement, as well as a statement on its activities." The statement of activities should cover "the past and present activities of the organization, its plan of action and any other information that may help to determine the identity of the organization, its purpose and objectives, as well as its field of activities."

NGO Activities

The Commission has been generous in granting observer status to NGOs, and such status should be sought by any minority rights organization in Africa. Having observer status entitles an NGO to receive public documents and to participate in the public sessions of the Commission and its subsidiary bodies. The Commission may consult with NGOs either directly or through committees set up for this purpose. NGOs may distribute their documents, make oral interventions under agenda items considered in public session, and participate in working groups established by the Commission.

Under §6, Chapter II, of the Annex of the resolution on observer status, observers may request to have issues of particular interest to them included in the provisional agenda of the Commission. This might be a particularly useful tool for NGOs that would like to see more attention paid to issues of minority rights and non-discrimination.

The Rules of Procedure do not require that documentation, other than the provisional agenda, be distributed to NGOs in advance of the African Commission's sessions. However, all general distribution documents are available to all at the Commission's sessions. It is therefore important that NGOs take responsibility for following items of interest to them and for requesting relevant documentation so that they can prepare their contribution to the debate.

NGOs cannot take the floor when States report to the Commission on the implementation of the Charter. However, as noted above, they can and have provided alternative reports on countries under consideration by the Commission. Similarly, NGOs can take the floor during the general debate on the reports of Special Rapporteurs.

Under Article 45(3) of the Charter, the Commission is empowered to "interpret all the provisions of the Charter at the request of a State Party, an institution of the OAU or an *African organization recognized by the OAU*" (emphasis added). It is not clear whether this provision would include an NGO observer, but this could be an avenue worth pursuing in the future.

Since 1991 the Commission's sessions have been preceded by NGO meetings. These were previously organized jointly by the African Commission and the Geneva-based International Commission of Jurists. For information on such meetings, NGOs should now contact the African Centre for Democracy and Human Rights Studies in Banjul, The Gambia. These have been important meetings for both NGOs and the Commission, and are among the most significant and practical ways in which NGOs can help strengthen this mechanism. The conclusions of the meetings have been forwarded to the Commission for consideration.

The African Court on Human and Peoples' Rights

The OAU adopted a Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights in 1998. It will come into effect after fifteen ratifications or accessions have been received. As of mid-2001, only Senegal, Burkina Faso, The Gambia and Mali had ratified the Protocol. The establishment of an African Court that could issue legally binding judgements would represent an important step towards a comprehensive regional mechanism for protecting human rights in Africa.

Further Information and Contacts

All communications regarding the Commission should be sent to:
Secretariat of the African Commission on Human and Peoples' Rights
Kairaba Avenue, 90
P.O. Box 673
BANJUL, The Gambia
Tel. +220 39-29-62; Fax +220 39-07-64
e-mail: achpr@achpr.gm

Information and urgent appeals can be sent to the appropriate Special Rapporteur c/o the Secretariat of the African Commission, or directly to the Rapporteurs (as of mid-2001):

Special Rapporteur for Prisons and Conditions of Detention in Africa, Ms. Vera Mlangazuwa Chirwa (Malawi)

Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, Mr. Mohammed Hatem Ben Salem (Tunisia)

Special Rapporteur on the Rights of Women in Africa, Ms. Julienne Ondziel-Gnelenga (Congo, Brazzaville)

Other useful contacts:

The African Centre for Democracy and Human Rights Studies, Banjul, The Gambia, Kairaba Ave. K.S.M.D., Banjul, The Gambia. Tel: + 220 394 525, 394961; Fax + 220 394 962

E-mail: acdhrs@acdhrs.gm ; Web address: <http://www.acdhrs.org>

The African Institute for Human Rights and Development (Institut Africain pour les Droits Humains et le Développement), P.O. Box 1896, Banjul, The Gambia; Tel. +220 496-421; Fax +220 494-178; e-mail: info@africaninstitute.org; web site: www.africaninstitute.org.

International Commission of Jurists, PO Box 216, 81A avenue de la Châtelaine (Geneva), Switzerland; Tel. +41 22 979 3800; Fax +41 22 979 3801; email: info@icj.org - especially for information concerning NGO meetings' organized in the 1990s prior to the African Commission's sessions.

For the present, secondary sources are also a good place to look for information about the Commission and its work. The web site of the Organization of African Unity (www.oau.org) contains the texts of the African Charter and the Commission's Rules of Procedure, listed under "Commissions". Press communiqués and the Commission's annual reports to the OAU, may be found at the University of Minnesota's Human Rights Library web site

(www.umn.edu/humanrts), and some bibliographic references on the web site of Interights (www.interights.org/search.asp). In addition, two recent books describe the Commission's work: E. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedure* (1996), and R. Murray, *African Commission on Human and Peoples' Rights and International Law* (2000).