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Morris K Mbondenyi

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IMPROVING THE SUBSTANCE AND CONTENT OF CIVIL AND POLITICAL RIGHTS UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

M.K. Mbondenyi *

Abstract

The normative framework of the African human rights system has, to a large extent, been criticised for being inadequate. It is in this context that this article discusses the possible reforms to the civil and political rights provisions of the African Charter on Human and Peoples’ Rights. The article acknowledges that although there are problems and challenges associated with the African human rights system, it has contributed positively in the sphere of international human rights law. The article is therefore not confined to the issue of improving the relevant Charter provisions, but rather examines the complex-whole, meaning, the development of this category of rights by the African Commission on Human and Peoples’ Rights, as well as their short-comings. The bottom line argument is that the African human rights system is not static, but has rather evolved over time to incorporate, in its norms, institutions and practice, some aspects that were not given credence during the adoption of the African Charter.

* LLB (Moi), LLM, LLD candidate (UNISA); Legal researcher & Consultant, Arise Africa Consultants, Johannesburg South Africa.
Introduction


6 Adopted by the 35th ordinary session of the Assembly of Heads of State and Government, Algiers, Algeria, 14 July 1999.
7 Adopted by the Second Ordinary Session of the Assembly of the Union in Maputo, July 11, 2003.
Despite the proliferation of normative and, institutional mechanisms, the African Charter remains the main human rights instrument under the African system. The Charter can generally be said to be an innovative human rights instrument that incorporates in one document all the three generations of rights: civil and political rights; economic, social, and cultural rights; and group (peoples’) rights. Sadly, however, its civil and political rights provisions have a number of shortcomings, although they constitute the bulk of the substantive provisions of the Charter. These shortcomings have inspired the ongoing debate on the reform of the Charter, in particular, and the African human rights system, in general.

At least two approaches may be useful when addressing the question of reforming the civil and political rights provisions of the Charter. The first would involve the interpretive and jurisprudential procedures of the African Court and Commission on Human and

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11 As above Arts 14-18.

12 As above Arts 19-24.
Peoples’ Rights. This approach contemplates a situation where the African Commission and the Court are given the opportunity to interpret the Charter and bring its provisions in line with international jurisprudence. The approach is vindicated by Articles 60 and 61 of the Charter. Accordingly, Article 60 provides:

The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Article 61 adds:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organization of African Unity, African practices consistent with international norms on human and people’s rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

The above provisions seem to suggest, should the Commission deem the substantive provisions of the Charter to be inadequate or flawed,

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14 As above.
it could either ‘draw inspiration from international law on human and peoples’ rights’, or ‘take into consideration other general or special international conventions.’ The Commission could, by virtue of these provisions, interpret the rights in the Charter in line with international standards, where appropriate. The inadequate provisions of the African Charter may, by extension, be interpreted in light of the jurisprudence evolved during the interpretation of the international instruments and principles contemplated in Articles 60 and 61.

The second approach prefers comprehensive reform of the Charter. While the Commission and Court are entitled to exercise its mandate to interpret the Charter the interpretations need to be entrenched in the Charter to avoid confusion. The jurisprudence evolved by the Commission and the Court may also not be regarded with the same degree of seriousness as the Charter provisions. Further, it is much easier for one to understand the provisions of the Charter than peruse a lengthy precedent, perhaps shrouded in legalese, purporting to interpret the Charter. Moreover, some of the problems inherent in the Charter, as well as the African Human Rights Court Protocol, may be beyond the powers of the Commission and the Court to rectify, even through creative interpretation.

This article therefore discusses the civil and political rights provisions of the Charter in the light of their weaknesses (shortcomings), strengths and development by the Commission, as well as possible ways of reforming them. The article begins with a discussion on the civil and political rights guaranteed by the Charter and jurisprudence of the African Commission on certain rights. It then examines the weaknesses and ways of improving the Charter’s provisions on this category of rights.
Civil and Political Rights under the African Charter on Human and Peoples’ Rights

The Charter guarantees the enjoyment of a number of civil and political rights. Every individual is entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter 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.15 The exclusion of individuals from enjoying the rights in the Charter on the basis of the aforementioned distinctions may amount to discrimination. Although discrimination is a particular form of differentiation, the two concepts are distinct. Discrimination refers to differentiation on illegal grounds on the basis of very subjective criteria like those mention in Article 2. This does not, however, rule out affirmative action that may be preferred to redress past inequality.

The African Commission has had the opportunity to interpret Article 2 in a number of cases. For instance, in *Rencontre Africaine pour la Défense des Droits de l’Homme v. Zambia*16, the Zambian government expelled West African nationals on grounds that they were living in Zambia illegally and that the African Charter did not abolish the requirements for visas and the regulation of movement over national borders between member states. The Commission held that the nature of the expulsion by the Zambian government was discriminatory on nationality basis. The Commission further stated that Zambia, by ratifying the African Charter, was committed to “secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals.”17

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15 African Charter (n 1 above) Art 2.


17 As above.
The Commission also found a violation of the Article in *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrats, Commission Internationale des Juristes, Union Interafrique des Droits de l'Homme (OMCT, AIJD, CIJ, UIDH) v. Rwanda*. The communication alleged the expulsion of Burundian refugees from Rwanda as well as summary executions of Tutsis and political opponents, among other human rights violations. The Commission found that the violations of the rights of the individuals in this case were on the basis of their being Burundian nationals, members of the Tutsi ethnic group or members of opposition parties, and as such violated Article 2 of the Charter. The Commission concluded that:

> There is considerable evidence, undisputed by the government, that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2.

It is evident that discrimination has been practiced in many African states, more so against non-nationals. Mass expulsions, discrimination at the workplace, and subjection to unfavourable social and economic conditions, among other vices, have been experienced by foreign nationals in many African states. Such practices have often constituted a flagrant violation of Article 2 of the Charter, among other provisions. It is appreciated that African states are generally faced with many challenges, mainly of economic nature. In the face of such difficulties, they often resort to radical measures aimed at

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19 As above.
protecting their nationals and their economy from non-nationals. Whatever the circumstances may be, however, such measures should not be taken to the detriment of the enjoyment of human rights, as has been the case.21

Some governments have also been accused of promulgating discriminative legislation. For instance, in *Purohit and Moore v. Gambia*22, the communication alleged that the principal legislation governing mental health in Gambia, namely the *Lunatics Detention Act of 1917*, was outdated and discriminative in effect. The complainants contended, as there were no review or appeal procedures against determination or certification of one’s mental state for both involuntary and voluntary mental patients, the legislation did not allow for the correction of an error assuming a wrong certification or wrong diagnosis had been made. In such circumstances, they further contended, if an error was made and there was no avenue to appeal or review the medical practitioners’ assessment, there would be a great likelihood that a person could be wrongfully detained in a mental institution. In finding a violation of Article 2 and 3 of the Charter, the Commission stated:

54. Clearly the situation presented above fails to meet the standards of antidiscrimination and equal protection of the law as laid down under the provisions of Articles 2 and 3 of the African Charter and Principle 1(4)23 of the United Nations Principles for the Protection

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23 Principle 1(4) provides: “There shall be no discrimination on the grounds of mental illness.” ‘Discrimination’ means any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights [footnote retained].
of Persons with Mental Illness and the Improvement of Mental Health Care.\textsuperscript{24}

...  

61. The African Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being.\textsuperscript{25} Like any other human being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all states party to the African Charter in accordance with the well established principle that all human beings are born free and equal in dignity and rights.\textsuperscript{26}

The African Commission’s observation in this regard is quite commendable because it draws the nexus between the right to non-discrimination and human dignity. In other words, discrimination undermines a person’s dignity by suggesting that he or she is inferior to the rest. Human dignity is an inherent basic right to which all human beings, regardless of their capabilities or disabilities, as the case may be, are entitled to without discrimination. It is therefore a

\textsuperscript{24} GA Res 46/119, 46 UN GAOR Supp. (No. 49) at 189, UN Doc. A/46/49 (1991) [footnote retained].

\textsuperscript{25} Article 3 of the UN Declaration on the Rights of Disabled Persons, UNGA Resolution 3447(XXX) of 9 December 1975, provides ‘Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible’ [footnote retained].

\textsuperscript{26} Universal Declaration of Human Rights of 1948, Article 1 [footnote retained].
right which every human being is obliged to respect by all means possible.

It must, however, be noted that the scope of the right to non-discrimination does not exclude reasonable measures intended to protect or support individuals who are disadvantaged by reason of their race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.27 Such measures are generally referred to as affirmative action or ‘positive discrimination.’ Some states, such as South Africa, have come up with concepts like ‘fair discrimination’ to justify affirmative action.28 Hence, differentiation will not amount to discrimination if it is intended to redress imbalances in society and if it does not result to the violation of the right to equality and other associated rights. This essentially means that there is a very faint line between differentiation and discrimination.

Article 3 of the Charter guarantees every individual the twin-rights of equality before the law and equal protection of the law.29 Right to equality is closely linked to the right to non-discrimination. This essentially means that the law should not have regard for race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Like the right to non-discrimination, the right to equality is not absolute, but rather recognises relative equality. Relative equality allows for a differential treatment of individuals proportionate to their circumstances.

In Union Interafricaine des Droits de l’Homme, Federation International des Ligues des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme,

27 See U Umozurike The African Charter on Human and Peoples’ Rights (1997), Ch. 3.
29 African Charter (n 1 above) Art 3(1) & (2).
Organisation Nationale des Droits de l’Homme au Senegal and Association Malienne des Droits de l’Homme (UIDH, FIDH, RADDHO, ONDH and AMDH) v. Angola, the communication alleged the expulsion of West Africans from Angola without the opportunity to challenge the matter before the domestic courts. The Commission held that states parties are under obligation to ensure that persons living in their territory, whether nationals or non-nationals enjoy the rights guaranteed under the Charter. Thus, the Commission found that the victim's rights to equality before the law were trampled on because of their origin, and constituted a violation of Article 3 of the Charter.

Most communications before the Commission that alleged the violation of Article 3 also alleged the violation of Article 2 of the Charter. Thus, it is inevitable to conclude that the right to non-discrimination and the right to equality are closely related, if not intertwined. The right to equality and equal protection of the law requires that no law shall make any provision that is discriminatory either of itself or in its effect. Hence, this right would be violated when, for example, a public authority in the performance of the functions of a public office discriminates against a person. The right to equality also requires that no law shall be promulgated that would treat people in a discriminatory manner in respect of, for example, access to shops, hotels, lodging-houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.


Article 4 of the Charter guarantees the right to life in very precise terms. It begins with affirming the inviolability of human beings then proceeds to acknowledge the entitlement to respect for life and integrity of the person. The Article prohibits arbitrary deprivation of the right to life. This right is regarded as the most fundamental right on the basis of which other rights accrue. As a matter of fact, a person cannot claim any other right if his right to life has been violated. Generally, this right is non-derogable except in certain circumstances judicially recognised or resulting from lawful acts of war or self-defence. However, in some national jurisdictions, such as South Africa, this right is non-derogable even in times of emergencies.

The African Charter is silent on what might constitute arbitrary deprivation of the right to life. In the absence of a working definition from both the Charter and the Commission, arbitrary deprivation of the right to life has narrowly been taken to mean extra-judicial killings. This reasoning was deduced from OMCT, AIJD, CIJ, and UIDH v. Rwanda, where the Commission observed that extra judicial killings of Rwandan villagers by the Armed Forces violated the right to life guaranteed by the Charter.

The Commission’s response to the violation of the right to life has generally been unsatisfactory because it has not only failed to provide the definition of this right within the context of the Charter, but has

32 Article 4 states, “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.
also failed to find its violation in certain instances. For example, in *International Commission of Jurists v. Rwanda*\(^{37}\), it failed to find a violation of the right even when it was informed of the extra-judicial killings that were taking place in Rwanda. Instead, it requested permission from the Rwandan government to conduct on-site investigation of the allegations.\(^{38}\) In *Orton and Vera Chirwa v. Malawi*\(^{39}\), the Commission also failed to clarify the scope of this Article. Although the communication alleged violation of the right to fair trial, right to liberty and freedom from torture, the Commission went ahead to find the violation of the right to life.\(^{40}\) The findings of the Commission were unsatisfactory in as far as it failed to comprehensively interpret those provisions that had been violated by Malawi.

In *Interights et al (on behalf of Mariette Sonjaleen Bosch) v. Botswana*\(^{41}\), the communication related to the conviction for murder and subsequent sentencing to death of Mariette Bosch in Botswana, allegedly in violation of Article 4 of the Charter. The complainants argued, among other things, that the death penalty had been imposed in breach of the Charter. The Commission found the penalty not to be in breach of the Charter stating that death penalty should be imposed only after full consideration of the circumstances of the offence and of the offender.\(^{42}\)

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\(^{40}\) See the 8th Annual Activity Report of the African Commission on Human and Peoples Rights.


\(^{42}\) As above.
It found that the court in respect of Mariette Bosch had looked at the circumstances fully. The Commission also observed that:

... it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty. This is illustrated by the UN General Assembly’s adoption of the 2nd Optional Protocol to the ICCPR and the general reluctance by those states that have retained capital punishment on their statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a ‘Resolution Urging States to envisage a Moratorium on the Death Penalty’ and therefore encourages all states party to the African Charter on Human and Peoples’ Rights to take all measures to refrain from exercising the death penalty.43

It then “strongly urged the Republic of Botswana to take all measures to comply with the Resolution Urging States to envisage a Moratorium on the Death Penalty.”44 This appears to be contradictory, although not dissimilar to the approach that has been adopted by other international bodies.45 The Commission has also previously held that where a trial which ordered the death penalty was not fair and so violated Article 7 of the Charter, the subsequent execution will further violate the right to life under Article 4.46

43 As above para. 52.
44 As above.
Although individual Commissioners have sometimes appeared to suggest that the death penalty is in itself a violation of the guarantee of the right to life in Article 4 of the Charter, the Commission as a whole has not taken this position.\(^{47}\) In the examination of state reports, Commissioners have sometimes asked states whether they have abolished the death penalty, expressly linking this with the violation of the right to life. For example, at the 31st Session of the Commission in May 2002, one Commissioner asked the delegation from Cameroon: “the death sentence is still in the criminal code but it has been said that for more than 15 years there has been no execution. Are there any efforts to guarantee the right to life and thus abolish the death sentence?”\(^{48}\) This essentially means that the Commissioner perceived the abolition of the death sentence as a guarantee to the right to life. Once again, it failed to seize this moment to define the scope of the right to life as contemplated in the Charter.

In the Resolution Urging the State to Envisage a Moratorium on the Death Penalty\(^{49}\), the Commission, referring to the right to life, only urged states to review their approach and consider abolishing the death penalty, without expressly calling on them to do so. The Commission stated that it:

> Urges all states parties to the African Charter on Human and Peoples’ Rights that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter.... Calls upon all states that still maintain the death penalty

\(^{47}\) R Murray ‘Developments in the African Human Rights System 2003-04’ (n 45 above).


\(^{49}\) Adopted at 26th Ordinary Session on 15 November 1999, ACHPR/Res.42(XXVI) 99.
to: (a) limit the imposition of the death penalty only to the most serious crimes; (b) consider establishing a moratorium on executions of death penalty; (c) reflect on the possibility of abolishing death penalty.50

From the foregoing, it is imperative to note that the Commission is not unequivocal on the abolition of the death penalty. Rather, it gives states two options, the first being limiting the imposition of the death penalty only to the most serious crimes and the second being considering on the possibility of abolishing the penalty. Thus, it can be said that the right to life in the context of the African human rights system does not exclude judicial execution.

Generally, the Commission still has a lot to do with regard to the clarification of the right to life. The Commission is yet to interpret Article 4 in the light of issues such as the right to life of a foetus, and other controversial components of this right that have come before the UN and other regional mechanisms. The importance of the right to life in Africa cannot be overlooked. This is especially because it is one of those rights that have been violated with impunity by successive brutal regimes which have engaged in endless power struggles and extra-judicial killings.

Article 5 of the Charter protects a number of related rights, namely: (i) the right to the respect of the dignity inherent in a person; (ii) the right to the recognition of one's legal status; and (iii) the right against all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.51 The right to the respect of the dignity inherent in a human

50 As above.
51 Article 5 states: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”.
being is the basis of the human rights concept. This concept acknowledges that every individual has legal entitlements (rights) by virtue of being human. It is on the basis of this acknowledgement of one’s legal status that Article 5 recognises the fact that slavery is a dehumanising practice because it exploits people. Slave trade has been one of the greatest violations of human rights ever to be committed in Africa. Slave trade and slavery in their contemporary forms include practices such as: illegal sale and traffic in human beings, pledging of young girls for debts, forced marriages in exchange of dowry; use of domestic servants for extremely low pay; child labour; and forced labour.

In *S.O.S Esclaves v. Mauritania*[^52], the communication alleged that slavery was still a common practice in Mauritania and that the government in some cases supported its perpetrators. It stated, *inter alia*, that ten adults were sold and bought as slaves; children from four families were enslaved by their parents’ masters; two women were married to their masters against their will; and six people and their families were disposed of their ancestral property by their parents’ masters. The communication was, however, found inadmissible for non-exhaustion of domestic remedies.

Another communication, *Bah Ould Rabah v. Mauritania*[^53], concerned the expulsion of a family from their home after the death of their mother. Mr. Mohammed Bah (not the complainant herein) alleged that their mother had been his slave and therefore her estate should have passed to him on her death. The complainant, who was the son


of the deceased, alleged the violation of Article 5 of the African Charter. The government of Mauritania asserted that the dispute was between two citizens who were members of the same family and that the allegations could not be justified as slavery.

The Commission observed that the consequences of slavery still existed in the respondent state. It therefore called on all public institutions in Mauritania “to persevere in their efforts so as to control and eliminate all the offshoots of slavery.”54 It then ordered the government to “take the appropriate steps to restore the plaintiff his rights.” The Commission, as has been its custom, failed to specify the ‘appropriate steps’ the government of Mauritania needed to take to restore the plaintiff’s rights. It also did not elaborate on the content of the right against slavery, especially in its contemporary application. This indeed is an overt failure on the part of the Commission.

Article 5 also provides for the prohibition of all forms of torture, cruel, inhuman or degrading punishment and treatment. The exact meaning of the term ‘torture’ is still debatable in academic circles.55 In Article 1 of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT), torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

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54 Paragraphs 29 & 31.
55 See A Cullen ‘Defining torture in international law: A critique of the concept employed by the European Court of Human Rights’ (2003) 34 California Western International Law Journal 29, where the author expressed the need for a less definitive and broader view of the concept of torture; E Gross ‘Legal aspects of tackling terrorism: The balance of the right of a democracy to defend itself and the protection of human rights’ (2001) 6 UCLA Journal of International Law and Foreign Affairs 94, who argues that there is no clear definition of torture.
suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Torture is still a persistent problem in Africa. It has been noted that this practice is usually employed by both governments and individuals, mainly to counter dissent and to impose ideas or authority on others.\(^\text{56}\) It is not surprising that the African Charter puts torture in the same category as slavery and slave trade, and categorises them as “forms of exploitation and degradation.”\(^\text{57}\)

From the Commission’s jurisprudence, it can be deduced that torture includes acts such as beatings usually carried out by security forces, long periods of detention without charge or trial, overcrowded detention cells and prisons and detention in solitary cell. In Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa v Malawi)\(^\text{58}\), for example, the Commission held

\(^\text{56}\) Statement made at an international seminar ‘African cultures and the fight against torture’ which was held from 29 July 2005 to 1 August 2005 at Dakar, Senegal http://ww2.fiacat.org/en/article.php3?id_article=41 (accessed 31 July 2007).


\(^\text{58}\) Communication 64/92, 68/92 and 78/92, Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa v Malawi, Seventh Activity Report 1993-1994, Annex IX; Eighth Activity Report 1994-1995, Annex VI (Documents of the African Commission on Human and Peoples’ Rights). The Commission was also seized with other communications alleging the violation of this right. However, they were dismissed for failing to meet the admissibility requirement. See, for example, Communication No. 8/88, Nziwa Buyingo v. Uganda; Communication no. 17/88, Hilarie v. Benin; and Communication no. 18/88, El Hadji Boubacare v. Benin,
that conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened this provision of the Charter. The Commission has also found the holding of a prisoner in handcuffs, airless and dirty cells, chained by foot to the wall in the cell, and the denial of medical attention in situation of deteriorating health to be acts of torture and cruel, inhuman and degrading treatment.59

In Curtis Francis Doebbler v. Sudan60, eight Muslim university students on a picnic were arrested and charged with committing, in a public place, acts contrary to public morality prohibited under Article 152 of the Sudanese Criminal Law of 1991.61 The alleged offensive acts comprised of girls kissing, wearing trousers, dancing with men, crossing legs with men, and sitting and talking with men.62 They were subsequently convicted and sentenced to fines and lashes. The lashes were executed in public under the supervision of the national court. The communication alleged that the punishment violated Article 5 of the African Charter. In finding a violation and requesting the abolition
of the penalty of lashes by Sudan, the African Commission observed as follows:

Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual [to act] against his will or conscience. While ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case, the African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses [Footnote omitted]....There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty. The law under which the victims in this communication were punished has been applied to other individuals. This continues despite the government being aware of its clear incompatibility with international human rights law.63

The Commission further rejected the argument by Sudan that the lashings were justified because the authors of the petition committed acts found to be criminal according to the laws in force in the country. It did not, however, address Sudan’s argument that “it was better for the victims to have been lashed rather than hold them in detention for the said criminal offences and as such deny them of the opportunity to continue with their normal lives.”64 This is a relativist argument

63 As above paras 35-44.
64 As above para 34.
Improving the Substance & Content

often advanced to establish that lashing is less cruel, inhuman or degrading than imprisonment. The argument, however fails to appreciate that a punishment does not lose its degrading character just because it is a more effective deterrent.

The Commission’s jurisprudence regarding violation of Article 5 of the Charter is rather scanty because it is yet to articulate on what amounts to torture, cruel, inhuman and degrading punishment in the context of the African Charter as has been done in the European and Inter-American systems. This may partly be attributed to the few communications alleging the violation of this right. The fact that there are few complaints on the violation of this right, however, does not necessarily depict the situation on the ground. This is because, and sadly so to state, many practices which violate these provisions continue to persist throughout the continent. Notably, corporal punishment still punctuates the criminal laws of many African states. Certain religious and cultural practices such as amputation of limbs as criminal punishment are also common.

Although the Commission has not evolved substantial jurisprudence on the right against torture and inhuman or degrading treatment, it has all the same taken initiatives to elaborate on, and protect this

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65 See, for example, *Tyrer v. UK* (1978) 2 ECHR, p. 1, where the court held that birching by order of a judicial authority in the Isle of Man amounted to degrading punishment and violated Article 3 of the European Convention. Similarly the court held in *Campbell and Cosans v. UK* 1982 4 ECHR, p. 293 that although birching in Scottish schools did not violate Article 3 of the Convention per se, suspension of the applicants from school refusing to submit to the punishment was in breach of parental convictions against corporal punishment protected under Article 2 of Protocol No. 1.

66 For instance, Section 18 of the Criminal Code of Southern Nigeria and S 68 (j) (f) of the Penal Code of Northern Nigeria, which authorise flogging for prescribed offences. S 55(j)(d) of the code allows the reasonable chastisement of a wife by her husband, if they are married under customary law. See U Umozurike *The African Charter on Human and Peoples’ Rights* (n 27 above) 44.
right. For instance, it adopted the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)\textsuperscript{67}, and has ensured their distribution in some African countries.\textsuperscript{68} The RIG approaches the question of torture in three broad ways: prohibition, prevention, and responding to the needs of victims.\textsuperscript{69} Specifically, the guidelines require states to, \textit{inter alia}: criminalise torture; combat impunity for both nationals and non-nationals who commit acts of torture; establish complaints and investigation procedures to which all persons can bring their allegations of torture; take steps to ensure that conditions of detention comply with international standards; and train and empower, among others, law enforcement officers so that they refrain from using torture.\textsuperscript{70}

The guidelines also oblige states to ensure that all victims of torture and their dependants are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support.\textsuperscript{71} Remarkably, the guidelines recognise families and communities which have been affected by the torture and ill-treatment of one of its members as torture victims.\textsuperscript{72} A detailed discussion of these guidelines is beyond the scope of this article.

Suffice it to state that in spite of it being a step towards the right direction; the RIG is not binding on states, as it is a mere declaration

\textsuperscript{67} Adopted by the African Commission at its 32nd ordinary session, 17-23 October 2002, Banjul, The Gambia.
\textsuperscript{69} J Mujuzi ‘An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples’ Rights’ (n 57 above) 440.
\textsuperscript{70} Resolution on the Robben Island Guidelines adopted by the African Commission at its 32nd ordinary session, 17-23 October 2002 (n 67 above).
\textsuperscript{71} As above Part III (49-50 a-c).
\textsuperscript{72} As above.
and not a treaty. Additionally, its purported enforcement mechanism is very weak. The guidelines establish a follow-up committee of only five members with the mandate to organise seminars, to disseminate the RIG, to develop and propose to the Commission strategies to promote and implement the RIG at national and regional levels, to promote and facilitate the implementation of the RIG within member states, and to draft a progress report to the African Commission at each session.\textsuperscript{73} This is clearly too much work for only five individuals.

In another initiative the Commission has liaised with certain institutions, especially prison authorities, in some European countries in an effort to gain an insight on how, among other things, torture can be prevented in places of detention.\textsuperscript{74} Commissioners have in the past visited countries such as France. The Commission has also granted observer status to many NGOs that deal with torture.\textsuperscript{75} It is hoped that with time, the Commission’s approach to the violation of this right will evolve to reflect the magnitude of the seriousness of torture and inhuman or degrading treatment occurring in the continent.

**Article 6 of the Charter provides that “every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”** This Article guarantees individuals physical liberty by prohibiting unlawful arrests and detention. The enjoyment of this right, however, is subject to reasons and conditions laid down by law. The right to liberty and security of the person requires the state to

\textsuperscript{73} As above para 3.

\textsuperscript{74} See *Thirteenth Annual Activity Report*, para 27 and *Fifteenth Annual Activity Report* para 30.

have justifiable grounds for depriving a person of his or her liberty, and further requires such deprivation to be in accordance with stipulated procedures.

The Charter is not explicit on what “law” this right should be subjected to: is it international law or domestic legislations? One might argue that the drafters intended the term “law”, as used in this Article, to mean international law. This is because there is imminent danger in subjecting such a right to the discretion of domestic laws. The danger is to the effect that what is “law” in a certain domestic jurisdiction may be an oppressive legislation that facilitates the violation of this right. Essentially, it may be correct to state that the law to be relied on in limiting this right must be consistent with the standards recognised under international law.

The African Commission has received a number of communications alleging violation of Article 6 of the Charter. In Henry Kalenga v. Zambia76, the complainant had been detained without trial. He then petitioned the Commission demanding his release. Zambia’s Ministry of Legal Affairs later informed the Commission of his release, after being in detention for three years. The Commission proceeded to declare the matter amicably resolved without consulting the victim. The conclusion of the case by the Commission without developing its jurisprudence on this right or pronouncing the appropriate relief is quite disappointing. Similarly, in International Pen v. Burkina Faso77, where the victim alleged unlawful detention, a notification to the Commission of the release of the victim was enough for it to declare the matter amicably resolved.

The Commission’s tendency of declaring communication’s amicably resolved without giving substantive reasoning was not taken lightly. Subsequently, it resolved to adopt a new approach of contacting the petitioner(s) to inquire whether other forms of relief are sought beyond release from detention. While this is a welcome step in the right direction, the Commission must go ahead to determine the award of compensation in cases where it finds a violation of Article 6. The fact that Article 6 of the Charter does not make specific provisions regarding compensation should not in any way deter the Commission from applying the standards known in international law, especially as authorised in Article 60 of the Charter.

**Article 7 guarantees the right to fair trial in the following terms:**

1. Every individual shall have the right to have his cause heard. This comprises:
   
   (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by

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79 See communication no. 62/91, Committee for the Defense of Human Rights (Jennifer Madike) v. Nigeria, ACHPR/LR/A1 (1997) 60, where despite receiving information that the detainee had been released, the Commission inquired of the petitioner if it wished to pursue the case further.

80 Article 60 provides that: “The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by 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.” See O Nmehielle *The African Human Rights System* (n 38 above) 92.
conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

This Article lays down some essential elements of a fair trial namely:

(i) fair hearing; (ii) the right of appeal; (iii) presumption of innocence; (iv) defence by counsel of one’s choice; (v) trial by an impartial court or tribunal; (vi) individual criminal responsibility; and (vii) prohibition of ex-post facto laws.

Article 7 (1) (a) guarantees the right to an effective appeal to competent national organs against acts violating fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force. According to the construction of the Commission, the term ‘appeal’ seems to refer to the right to lodge an appeal to a higher court, where one exists. In The Constitutional Rights Project (Zamani Lekwot & 6 Others) v. Nigeria81, the victims were convicted and sentenced to death under the Nigerian Civil Disturbances (Special Tribunal) Act. The petitioner contended, inter alia, that there was a violation of the right of appeal under Article 7(1) (a) of the Charter.

The Commission held that to foreclose any avenue of appeal to “competent national organs” in criminal cases violates Article 7(1)(a) of the African Charter.

The Commission had earlier held section 11(4) of the Nigerian Armed Robbery and Firearms (Special Provisions) Act, which restricted appeals, to be a violation of the right to appeal guaranteed under Article 7(1)(a) of the Charter. Similarly, the Commission has also found “the system of executive confirmation, as opposed to appeal, provided for in the institution of special tribunals” to be contrary to Article 7(1)(a). In other words, special tribunals are not entitled to substitute the right to appeal with executive confirmation.

The phrase ‘competent national organs’ in Article 7(1)(a) has been said to envisage ingredients such as the expertise of the judges and the inherent justice of the laws under which they operate. Consequently, “to deprive a court of the personnel qualified to ensure that they operate impartially denies the right to individual’s to have their case heard by such bodies.” Reference to ‘court or tribunal’ in the subsection indicates that the Charter applies to all courts and tribunals, whether specialised or ordinary. Thus, the Commission has maintained that a military tribunal, per se, is not offensive to the rights in the Charter, nor does it imply an unfair or unjust process;

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82 The sub-section provided that “no appeal shall lie from a decision of a tribunal under this Act or from any confirmation or dismissal of such decision by the governor.”
85 As above.
86 As above.
neither is such a tribunal negated by the mere fact of being presided over by military officers.88

However, such tribunals may present serious problems in areas of equitable, impartial and independent administration of justice. For them to be recognised, at least in the context of subsection 7(1)(a) of the Charter, they must be subject to the same requirements of fairness, openness, justice, independence, and due process as any other ordinary court. Even the former UN Human Rights Committee maintained that, while the ICCPR does not prohibit such categories of courts (military or special courts which try civilians), they must lay down conditions which clearly afford the full guarantee stipulated in Article 14 of the ICCPR.89

Article 7 (1) (b) deals with the presumption of innocence, which is a criminal law principle that requires a person to be presumed innocent until proved guilty. In criminal cases, the burden of proof lies with the prosecution. The Commission has found violation of this right in a number of cases.90 For instance, in Annette Pagnoulle v. Cameroon91, it held that the detention of the complainant for two years after he had served his sentence of imprisonment on the suspicion that he ‘may cause problems’ was a violation of his right to be presumed innocent.

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89 See UN Human Rights Committee General Comment No 13 (XXI/1984) para 4.
In *Media Rights Agenda and Others v. Nigeria*\(^{92}\), Mr. Niran Malaolu and three other members of staff of a Nigerian newspaper, the *Diet* newspaper, were arrested by armed soldiers at the editorial offices of the newspaper in Lagos on 28 December 1997. Neither Mr. Malaolu nor his three colleagues were informed of the reasons for their arrest or shown a warrant of arrest. Three of the arrestees were later released, but Mr. Malaolu continued to be held without charges until 14 February 1998, when he was arraigned before a special military tribunal for his alleged involvement in a coup. Throughout the period of his incarceration, he was not allowed access to his lawyer, doctor or family members. On 28 April 1998, the tribunal, after a secret trial, found the accused guilty of concealment of treason and sentenced him to life imprisonment.\(^{93}\) The African Commission held that his right to a fair trial, including the right to be presumed innocent until proven guilty, had been breached.\(^{94}\)

The sub-section also requires proof of guilt to be conducted by a competent court or tribunal. To facilitate this process, the state must employ competent and qualified umpires to preside over cases. These umpires must be impartial and independent of executive influence.\(^{95}\) In *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria*\(^{96}\), the Commission found a bench composed of members of the armed forces and police to be impartial and therefore in violation of the law.

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93 As above paras 3-8.

94 As above para 43.

95 See Communication 71/92 *Rencontre Interafricaine pour la Defense des Droits de l’Homme v. Zambia* where the Commission held that the deportation of foreigners from Zambia without giving them the opportunity to be heard by the national judicial authorities violated article 7 (1) of the African Charter.

96 Communication 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria*. 
of Article 7 (1) (b). A competent court is one whose judges (or magistrates) are duly qualified, meeting both legal and natural qualifications such as personal integrity and dedication.

The African Charter does not provide for, among other things, the right of persons arrested to be informed at the time of arrest of reasons for their arrest, in a language that they understand, and to be informed promptly of any charges against them. It was the African Commission’s Resolution on the Right to Recourse Procedure and Fair Trial that filled this gap. This resolution shall be revisited later.

Article 7 (1)(c) guarantees every person the right to defence. This includes the right of an accused to be informed of the charges against him and the evidence of the said charges. In this regard, the African Commission has defined this right to envisage “all sorts of elements required to prepare” for one’s defence. Where these elements are not availed to the accused, then Article 7(1)(c) of the Charter is violated. A state, however, bears no responsibility for the failure of the accused to make objections or call witnesses at a trial, unless access is denied to the evidence on which the prosecution is based.

The other component of the right to defence that is expressly stipulated in the Charter is the right to be defended by Counsel of one’s choice. Thus, trial without being defended was held to be a violation of Article 7 (1) (c). The guarantee of the right to be

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97 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa in Recommendations and Resolutions of the Commission, para 3.
defended by ‘Counsel’ of one’s choice is problematic if ‘Counsel’ is understood to mean a fully qualified and admitted lawyer.\textsuperscript{101} It has correctly been suggested that the term ‘Counsel’ should be taken to mean a ‘legal representative’ and nothing more.\textsuperscript{102} The Commission found a violation of the provision when Defence Counsel was harassed during a trial to the point where he withdrew from the case.\textsuperscript{103} A similar finding was made when a Defence Counsel was allegedly assaulted by soldiers.\textsuperscript{104} It has also been held that the right to be defended by Counsel of one’s choice implies that one has the right of access to a lawyer when being detained without trial.\textsuperscript{105}

In \textit{Media Rights Agenda and Others v. Nigeria}\textsuperscript{106}, the complainant alleged that Mr. Malaolu was denied the right to be defended by lawyers of his choice and was, instead, assigned a military lawyer by the tribunal, in contravention of the right to a fair hearing.\textsuperscript{107} The African Commission agreed, relying on its Resolution on the Right to Recourse and Fair Trial, which provides, \textit{inter alia}, that “in the determination of charges against individuals, the individual shall be

\textsuperscript{101} See E Ankumah \textit{The African Commission on human and Peoples’ Rights} (n 78 above) 126.


\textsuperscript{103} Ken Saro Wiwa’s case (n 59 above) para 96.

\textsuperscript{104} As above para 97.


\textsuperscript{106} As above.

\textsuperscript{107} As above paras 11 & 55.
entitled in particular to: (i) . . . communicate in confidence with counsel of their choice.” 108

In Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi109, the African Commission was called upon to rule that, by denying Mr. Gaetan Bwampamye’s Counsel the right to plead his case, the Criminal Chamber of the Ngozi Court of Appeal held a hearing which was not equitable in terms of the African Charter. The communication alleged, inter alia, although the Criminal Chamber of the Court of Appeal accorded the prosecution the right to make oral submissions, the Defence Counsel was denied the same.110 The African Commission stated as follows:

The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner.


110 As above paras 9-10.
The Commission’s observations were indeed very constructive given that it has interpreted the right to defence broadly enough to include equality of treatment of the accused persons and the prosecution. Where parties to a dispute are not afforded equal opportunities, it is likely that justice would be compromised. Additionally, the Commission held that the right to defence also implies, at each stage of the criminal proceedings, the accused and his counsel should be able to reply to indictment of the public prosecutor. 111

Although the Charter guarantees the right to legal representation, it fails to make provision for state-provided legal assistance. The European 112 and Inter-American 113 human rights systems have provisions for legal assistance. The right to legal aid and assistance is an important element of fair trial as it ensures that indigent persons are not denied the opportunity of a fair trial due to their lack of means to pay for legal services. However, the provision of legal aid and assistance is a capital-intensive undertaking, which many African states may find very difficult to accomplish effectively from their own resources.

The right of an accused person or of a party in a civil case to legal aid and assistance may be necessitated by two main factors, namely that (i) the interest of justice so requires and (ii) the person does not have sufficient means to pay for it. The determination of the interest of

111 As above para 28.
112 See European Convention, supra, Article 6 (3) (c), which guarantees the right of a person charged with criminal offence to: “defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so requires”.
113 See Article 8 (2) (e) of the American Convention, supra, which stipulates the: “inalienable right to be assisted by Counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself or herself personally, or engage his or her own Counsel within the time period established by law”.


justice in criminal cases is based on the seriousness of the offence and the severity of the sentence, whilst in civil cases it is based on the complexity of the case and the ability of the party to adequately represent himself or herself; the rights to be affected; and the likely impact of the outcome of the case on the wider community. Currently, in many African countries, legal aid is only provided by the state in cases of capital punishment, due to resource constraints.

One can legitimately wonder about access to the African Commission in the case of persons in distress or destitute, especially as no state makes provision for legal aid for the submission of cases to an international authority. Resource constraints notwithstanding, states need to commit themselves to legal assistance if the right to fair hearing is to be guaranteed. In *John Modise v. Botswana*¹¹⁵, where the complainant could not exhaust domestic remedies for lack of funds to seek legal representation in local courts, the Commission held that the lack of funds cannot be an exception to the exhaustion of domestic remedies requirement. The Commission should have used that case to lay down principles on legal aid as an important aspect of the right to a fair trial.

Article 7 (1) (d) guarantees the right of an accused to be tried within a reasonable time by an impartial court or tribunal. The Charter’s reference to ‘reasonable time’ is to ensure that proceedings are not prolonged. The rationale of the provision is to facilitate the speedy rendition of justice to ensure effectiveness and credibility. Reasonableness of the duration of proceedings, however, depends on the particular circumstances of a case. The Commission found the detention of a victim for seven years without trial to be a violation of

the right to be tried within a reasonable time under Article 7 (1) (d).\textsuperscript{116} Similarly, detention without trial was termed as a violation of this provision.\textsuperscript{117}

The Commission has also interpreted what might reasonably constitute an impartial court or tribunal under Article 7 (1) (d). In \textit{Constitutional Rights Project (Akunu) v. Nigeria}\textsuperscript{118}, the impartiality provision was dealt with in relation to the special tribunals that had been created to deal with cases involving robbery and firearms. The Commission stated:

\begin{quote}
The \textit{Robbery and Firearms (Special Provision) Act}, Section 8 (1), describes the constitution of the tribunals, which shall consist of three persons: one judge, one officer of the Army, Navy or Air Force and one officer of the Police Force. Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of the government, the same branch that passed the \textit{Robbery and Firearms Decree}, whose members do not necessarily possess any legal expertise. Article 7 (1) (d) of the African Charter requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance of, if not actual, lack of impartiality. It thus violates Article 7 (1) (d).
\end{quote}


Accordingly, it could be said that impartiality under this provision has a nexus with independence from executive interference. A court or tribunal that is not independent from executive interference is obviously not expected to be impartial, especially where the executive is a party to a case.

The last of the legal protections afforded to an accused person by Article 7 of the Charter is the prohibition of ex post facto laws. Article 7 (2) prohibits retroactive punishment. The Article also provides for individual criminal responsibility. The provision prohibits the introduction of new offences with retrospective effects. Article 7(2) is, however, not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty and the principle that the criminal law must not be extensively construed to an accused detriment.119

In Media Rights Agenda and Constitutional Rights Project v. Nigeria120, the Commission stated that Article 7(2) must be read to prohibit not only infliction of punishment for acts not constituting crimes at the time they were committed, but to retroactivity itself. It further observed that it is no excuse that a retroactive law has not been enforced; “an unjust but un-enforced law undermines . . . the sanctity in which the law should be held.”121 The Commission has also been seized with communications alleging transfer of criminal liability to persons related to the accused.122 Members of an accused person’s immediate

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121 As above para 60.
122 See in this regard, Communication 103/93 Alhasan v. Ghana 116; Communication 108/93, Monja v. Madagascar 125; and communication 142/94, Njoku v. Kenya 141.
and extended families have in certain instances allegedly been
arrested, detained and even prosecuted for offences they did not
commit. The Commission has however not dealt with this issue
comprehensively.

Although the Charter and the Commission seem to attach significance
to the right to fair trial, certain pertinent aspects of this right have
been overlooked. For instance, the Charter does not provide for public
hearing. This is regrettable because African states have been notorious
in holding ‘secret proceedings’ which are largely unfair to the accused
person.123 The Charter also does not provide for the right of an
accused person to be assisted by an interpreter which is particularly
essential in Africa because a majority of the accused are indigenous,
whereas court proceedings are usually conducted in foreign
languages such as English, Portuguese, Spanish, Arabic or French.
This limitation in language, coupled with complex court procedures
emphasise the need to have interpreters for accused persons.

Further, the Charter does not guarantee the right against self-
incrimination or double jeopardy or compensation for miscarriage of
justice. These shortcomings in the Charter will be discussed in detail
at a later stage. It is important to mention, however, that the
Commission has tried to overcome the shortcomings and deficiencies
of the Charter in relation to this right by adopting a number of
resolutions. For instance, at its 11th Ordinary Session, the Commission
adopted a resolution on the right to a fair trial.124 Principally, the
resolution underscores the importance that the Commission attaches
to this right. It stressed that “the right to a fair trial is essential for the

(1985) Recuel Des Cours 156.
124 See Resolution on the Right to Recourse Procedure and Fair Trial, Fifth Annual Activity
ACHPR/RPT/5th, Annex VI (Documents of the African Commission, 224). See also E
Ankumah The African Charter on Human and Peoples’ Rights (n 78 above) 127.
protection of fundamental human rights and freedoms.”¹²⁵ In summary, the resolution amplifies Article 7 of the Charter as follows¹²⁶:

(a) All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations.

(b) Persons who are arrested shall be informed, at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them.

(c) Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released.

(d) Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court.

(e) In the determination of charges against individuals, the individuals shall be entitled in particular to—

   (i) have adequate time and facilities for the preparation of their defence and communicate in confidence with counsel of their choice;

   (ii) be tried within a reasonable time;

   (iii) examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses against them; and

¹²⁵ As above preamble.
¹²⁶ As above para 2.
(iv) have the free assistance of an interpreter if they cannot speak the language use in the court.

Additionally, in 1996, the Commission, at its 19th ordinary session, adopted the Resolution on the Respect and the Strengthening on the Independence of the judiciary. Among other things, it called on states to repeal all legislation that are inconsistent with principles of judicial independence, especially on the appointment and posting of judges; provide the judiciary, with the assistance of the international community, with sufficient resources for it to fulfil its function; provide judges with decent living and working conditions for them to maintain their independence and realise their full potential; incorporate universal principles on judicial independence in their legal systems, especially with regard to security of tenure; and refrain from taking actions that could directly or indirectly threaten the independence and the security of judges and magistrates.

The resolution was significant for several reasons. In the main, Judges have, in numerous occasions, been subjected to all forms of intimidation and persecution for carrying out their constitutional mandate. The judiciary is particularly consigned and confounded into impotence by military regimes in many African countries. This has serious negative implications to the right to fair trial, since the harassment of judges makes them to look over their shoulders in the dispensation of justice.

Additionally, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa were adopted by the African Commission in

127 See Resolution on the Right to Recourse and Fair Trial in Recommendations and Resolutions Adopted by the African Commission on Human and Peoples’ Rights (n 108 above) 158.
128 As above para 1.
129 See M Rishmawi (ed.) Attacks on justice: The harassment and persecution of judges and lawyers (2000) (reporting measures taken in different countries that affect judges or undermine the judiciary and the legal profession).
May 2003.\textsuperscript{130} The Principles and Guidelines are very comprehensive, covering most of the recognised elements of the right to a fair trial and due process under international human rights law.\textsuperscript{131} The document elaborates on the elements of a fair and public hearing, as well as on independent and impartial tribunals.

Other specific elements covered are judicial training; the right to an effective remedy; court records and public access; \textit{locus standi}; the role of prosecutors; access to lawyers and legal services; legal aid and legal assistance; independence of lawyers; cross-border collaboration among legal professionals; access to judicial services; military courts; arrest and detention; criminal charges and trials; juvenile trials; victims of crime; abuse of power; and traditional courts. The Principles and Guidelines therefore encompass almost all recognised pre-trial, trial and post-trial rights. The scope of this article does not permit a comprehensive analysis of these resolutions, guidelines and principles.

Article 8 guarantees the protection of two interrelated rights- right to freedom of conscience and religion. The Article stipulates that:

\begin{quote}
Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.
\end{quote}

Right to freedom of conscience entitles a person to hold a belief or conviction, be it of cultural, religious, political or any other nature. The rationale of entrenching this right in the Charter is to allow an
individual to hold a thought or belief that is independent of a state’s interference.

Freedom of conscience in its broader sense envisages the right to profess and practice one’s religion. This right, as contemplated under Article 8, includes the freedom to manifest one’s religion or belief in public or in private, alone or with others, without the state’s intervention. This could be in the form of worship, teaching, practice and religious observance, among other activities. Though not expressly provided in the Charter, freedom of religion could also include freedom to maintain or change one’s religion or belief.

The right to freedom of conscience and religion under the Charter, however, is subject to law and order. The Charter appears to be keen to ensure the balance between freedom of conscience and religion, on the one hand, and on the other, the protection of individuals or society from religious or pseudo-religious practices, which may infringe other people’s rights. While states parties have the discretion to determine whether a particular religion or belief is appropriate, that discretion must not be exercised contrary to Article 8 of the Charter. In this regard, the African Commission has been faced with complaints alleging the violation of this Article.

In Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Temoins de Jehovah v. Zaire, the complainants, who were Jehovah’s Witnesses, were allegedly persecuted by the government of Zaire on the basis of their religious beliefs. The Commission held that such persecution violated

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Article 8 since the former Zaire government had presented no evidence that the practice of their religion in any way threatened law and order. The Commission has also held that freedom of religion has to be exercised in a way that does not violate the equal protection of the law, as guaranteed by the African Charter. Thus, it ruled against imposition of sharia trials and emphasised the right of everyone to be tried by a secular court if they wish.\(^\text{135}\) It is important to note, however, that in some African states, freedom of religion is limited to the practice of a certain religious faith. An example is Libya where Islam has been proclaimed to be state religion, and the Koran part of the Libyan laws.

The African Commission has recently held that the freedom to manifest one’s religion or belief does not in itself include a general right of the individual to act in accordance with his or her belief.\(^\text{136}\) Rather, while the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. In _Gareth Anver Prince v. South Africa_\(^\text{137}\), a South African citizen alleged the Law Society of South Africa had refused to register him for practice, given his disclosure of two previous convictions for the possession of cannabis and his stated intention to continue to use it because its use was required by his Rastafarian religion. He alleged violation of, among other provisions, Article 8 of the African Charter. The African Commission held that the restrictions on the use and possession of cannabis were reasonable and a legitimate limitation of Article 8.\(^\text{138}\) Indeed, participating in one’s religion should not be at the expense of the overall good of the


\(^{137}\) As above.

\(^{138}\) As above.
society. Minorities like the Rastafarians may freely choose to exercise their religion, yet that should not grant them unfettered power to violate the norms that keep the whole nation together.

Article 9 guarantees the right to freedom of expression in the following terms: “1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.” The right to freedom of expression is the cornerstone upon which the very existence of a democratic society rests. The importance of freedom of expression is demonstrated by the many cases considered by the African Commission involving Article 9 violations. The Commission observed in Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria, that freedom of expression is a basic human right, vital to an individual’s personal development, his political consciousness, and participation in the conduct of public affairs in his country.

The African Charter gives two aspects of this right namely: (i) the right to receive information and (ii) the right to express and disseminate ones opinion. Access to information is fundamental to encouraging transparency and accountability in the way the

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140 As above.
government and public authorities operate. Thus in *Amnesty International v. Zambia*\(^\text{141}\), the Commission observed that the failure of the government to provide two deportees with reasons for the action taken against them “means that the right to receive information was denied to them.” In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*\(^\text{142}\), the Commission dealt with the proscription of newspapers through executive decree by the military government in Nigeria. It held, *inter alia*:

> The proscription of specific newspapers by name and the sealing of their premises, without a hearing at which they could defend themselves...amounts to harassment of the press. Such actions not only have the effect of hindering the directly affected persons in disseminating their opinions, but also pose an immediate risk that journalists and newspapers not yet affected by...the Decree will subject themselves to self-censorship... Decrees like these pose a serious threat to the public of the right to receive information not in accordance with what the government would like the public to know. The right to receive information is important: Article 9 does not seem to permit derogation, no matter what the subject of the information or opinion and no matter the political situation of a country.\(^\text{143}\)

In this regard, the Commission was emphasising the non-derogable nature of the right to receive information. It is clear, from the wording of Article 9 (2), that the right to express and disseminate one’s opinion may be restricted by law. This, however, does not mean that national


\(^{143}\) As above para 38.
law can restrict this right to the extent that it becomes ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.\textsuperscript{144}

With regard to the restriction of rights through domestic legislation, the Commission has stated that restrictions should be as minimal as possible and not undermine rights guaranteed under international law.\textsuperscript{145} Thus, any restrictions on rights should be the exception and not the rule.\textsuperscript{146} Noteworthy, the right to freedom of expression as defined in Article 9 (2) is not subject to specific duties, as is the case in the ICCPR\textsuperscript{147} or the European Convention\textsuperscript{148}, and does not contain explicit exceptions in respect of hate speech.\textsuperscript{149}

The Commission has expressed the importance of this right by adopting resolutions to elaborate it beyond the Charter provisions. It has adopted a Resolution on the Right to Freedom of Expression\textsuperscript{150}, and a Declaration of Principles on Freedom of Expression in Africa\textsuperscript{151}, in 1992 and 2002, respectively. While the 2002 Declaration identified freedom of expression “as a cornerstone of democracy”\textsuperscript{152} and stated that “respect


\textsuperscript{146} As above.

\textsuperscript{147} Article 19.

\textsuperscript{148} Article 10(2).

\textsuperscript{149} See Article 20 of the ICCPR.

\textsuperscript{150} Adopted at the 11th Ordinary Session of the African Commission, 2–9 March 1992.

\textsuperscript{151} Adopted at the 32nd Ordinary Session of the African Commission, 17–23 March 2002.

\textsuperscript{152} As above, first preambular paragraph.
for freedom of expression … will lead to … the strengthening of democracy"\textsuperscript{153}, the Commission had not in its previous decisions on Article 9 specifically linked the right to freedom of expression to the strengthening of democracy in Africa. The recent case of \textit{The Law Offices of Ghazi Suleiman v. Sudan}\textsuperscript{154} provided the Commission with an opportunity to clarify its jurisprudence on the provisions of Article 9 of the ACHPR and also to express its view on the important link of freedom of expression to the promotion and protection of democracy in Africa.

\textit{The Law Offices of Ghazi Suleiman v. Sudan} alleged that Mr. Ghazi Suleiman, a Khartoum based lawyer and human rights advocate was prohibited from travelling to deliver a public human rights lecture in Sinnar, Blue Nile State, in the Sudan. He alleged that he had been threatened by some state security officials that if he made the trip he would be arrested. The author complained, \textit{inter alia}, of a violation of Article 9 of the Charter. In upholding the complaint, the African Commission observed:

\begin{quote}
In adopting the Resolution on the Right to Freedom of Association, the African Commission noted that governments should be especially careful that “in regulating the use of this right, that the competent authorities should not enact provisions which would limit the exercise of this freedom … [and that] … the regulation of the exercise of the right to freedom of association should be consistent with state’s obligations under the African Charter on Human and Peoples’ Rights.” Mr. Ghazi Suleiman’s speech is a unique and important part of political debate in his country. The
\end{quote}

\textsuperscript{153} As above, fourth preambular paragraph.

African Commission’s view affirms those of the Inter-American Court of Human Rights which held that: “freedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.” 155

The African Commission therefore affirmed the position of the Inter-American Court to the effect that when an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to receive information and ideas. 156 The above case was particularly grave because the information that was being denied concerned the rights protected in the African Charter. Because the complainant’s speech was directed towards the promotion and protection of human rights, “it is of special value to society and deserving of special protection.” 157

The Commission was of the view that a speech that contributes to political debate must be protected. It therefore found the government of Sudan to be in violation of Mr. Suleiman’s right to freedom of

156 As above para. 30.
157 UN Human Rights Defenders’ Declaration, Article 6, cited in The Law Offices of Ghazi Suleiman v. Sudan (n 154 above) para 52.
expression. In light of the important role of the right to freedom of expression in the fledging democracies in Africa today, these observations and findings by the Commission must be welcomed as a landmark decision.

According to Article 10 (1), every individual is entitled to the right to free association. This right envisages a number of components. For example, it contemplates the freedom of individuals to come together for the protection of their interests by forming a collective entity which represents them. These interests may be of a political, economic, religious, social, cultural, professional or labour union nature. However, this does not mean that such an individual has an absolute right to become a member of a particular association. Rather, an association may decide not to admit or continue the membership of an individual without necessarily infringing on his right to freedom of association.

Equally, an individual cannot be compelled to become a member of an association nor disadvantaged if he or she chooses not to do so. This right therefore precludes compulsion to join an association, but subject to Article 29 of the Charter. Article 29(4) imposes duties on individuals “to preserve and strengthen social and national solidarity, particularly when the latter is threatened.” This provision, read together with Article 10 (2) limits the right to freedom of association to the effect that an individual could be forced into association in order to strengthen social and national solidarity.

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158 As above para 53.
159 Article 10 (1) states: “Every individual shall have the right to free association provided that he abides by the law”.
161 As above.
162 Article 10 (2) provides: “Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association”.
163 See C Heyns, ‘Civil and Political Rights in the African charter’ (n 102 above) 169.
In *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria*\(^{164}\), the Commission found that the tribunal which had convicted Saro-Wiwa and his fellow accused of murder did so because they were members of a political group. Their freedom of association as expressed through their membership in that group was thus violated. The right to freedom of association has also been interpreted to include the right to dissociation.\(^{165}\)

The Commission has cited many instances where the right to freedom of association may be violated. These include: banning of political parties\(^{166}\), being arrested as a result of one’s political belief\(^{167}\) and the prohibition of “any assembly for a political purpose in a private or a public place.”\(^{168}\) In respect to laws limiting the right to freedom of association, the Commission has held that they should include an objective description that makes it possible to determine the criminal nature of an organisation.\(^{169}\)


Apart from its jurisprudence, the Commission has also adopted a resolution on the right to freedom of association with a view to strengthen the provisions of Article 10 of the Charter.\textsuperscript{170} The resolution provides, \textit{inter alia}, that competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards; that in regulating the use of the right to association, the competent authorities should not enact provisions which will limit the exercise of the freedom and such a regulation should be consistent with states obligations under the Charter.\textsuperscript{171}

The right to freedom of assembly complements the right to freedom of association. Article 11 of the Charter provides that:

\begin{quote}
Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.
\end{quote}

The right to freedom of assembly allows individuals to indulge in meetings, picketing, protest marches and demonstrations, as long as the assemblers aim to express a common opinion. In \textit{Commission Internationale de Juristes v. Togo}\textsuperscript{172}, the Commission found that the shooting at peaceful demonstrators by the Togolese military was a violation of the right to assembly. Since the purpose of the right is to protect assembly as a means of communicating opinion, the assembly

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\textsuperscript{170} As above.
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\textsuperscript{172} Communication 91/93, \textit{Commission Internationale de Juristes v. Togo.}
\end{flushright}
must be ‘peaceful’ and unarmed. Actions or laws aimed against armed or violent assemblies will therefore not constitute an infringement of the right to assemble.

Article 12 of the Charter stipulates as follows:

1. Every individual shall have the right to freedom of movement and residence within the border of a state provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and public order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.

4. A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of nonnationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

The provisions of Article 12 could be divided into three main classes of rights: (i) freedom of movement within and freedom to return to an individual’s country of origin or residence; (ii) the right to seek and obtain asylum; and (iii) the right not to be expelled extra-judicially or en mass. Freedom of movement in the context of the Charter applies to “every person” which includes aliens or stateless persons. This freedom is subject to the sovereign power of a state to regulate and
control the entry of aliens into its territory. This means in effect that an alien does not *per se* have an unqualified right to enter, reside or remain in a particular country. The Charter does not make provision against the expulsion of a person from the territory of a state which he or she is a citizen or national.

With regard to the rights of asylum seekers, Article 12 (3) is quite an unusual provision in the sense that it provides that one has the right not only to seek but also to obtain asylum. It should be observed that while a person may not be prevented from seeking asylum, the granting of asylum is entirely a different matter dependent upon the will of a state. Whether or not a person should obtain or be granted asylum rests with the law of the territory in which asylum is sought and international law.

Further, the Charter gives persecution as a condition for the exercise of the right to seek and obtain asylum, but does not indicate what kind of persecution is necessary for asylum purposes. Generally, a person is afforded refugee status if he or she has been persecuted or has a well founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion.173

Article 12(4) and (5) prohibits two forms of expulsion of persons from the territory of a state party to the Charter. First, an alien lawfully admitted to any such territory may only be expelled pursuant to a decision reached in accordance with the law. Secondly, the mass expulsion of non-nationals. The Charter goes on to define mass expulsion as one aimed at national, racial, ethnic, or religious group. Unlike the prohibition of the expulsion of lawfully resident non-nationals in member states, the prohibition of mass expulsion aims to protect groups of persons based on nationality, ethnicity, race and

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religion, whether or not such groups of persons are lawfully residing in the expelling state. Mass expulsion has been an issue of concern in Africa. A notable example was the expulsion of Nigerians from Ghana in 1969.\footnote{E Ankumah \textit{The African Commission on Human and Peoples’ Rights} (n 78 above) 140.}

**Article 13 provides that:**

1. Every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 13 presents different facets in which the right to participate in the government of one’s country may be enjoyed. Article 13(1), for example, provides that citizens may enjoy this right either directly or through freely chosen representatives. This seems to guarantee participation in decision making through a legislative body such as parliament. Essentially, this means that, subject to relevant electoral laws, citizens of a state party to the Charter are entitled to participate in periodic elections either as candidates or voters.

The purpose of Article 13 (1) of the Charter is therefore “to allow an individual, without apparent legal disability, to participate in periodic elections, exercise his or her voting rights, and participate in the conduct of public affairs directly or through freely chosen representatives.”\footnote{U Umozurike \textit{The African Charter on Human and Peoples’ Rights} (n 27 above) 32.} By extension, the provision requires state authority to be based on the sovereignty of the people. Hence, this
right is infringed when any group or person seizes the reigns of government and imposes themselves on the rest of the population.\textsuperscript{176}

Article 13 (1) should be read in tandem with Article 20 (1) which recognises the right of peoples to self-determination. This nexus was recognised by the African Commission in a case concerning an attempted secession from Zaire by Katanga.\textsuperscript{177} Although the Commission held that there was no violation of Article 20, it could be inferred, from its observations, that massive human rights violations as well as the denial of the right of political participation under Article 13 (1) could constitute transgressions of the Charter on such a scale that it would justify secession.\textsuperscript{178}

In another case, the Commission held that to participate freely in government entails, among other things, the right to vote for the representative of one’s choice and to have the results of free expression of the will of voters respected.\textsuperscript{179} The Commission has also found a ban on members of a former government and parliament after a coup to be in violation of their Article 13(1) rights.\textsuperscript{180}

The right to participate in the government of one’s country cannot be fully enjoyed unless citizens have the right to equal access to, for example, public services and property. The drafters of the Charter, in recognition of this fact, incorporated these important rights under Article 13(2) & (3). These two provisions resonate the importance of democratic governance in which citizens have unfettered rights to

\textsuperscript{176} As above.


\textsuperscript{178} As above para 6. See also U Umozurike \textit{The African Charter on Human and Peoples’ Rights} (n 27 above) 32.


participate, as well as a reasonably unrestrained right of access to public property and services. Unfortunately, the issue of equal access to public services and property in many African states has remained very controversial and complicated for reasons ranging from legal complexities, political involvement, corruption and extreme poverty.

This situation is exacerbated by the fact that some states still largely rely on laws and policies promulgated by colonial governments, which in many cases prevent the most disadvantaged groups from accessing public services and property that they need to survive. Due to such policies and laws, equitable land allocation and distribution in post-colonial Africa, for example, has not as yet been achieved. Political contests in most African states have therefore become all the more charged because of what is at stake; those who achieve political power benefit from widespread abuses, including theft and misappropriation of public resources.

While the African Commission is yet to deliberate in great detail on the Article 13 rights, it could be guided by the experience of other regional human rights organs. This is important because African states have been paying lip service to these rights despite their fundamental importance to nation building. Many African states have been affected by governments of exclusion such as dictatorships, military rule, or single-party autocracies. Ethnicity as well as vote rigging has also had a hand in derailing democratic processes on the continent.

It is encouraging to note that the Constitutive Act of the African Union (CAAU) acknowledges the importance of this right in no uncertain terms. The Act condemns and rejects unconstitutional change of government.\textsuperscript{181} In fact, the CAAU categorically states that a government that seizes power through unconstitutional means shall

\textsuperscript{181} See Constitutive Act of the African Union, Art. 4 (p).
not be allowed to participate in the activities of the Union.\textsuperscript{182} The Union has a variety of options on how to deal with an unconstitutional government, including imposition of sanctions.\textsuperscript{183}

Article 14 provides for the protection of the right to property, stating that “the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.” The right to property guaranteed under this provision is the right to own property, hold it and to dispose of it. In 

\textit{UIDF, FIDH, FADDHO, ONDH, AMDH v. Angola}\textsuperscript{184}, the Commission observed that the deportation of the non-nationals in this case called into question rights guaranteed under the Charter such as property rights. It concluded that the deportation of victims, thus separating them from their property constituted a violation of Article 14 of the Charter.

From the wording of Article 14, it can correctly be concluded that the enjoyment of the right to property is subject to encroachment upon “in the interest of public need or in the general interest of the community and in accordance with the provisions of the law.” The Charter, however, does not define what constitutes public or community interests. Additionally, it does not provide for compensation of state encroachment (acquisition) victims. The fact that state acquisition should be in accordance with appropriate laws is not sufficient enough to indicate whether the Charter subscribes to compensation of victims. However, ‘in accordance with appropriate laws’ could be

\textsuperscript{182} As above, Art. 30.

\textsuperscript{183} Article 23 provides as follows: “2. …any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly”.

\textsuperscript{184} Communication 159/96 \textit{UIDF, FIDH, FADDHO, ONDH, AMDH v. Angola} (n 30 above).
construed to mean ‘in accordance with international standards on state acquisition’.

Thus, when interpreting Article 14 of the Charter, regard could be had to corresponding provisions from other human rights systems. Contextually, the Article is narrower than the corresponding provision of the American Convention, which is more progressive in the recognition of the right to property than any other regional human rights instrument.185 Its Article 21(2) stipulates that “no one shall be deprived of their property except upon payment of just compensation, for reasons of public utility or social interest…” The African Commission and the Court can thus ensure that the power of the state to encroach upon private property for public or community interest is not abused, by requiring states to adhere to the international law principle of payment of just and adequate compensation.

The above discussion on civil and political rights clearly indicates that the jurisprudence of the Commission is yet to attain the standard of other international judicial mechanisms, such as the Inter-American and European human rights systems. As Murray noted, this may be partly because the Commission is faced with the difficult task of overcoming the shortcomings in the way in which the Charter has been drafted.186 In all fairness though, it is important to note that the Commission, as of recent, has shown some willingness to be creative in its interpretation of the Charter provisions.187

There are certain instances, however, where the Commission has failed to expound on certain rights even when the opportunity arose. This is not very encouraging especially given that the substantive

185 See the American Convention, Article 21.
187 As above, 3.
rights in the Charter are not elaborate. It is hoped that the establishment and operationalisation of the African Court on Human and Peoples’ Rights will reverse this trend.

Reforming the Civil and Political Rights Provisions of the African Charter

The Charter’s civil and political rights provisions have a number of shortcomings, although they constitute the bulk of its substantive provisions. The drafters of the Charter conspicuously omitted several internationally recognised civil and political rights.\(^{188}\) For example, it does not guarantee the right to privacy which is an important right entrenched in all the regional human rights instruments, as well as in those of the Universal system. The right to privacy protects individuals from unnecessary interference by the state or its agencies. It has various facets, including the right not to have: (a) their person or home searched; (b) their property searched; (c) their possessions seized; (d) information relating to their family or private affairs unnecessarily required or revealed; and (e) the privacy of their communications infringed.\(^{189}\)

The rationale for the omission of this important right from the Charter cannot be understood, particularly given the fact that it is always infringed in many domestic jurisdictions in Africa. The police, for example, have been the most notorious violators of this right, especially when arresting suspects and undertaking seizure and searches when enforcing criminal laws and procedures.

The Charter also does not guarantee the right against forced labour. This right is essential in Africa for a number of reasons. First, forced labour was a common practice during the slave trade and colonial

\(^{188}\) C Heyns ‘The African Regional Human Rights System: In need of reform?’ (n 13 above) 159.

periods. The possibility of this practice finding its way into the post-colonial societies cannot therefore be overlooked. Secondly, forced labour is still evident in some African cultural and religious practices. It is not uncommon to hear of people being forced to work in order to service their debts. Although it may be against their will, such people are threatened or even sent to prison to compel them to comply with the demands of their masters. Thirdly, the right against forced labour is essential in Africa because some governments have policies that require people to do certain jobs for the state against their wish. Such jobs may include helping in the construction of roads and bridges, or similar community labour involvements that are largely meant to be the responsibility of the state to its people and not vice versa.

The Charter has also failed to explicitly give credence to the right to form trade unions and other civic organisations within states. Article 10 should have incorporated this right in clear and precise terms.\textsuperscript{190} Although not explicitly stated, this Article intends to protect the rights and freedom of individuals who unite to form a collective entity that represent their common interests and objectives. These interests and objectives may be of a political, economic, religious, social, cultural, professional or labour union nature.\textsuperscript{191}

The Charter should therefore have clarified the scope of the right to freedom of association under Article 10 by specifically mentioning the right to form trade unions and other civic organisations. It is not enough just to mention freedom of association without defining its scope. It is common knowledge that many governments in Africa have attempted either to suppress or outlaw the formation of trade

\textsuperscript{190} The Article provides that “(1). Every individual shall have the right to free association provided that he abides by the law. (2). Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association”.

\textsuperscript{191} O Nmehielle \textit{The African Human Rights System} (n 38 above) 110.
unions and civic organisations, particularly those that appear to be ‘a threat to their smooth running’. Many Non-Governmental Organisations have been banned or forced to desist from criticising the government of the day. That is why it would have been expedient for the Charter to guarantee their protection.

The Charter should have gone ahead to require states to take legislative and policy measures to promote and encourage trade unions and civil society participation in decision-making and in the management of public affairs at all levels of government, as a way of exercising the right to freedom of association. It should also have provided measures to ensure the smooth running and operation of these organisations in order to curtail state interference.

It is suggested that the Charter should have provided that any legislation purporting to regulate the registration or operation of civil society organisations or trade unions should ensure that: (a) registration shall be in the hands of a body that is independent of government or political control; (b) any fee chargeable shall be no more than is necessary to defray essential cost of the procedure; (c) there shall be a right to registration, unless there is good reason to the contrary; (d) any standards of conduct applied to organisations shall be formulated with input from the affected organisations; and (e) de-registration procedures shall provide for a fair hearing and for a right of appeal to an independent tribunal.

Further, the provisions of the Charter guaranteeing the rights to liberty and security of the person and those of an arrested person do not reflect international standards and are therefore inadequate. For example, the Charter apparently fails to acknowledge that the right to

192 See Articles 6 and 7 of the Charter which guarantee the right to liberty and security of person and the right to a fair trial, respectively. See also C Heyns ‘Civil and political rights in the African Charter’ (n 102 above); E Ankumah The African Commission on Human and Peoples’ Rights (n 78 above) 176.
liberty and security of the person goes beyond arbitrary arrest or detention to envisage important issues such as the right of every person: (a) not to be detained without trial, except in conditions that are clearly laid down under international law; (b) to be free from all forms of violence from either public or private sources; (c) not to be tortured in any manner, whether physically or psychologically; and (d) not to be subjected to corporal punishment or to be treated or punished in a cruel, inhuman or degrading manner. Thus, the Charter provisions guaranteeing these rights need to be brought in line with these standards.

The same applies to the provisions on fair trial under Article 7, where the drafters of the Charter either deliberately ignored or accidentally omitted some important rights of an accused or arrested person. Before ‘appealing to competent national organs’ or even exercising the ‘right to defence’ an accused person is entitled to other forms of protection. 193 For example, he or she has the right to be informed promptly in a language that he or she understands of the reason for the arrest. The person also has the right to remain silent and in this regard must be informed of the consequences of not remaining silent. Thus, the accused person should be protected from making forced confession or admission that could be used in evidence against him or her. Where the accused freely chooses to make a confession, it should be made before a competent authority mandated to conduct such proceedings. An accused person or a suspect should also be detained separately from persons serving a sentence because he or she is innocent until proved guilty.

Additionally, the Charter has failed to provide that an accused person or a suspect must be brought before a court as soon as is reasonably possible. Instead, Article 7(1)(d) guarantees the right of an accused to

be tried ‘within a reasonable time’ by an impartial court or tribunal. The Charter’s reference to ‘reasonable time’ is to ensure that proceedings are not unduly prolonged. This provision therefore guarantees the speedy rendition of justice, but has nothing to do with the presentation of an accused before the court or a tribunal to be charged. 194 Thus, it does not cater for potential delays in the commencement of criminal proceedings. The Charter should have stated that an accused person be brought before a court or tribunal, for example, not later than forty eight hours after being arrested or not later than the end of the first court day after the expiry of the forty eight hours.

The Charter is also silent on the right to bail. The right of an accused person to be released on bail pending trial or appeal is very essential, unless there are compelling reasons to the contrary. Other important rights of an accused person which have not been addressed in the Charter include: the right to judicial review of ones’ detention; the right to compensation for unlawful detention or release from such detention; the right to public hearing or the circumstances under which the public hearing may be excluded; the right to adequate time and facilities to prepare a defence; the right of the defence to examine and cross-examine witnesses in court and the right to an interpreter; the right of those acquitted to compensation for miscarriage of justice and; the right not to be subjected to a new trial for the same cause. 195 The drafters of the Charter turned a rather blind eye to the importance of these rights.

Additionally, Article 13 of the Charter recognises the right to vote in a very superficial way. The Article guarantees every citizen the right to participate freely in the government of his country either directly or

194 O Nmehielle The African Human Rights System (n 38 above) 98.
through freely chosen representatives. As stated earlier, the right to participate freely in the government of one's country has different manifestations. The inadequacy with which this right has been addressed in the Charter defeats logic. Africa has experienced series of undemocratic governments which have ignored constitutionalism, the rule of law and human rights. Military rule and undemocratic change of governments has also taken toll unabated. Under such circumstances, it cannot be understood how the drafters of the Charter could have failed to entrench the right to vote and related rights. This is a serious omission that needs to be addressed urgently.

Apart from the inadequacies stated above, the Charter also deals with limitation of civil and political rights in a very unsatisfactory manner. The Charter lacks a derogation clause that would permit the suspension of certain rights and freedoms in strictly defined circumstances. Additionally, some of the rights therein contain claw-back clauses that limit their reach. For example, Article 8 guarantees the freedom of conscience and religion “subject to law and order”. Similarly Article 10 guarantees the right to freedom of association to an individual “provided that he abides by the law”. An individual’s freedom of movement under Article 12 is guaranteed “provided he abides by the law”. Article 13 (1) guarantees citizens the right to participate freely in their governments “in accordance with the provisions of the law”. The same is evident in Article 14 which permits the encroachment on property “in accordance with the provisions of appropriate law.”

These clauses have rightly been criticised since, in effect, they imply that international supervision of domestic law is limited in respect of these rights, thus defying the very reason for the existence of a

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regional human rights system. The Commission has attempted to address this inadequacy by, for example, interpreting claw-back clauses to the benefit of the complainant, in keeping with established international practice. Thus, it is now settled that the phrase ‘subject to law’, which is used in some of the provisions should be understood to refer not to domestic, but instead to international law.

The Commission’s creativity in this regard is commendable. However, it is important that such creativity is succeeded by a modification of the Charter. Unless this is done, there is the imminent danger that states could attempt to defend infringements of rights through national law with reference to the claw-back clauses in the Charter. Claw-back clauses, to the extent that they purport to exclude international supervision, should be scrapped from the Charter and replaced by an unequivocally phrased general limitation clause. The general clause should permit the limitation of rights only to the extent that the limitation is reasonable and justifiable. Such a limitation should take into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and freedoms by any individual does not prejudice the rights and freedoms of others; and the relation between the limitation and its


200 As above.

201 As above.
purpose and whether there are less restrictive means to achieve the purpose.\textsuperscript{202}

Civil and political rights under the Charter could therefore be enhanced by incorporating rights that were omitted or inadequately addressed but which are guaranteed by the universal as well as other regional human rights instruments. Variations may of course be permitted but not to the extent that the universal protection of such rights would be impeded. One way to incorporate or reform those provisions could be through the adoption of Protocols to the Charter. The other way may be through the constructive and progressive interpretation of the provisions in accordance with international standards and principles. Thirdly, states parties could exercise their mandate under Article 68 of the Charter to amend the Charter as they deem it appropriate.

With regard to the approach that involves the constructive and progressive interpretation of the Charter’s provisions, the Commission’s elaboration on several substantive rights is commendable, as has been shown in the above discussion on the rights. In some cases, however, it has remained passive and failed to develop its jurisprudence, even when an opportunity presented itself. The Commission needs to identify those rights that ought to be amended and notify the Assembly of Heads of States and Government on the importance to adopt Protocols to that effect. It is hoped that the African Court on Human and Peoples’ Rights will play a greater role in enhancing the content and substance of these rights beyond what the Commission has so far done.

Conclusion

From the above analysis, it may be observed that the Charter, as far as civil and political rights are concerned, has the capacity to be reformed to reflect international standards. Unfortunately, “its positive features are often under-estimated or overlooked, and its capacity for metamorphosis is yet to be fully explored.” This is despite the fact that both the Charter and the Commission have mechanisms for self-correction and adjustment. These include the Commission’s Rules of Procedure, its case-based, quasi-judicial and advisory mandates, its investigative powers under Article 46 and the interpretive mandate granted to the Commission under Articles 60 and 61 of the Charter.

It is acknowledged that the Commission is still contending with the difficulty arising from the way the Charter has been drafted, though it has in the past proved to be creative in its pronouncements. It has been shown that the Charter can be made more effective through the interpretation of its civil and political rights provisions by both the Commission and the Court and the adoption of relevant Protocols to boost these efforts.

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204 Articles 45(2) & (3), African Charter.