

@Amnesty International's observations on possible reform of the African Charter on Human and Peoples' Rights

Amnesty International, which has had observer status with the African Commission on Human and Peoples' Rights since 1988, participates actively in the work of the African Commission and has submitted five communications under Article 55 of the African Charter. It has undertaken a major effort in the past few years to promote awareness of the African Charter and the work of the African Commission. It has distributed thousands of copies of a circular on the Organization of African Unity and human rights to lawyers and human rights activists in Arabic, English, French and Portuguese. In 1991 in an effort to make the African Charter accessible to the general public and to persuade members of the OAU which had not yet become parties to the African Charter to do so, it began distribution throughout Africa of tens of thousands of copies of a Guide to the African Charter in different languages, including Arabic, English, French, Portuguese, Spanish and Swahili.

Nevertheless, Amnesty International is well aware that there are significant shortcomings in the African Charter. In some cases, the express guarantees it contains fall short of international standards. In addition, the methods established under the African Charter for ensuring that it is implemented suffer from a number of limitations on their effectiveness.

A comprehensive overhaul of the African Charter to ensure that it does not fall short of contemporary international minimum standards is desirable, but it would be an ambitious and possibly lengthy undertaking. It took twenty years from the 1961 Lagos Conference on the Rule of Law, sponsored by the International Commission of Jurists, until the OAU Assembly of Heads of State and Government was able to achieve the necessary consensus to adopt the African Charter and a further five years until it entered into force after a majority of member states became parties. Indeed, as of 31 December 1992, more than a decade after its adoption, two states - Ethiopia and Swaziland - still had not become parties.

This suggests that pending such a comprehensive reform it might be advisable to concentrate in the short term on drafting a special protocol or agreement to supplement the African Charter pursuant to Article 66 which would address a few key defects in the implementation procedures on which there is some chance that member states might quickly reach a consensus. The changes suggested below could help strengthen the African Commission's independence. They could also encourage it to interpret the African Charter consistently with current international standards and so address many of the limitations in the express guarantees of human rights in the African Charter. In those situations where it is difficult or impossible to interpret provisions of the African Charter consistently with

international standards and where important rights are not expressly guaranteed in the African Charter, they could be addressed as part of a comprehensive amendment of the African Charter. Similarly, a protocol establishing an African Court of Human and Peoples' Rights could be developed at a later stage when the OAU is able and willing to provide adequate financial and other resources to both the African Commission and a new court.

Amnesty International believes that the key implementation provisions requiring immediate improvements are found in Articles 58 and 59. Article 58 (1) provides that when the African Commission has received one or more communications pursuant to Article 55 which "apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, it shall draw the attention of the Assembly of Heads of State and Government to these special cases". Article 58 (2) provides that the Assembly "may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations". Article 58 (1) does not state what the African Commission may do with communications which do not refer to "a series of serious and massive" human rights violations.

More importantly, however, Article 58 (2) limits the independence of the African Commission, a body of experts which are mandated to be independent, by subjecting its power to conduct in-depth studies of serious and massive human rights violations and its ability to make factual reports, with findings and recommendations, to the control of a political body composed of states against whom the allegations are made. None of the other regional or international human rights treaty monitoring bodies are subject to such political control. The Inter-American Commission on Human Rights and Court of Human Rights and the European Commission on Human Rights and Court of Human Rights are free to investigate, make findings and conclusions and publish their decisions in individual cases without the permission of the member states of the Organization of American States or the Council of Europe. Similarly, treaty bodies serviced by the United Nations Secretariat, such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture, each of which can consider communications from individuals alleging violations of human rights, are free to investigate, make findings and conclusions and publish their views on such communications without seeking approval of the United Nations General Assembly.

Amnesty International believes that the independence of the African Commission would be strengthened by amending Article 58 to make clear that it can conduct in-depth studies, with findings and recommendations, in any case where there are reasonable grounds to believe that a violation of the African Charter has occurred - not just those in which there are serious or massive violations - and to eliminate the requirement that it obtain the approval of the Assembly to conduct such studies.

Article 59 (1) states: "All measures taken within the provisions of the present Chapter [Chapter III, Articles 46 to 59] shall remain confidential until such time as the Assembly of Heads of State and Government shall otherwise decide." Amnesty International and others have argued that this provision on its face requires only "measures taken" ("mesures prises"), such as decisions on admissibility or decisions to request the Assembly or the Chairman of the Assembly to authorize it to conduct an in-depth study, to be kept confidential pending a decision of the Assembly.

The Commission, however, has in practice interpreted this provision as requiring all information about the communications procedure to be kept confidential except the number of such communications made and the number examined at each session. Indeed, it has yet to inform even the Assembly in its annual activity reports of such basic information as the names of the authors of the communications (where they have not requested confidentiality), the states concerning which communications have been submitted, the rights alleged to have been violated, which states have failed to reply to requests for information, which communications have been declared admissible or inadmissible and which have been forwarded to the Assembly for action.

Article 59 (3) states that "[t]he report of the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government." The plain meaning of this paragraph is that the African Commission shall publish its annual report on its activities on its own initiative as soon as the Assembly has had an opportunity to consider it. This interpretation is supported by the different wording of Article 59 (1) (referring to an Assembly decision) and Article 59 (2) governing reports under the communications procedure: "However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government." Unfortunately, the African Commission so far has not interpreted this provision this way and has assumed that the Assembly could veto publication of its annual activity report.

Amnesty International recommends that Article 59 (1) be amended to make clear that all matters concerning communications should be public except the names of authors of communications who ask that their names be kept confidential, the actual deliberations of the African Commission on pending communications and exceptional matters in particular cases which the African Commission itself decides should be kept confidential in the interests of justice. This change would make the practice of the African Commission similar to that of other regional and international treaty bodies. Amnesty International also recommends that the second and third paragraphs of Article 59 be amended to make clear that the African Commission is free to decide which reports it wishes to publish and the content of those reports.

Although the changes in the communications procedure suggested above could be accomplished by a special protocol or agreement pursuant to Article 66 of the African Charter, this would apply only to parties to that protocol or agreement. Nevertheless, pending universal acceptance of the protocol or agreement, some of these changes could be accomplished by the African Commission simply changing its practice and the rest could be accomplished by the OAU Assembly reaching a consensus.

In addition to these changes in implementation procedures, there are a number of other more far-reaching reforms which could be considered in the African Charter. These include strengthening its substantive guarantees and the addition of an African Court of Human and Peoples' Rights. Amnesty International believes that there is much that the African Commission can accomplish under the Preamble and Articles 60 and 61 pending amendment of the African Charter to ensure that its human rights guarantees are interpreted consistently with evolving international standards. In the Preamble, the states parties reaffirm "their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations". Article 60 directs the African Commission to

"draw inspiration from international laws on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' 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".

Similarly, Article 61 directs the African Commission to take into consideration certain other international standards, custom and practice and legal precedents or doctrine "as subsidiary measures to determine the principles of law". Although the African Commission has not expressly invoked these provisions, it has cited international human rights standards in its resolutions interpreting the rights to freedom of association and to a fair trial.

Although these resolutions could be strengthened, they are a promising step in the right direction and indicate that it may be possible to interpret many provisions of the African Charter consistently with international standards in the near future. For example, the African Commission's resolution on the right to freedom of association states that the competent authorities should not override fundamental rights guaranteed by international human rights standards and should not enact provisions which would limit freedom of association. This makes it clear that the clawback clause in Article 10 (1) of the African Charter stating that individuals have the right to freedom of association provided that they abide by the law means that such law must be consistent with international standards. If the

African Commission follows the same approach with the other clawback clauses in the African Charter, it will have addressed one of its most important deficiencies.

Nevertheless, in a number of cases it may be difficult or impossible for the African Commission to do this. For example, it will be difficult to reconcile the provisions in Articles 27 through 29 setting forth duties of individuals with provisions in other articles recognizing rights of individuals. A thorough revision of the African Charter is needed, but it will require some time to prepare a comprehensive series of substantive amendments which do not fall short of existing international standards and to draft technical amendments reconciling differences in the Arabic, English and French versions. Although non-governmental organizations and eminent African jurists played an important role in the early stages of drafting the African Charter, many of the deficiencies in the treaty are the result of the hasty and secretive way it was adopted by the OAU Assembly. Amnesty International believes that any comprehensive amendment of the African Charter would benefit from ensuring that the drafting of the amendments involve non-governmental organizations and eminent jurists both from Africa and other parts of the world at all stages of the process and that OAU Assembly deliberations be conducted in public sessions.

None of these proposed changes in the African Charter will effectively promote and protect human rights in Africa unless the states parties demonstrate the political will to implement the guarantees in this treaty in national law and practice, to submit timely and comprehensive periodic reports, to cooperate with the African Commission in its examinations of communications under Article 55 and to provide the African Commission with the financial and other resources it needs. The African Commission must be encouraged by the Assembly, by individual states, non-governmental organizations and the general public to interpret existing provisions of the African Charter creatively and act with initiative in a manner which will further the purposes of the treaty - to promote and protect human rights. Unless it does so, no amount of amendment will ensure these goals.