INVESTIGATING THE RESPONSES OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS TO THE CRITICISMS OF THE AFRICAN CHARTER

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ABSTRACT

The adoption of the African Charter on Human and Peoples' Rights in 1981 and its coming into force in 1986 improved African human rights jurisprudence. Over the years, the Charter has received praise for containing human rights unique to Africans. It is also heavily commended for being the first international human rights instrument to recognize and introduce "new rights." Notwithstanding these praises, the Charter has been criticized for many reasons. This article discusses four main criticisms that have been levied against the Charter: the inclusion of claw-back clauses, absence of a privacy provision, stringent seizure and admissibility criteria, and an impotent and toothless implementation mechanism. Moreover, this article investigates how the African Commission on Human and Peoples' Rights, the supervisory body for the Charter, has responded to these criticisms. It finds that while the Commission has responded adequately to the criticism of claw-back clauses, it has yet to adequately respond to others. The article, therefore, recommends that the Commission pay closer attention to these ignored criticisms and provides a variety of possible remedies that may aid the Commission in doing so. Examples include adopting resolutions and soft laws, assuming a more flexible jurisprudence, taking more action through "soft and forceful" approaches, and improving the consistency on its jurisprudence to attain reliability of its decisions.

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INTRODUCTION

The African Charter on Human and Peoples' Rights[1] is the principal human rights instrument upon which the African human rights system rests.[2] The adoption of the Charter in 1981[3] and its subsequent entry into force in 1986[4] greatly improved human rights jurisprudence in Africa[5] with an influx in human rights literature critiquing the Charter.[6] Prior to the

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[1] The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 I.L.M. 59 (1982) (hereafter referred to as the "African Charter" or "the Charter"). The Charter is also known as the Banjul Charter because the two Ministerial Conferences that led to its final draft took place in Banjul, the capital of The Gambia. *See* Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667 (1982).

[2] Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995); Makau wa Mutua, *The African Human Rights System,* Prepared for United Nations Development Programme, Human Development Report 2000 (2000); Christof Heyns, *The African Regional Human Rights System: In Need of Reform?*, 2 AFR. HUM. RTS. L.J. 155, 156 (2001); Sabelo Gumedze, *Bringing communications before the African Commission on Human and Peoples' Rights,* 3 AFR. HUM. RTS. L.J. 118, 119 (2003).

[3] *See* Kenneth Asamoa Acheampong, *Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights,* 2 AFR. HUM. RTS. L.J. 185, 191 (2001).

[4] *Cf.* Mutua (2000), *supra* note 2, at 21 (stating "…that the Charter came into force in 1987"); *and* Frans Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa*, 43 J. AFR. L. 1 (1999); Moussa Samb, *Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union*, 15 ANN. SURV. INT'L & COMPAR. L. 61, 62 (2009) (stating that "…the Charter entered into force in 1986…").

[5] U. O. Umozurike, *The African Charter on Human and People's Rights*, 77 AM. J. INT'L L. 902, 911 (1983) (stating that "the adoption of the Charter should therefore be regarded as a milestone in the development of human rights on the continent).

[6] After the adoption and coming into force of the African Charter, there was an influx of scholarship on African human rights system. *See* Gittleman, *supra* note 1; Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467 (1983); B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141 (1984); Josiah Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309 (1987); Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples' Rights,* 31 HOW. L.J. 643 (1988); Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 HASTINGS INT'L & COMPAR. L. REV. 373 (1989); Julia Swanson, *The Emergence of New Rights in the African Charter*, 12 N.Y. L. SCH. J. INT'L. & COMPAR. L. 307 (1991); El-Obaid Ahmed El-Obaid &

Charter's adoption, one of the problems usually encountered by human rights advocates in their quest to advocate for human rights in Africa was the dearth of African human rights scholarship,[7] despite the superfluity of literature on human rights in other parts of the world.[8]

The Charter, when adopted, was an innovative treaty,[9] in that it contained rights never before found in existing human rights instruments.[10] One of such new rights introduced by the Charter was "peoples' rights".[11] For this, it has been described by some commentators as "the most reliable of all human rights instruments in all regions."[12] Despite this 'significant'[13] status, throughout its life—at its early life,[14] and recently[15]—the Charter has been subject to a lot of criticism.[16] Virtually all the leading African human rights scholars[17] and some non-African commentators[18] have critiqued the Charter and highlighted its shortcomings. Some have even suggested amendments to the Charter, outlining some ways for the African

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Kwadwo Appiagyei-Atua, *Human Rights in Africa – A New Perspective on Linking the Past to the Present*, 41 MCGILL L.J. 819 (1996).

[7] Daniel C. Turack, *The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts*, 17 AKRON L. REV. 365 (1984).

[8] At some point, it was even thought that human rights were "in a state of explosion, not just explosive growth, but explosion." *See* Thomas Reynolds, *Highest Aspirations or Barbarous Acts…The Explosion of Human Rights Documentation: A Bibliographic Survey*, 71 L. LIBR. J. 1 (1978) cited in Turack, *supra* note 7; Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, 86 J. AM. HIST. 1231, 1250 (1999) (stating that "Human rights has a long intellectual pedigree…").

[9] Samb, *supra* note 4, at 64.

[10] Swanson, *supra* note 6, at 307.

[11] *Id.*

[12] Abiodun Jacob Osuntogun, *An Appraisal of the Rights in the African Charter on Human and Peoples' Rights and Notable Institutions for their Enforcement*, 4 AKUNGBA L.J. 332, 333 (2016).

[13] Mutua (2000), *supra* note 2, at 3.

[14] *See* Umozurike, *supra* note 5.

[15] Lucinda Patrick-Patel, *The African Charter on Human and Peoples' Rights: How Effective is this Legal Instrument in Shaping a Continental Human Rights Culture in Africa?*, LE PETIT JURISTE (Dec. 21, 2014) https://www.lepetitjuriste.fr/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/.

[16] *See generally* Heyns, *supra* note 2; Bondzie-Simpson, *supra* note 6.

[17] *See* Mutua (1995), *supra* note 2; Heyns, *supra* note 2; Bondzie-Simpson, *supra* note 6.

[18] *See* Swanson, *supra* note 6; Gittleman, *supra* note 1; Richard Gittleman, *The African Commission on Human and Peoples' Rights: Prospects and Procedures*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 153 (Hurst Hannum ed., 1984); Cees Flinterman & Evelyn Ankumah, *The African Charter on Human and Peoples' Rights*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 159 (Hurst Hannum ed., 1992).

Commission on Human and Peoples' Rights[19] to address these shortcomings pending such amendments.[20]

From the plethora of scholarship available on the Charter and the African human rights system, the following are some of the criticisms which have been levied against the Charter. First, the Charter contains "claw-back clauses" allowing States Parties to limit granted rights to the extent permitted by domestic law.[21] Second, the Charter is not comprehensive enough in that it excludes many internationally recognized civil, political and socioeconomic rights.[22] Third, the Charter does not have a privacy provision.[23] Fourth, the Charter is deficient in its provision on criminal procedure—specifically the right to a fair trial.[24] Fifth, the Charter does not have a right against forced labor, nor does it have the right to form trade unions,[25] it is also silent on social rights and rights regarding housing and food.[26] Sixth, the Charter does not contain any derogation clause for

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[19] The African Commission on Human and Peoples' Rights [hereinafter African Commission or the Commission] is established by the African Charter art. 30.

[20] Heyns, *supra* note 2; *see also* Wolfgang Benedek, *The African Charter and Commission on Human and Peoples' Rights; How to Make it More Effective*, 11 NETH Q. HUM. RTS. 25 (1993).

[21] Gittleman, *supra* note 1, at 691-709; Mutua (2000), *supra* note 2, at 6; Samb, *supra* note 4, at 64. *See also* Sanele Sibanda, *Beneath It All Lies the Principle of Subsidiarity: The Principle of Subsidiarity in the African and European Regional Human Rights Systems*, 40 COMPAR. & INT'L L.J. S. AFR. 425, 443 (2007) (stating that "the inclusion of claw-back clauses in the charter has attracted much criticism…"); EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 176 (1996) (describing them as "meaningless").

[22] Samb, *supra* note 4, at 64; Acheampong, *supra* note 3.

[23] Mujib Jimoh, *The Quest for Information Privacy in Africa: A Critique of the Makulilo-Yilma Debate*, 1 AFR. J. PRIV. & DATA PROT. (forthcoming 2023); Samb, *supra* note 4, at 64; Kinfe Micheal Yilma, *The Quest for Information Privacy in Africa: A Review Essay*, 7 J. INFO. POL'Y 111 (2017); Alex B. Makulilo, *The Quest for Information Privacy in Africa*, 8 J. INFO. POL'Y 317 (2018).

[24] Acheampong, *supra* note 3; Christof Heyns, *Civil and Political Rights in the African Charter, in* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 137 (R. Murray & M. Evans eds., 2002).

[25] Heyns, *supra* note 2, at 159.

[26] Samb, *supra* note 4, at 64. However, the African Commission has adopted a derivative approach to Articles 4, 16 and 22 of the Charter to recognize the right to food in *Social and Economic Rights Action Centre (SERAC) and Center for Economic & Social Rights (CESR) v. Nigeria* (2001) AHRLR 60 (ACHPR 2001). Also, in Communication 317/06, *Nubian Community in Kenya v. the Republic of Kenya,* the Commission derived the right to housing from some of the rights in the Charter. For discussion, *see* Mujib Jimoh, *The Status of New Rights before the African Human Rights Commission and Court,* 25 OR. REV. INT'L. L. (forthcoming 2024).

emergencies.[27] Seventh, the Commission is "impotent"[28] and "toothless"[29] as an implementing body.[30] Additionally, the Charter has stringent seizure and admissibility criteria which hinder access to the Commission.[31] Further, the Charter has a poor State reporting mechanism.[32] Claude Welch noted in 1992 that, "perhaps the mildest of the rebuke" is that the Charter is "modest in its objectives and flexible in its means,"[33] while "one of the strongest" is that the "congenital defects in no small way account for the near irrelevance of the Charter and its institutions to Africa's political life."[34]

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[27] Scholars have criticized this absence as dangerous. *See* Heyns, *supra* note 2, at 161-62 (stating that "although sometimes presented as evidence of the steely resolve of the Commission not to allow deviations from human rights standards under any circumstances, this approach can in reality hardly be conducive to the protection of human rights. States facing real emergencies could in practice be expected to ignore the Charter rather than succumb to the emergency, if those are the only two options available. Under such circumstances the Charter will exercise no restraining influence on states in respect of the way in which the operation of the rights in question is suspended, and the Charter will be discredited"). *See also* Henry C. Alisigwe & Chimere Arinze Obodo, *Three Decades of the Africa Charter on Human and Peoples Rights: An Appraisal of the Normative and Institutional Enforcement Regime*, 1 INT'L REV. L. & JURIS. 158, 162 (2019).

[28] William Edward Adjei, *Re-Assessment of Claw-back Clauses in the Enforcement of Human and Peoples' Rights in Africa*, 28 J. LEGAL STUD. 1, 15 (2019).

[29] *Id.* at 10.

[30] Mutua (1995), *supra* note 2; Gino Naldi & Konstantinos Magliveras, *The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison*, 8 AFR. J. INT'L & COMPAR. L. 944 (1996); Nsongurua Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000) (stating that "in the area of protection of human rights, the Commission stands as a toothless bulldog. The Commission can bark – it is, in fact, barking. It was not, however, created to bite").

[31] Kofi Oteng Kufuor, *Safeguarding Human Rights: A Critique of the African Commission on Human and Peoples' Rights*, 18 AFR. DEV. 65, 71 (1993). While the Charter does not contain the seizure criteria itself, the Commission derives power to make the criteria from the Charter. *See* Mujib Jimoh, *A Critique of the Seizure Criteria of the African Commission on Human and Peoples' Rights*, 22 AFR. HUM. RTS. L.J. 362 (2022).

[32] Rachel Murray & Debra Long, *Monitoring the Implementation of its Own Decisions: What Role for the African Commission on Human and Peoples' Rights?*, 21 AFR. HUM. RTS. L.J. 836, 843-44 (2021); Malcolm Evans et al., *The Reporting Mechanism of the African Charter on Human and Peoples' Rights, in* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986-2000 36 (Malcolm Evans & Rachel Murray eds., 2002).

[33] Claude E. Welch, Jr., *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment,* 14 HUM. RTS. Q. 43, 46 (1992) (quoting Okere, *supra* note 6, at 158).

[34] *Id.*

This article discusses how the Commission has responded to the call from scholars—particularly Heyns[35]—who have encouraged the Commission to, within its mandates under the Charter,[36] address these criticisms. It investigates the extent of the Commission's responses and underscores the need for more action. In scope, the article will consider the Commission's responses to the following criticisms: (a) claw-back clauses; (b) the absence of a privacy provision; (c) stringent seizure and admissibility criteria; and (d) impotent and toothless implementation. The article focuses on these four criticisms because most of the others may require an amendment to the Charter,[37] which is *ultra vires* of the Commission.[38]

The article is divided into five parts. After this introduction, Part II will briefly discuss the African Charter and its unique features. Part III will summarily discuss the Commission and its mandates under the Charter. Part IV will consider the criticisms of the Charter and how the Commission has or has not responded. Part V—the conclusion—will summarize and provide some recommendations.

I. THE HISTORY OF THE CHARGER & ITS UNIQUE FEATURES[39]

The Charter was completed in 1981 and came into force on October 21, 1986.[40] The idea to have a regional human rights treaty in Africa, which, in addition to other conferences held between 1961 and 1979, later culminated in the adoption of the Charter by the Organization of African Unity ("OAU" or "AU"),[41] is usually credited to the initiative of the International

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[35] Heyns, *supra* note 2.
[36] The African Charter art. 45 stipulates the mandates of the Commission.
[37] *See generally* Heyns, *supra* note 2.
[38] *See* African Charter art. 68. *See* Part IV [C] *infra*.
[39] For a full consideration of the Charter, RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMMENTARY (2019); RACHEL MURRAY, HUMAN RIGHTS IN AFRICA FROM THE OAU TO THE AFRICAN UNION (2004); ALLWELL UWAZURUIKE, HUMAN RIGHTS UNDER THE AFRICAN CHARTER (2020); OSITA C. EZE, AFRICAN CHARTER ON RIGHTS & DUTIES: ENFORCEMENT MECHANISMS (2021).
[40] Viljoen, *supra* note 4, at 1.
[41] When the Charter was adopted, it was referred to as the Organization of African Unity (OAU). It was changed to the African Union (AU) in 2002. *See* TIMOTHY MURITHI, THE AFRICAN UNION: PAN-AFRICANISM, PEACEBUILDING AND DEVELOPMENT (2005); RUSSELL

Commission of Jurists, which held an African Conference on Rule of Law in Lagos in 1961.[42] At the conference, the delegates adopted a declaration requesting African governments make and adopt a treaty on human rights in Africa with a court and a commission.[43] But in the early life of the AU, there were other issues the AU decided to focus on, one of which was securing independence for African States under colonial rule.[44] According to Murray, "at this stage, the [O]AU's focus was on protection of the State, not the individual."[45] This proposition seems correct as the word "human rights" appears only twice in the Constitutive Act of the AU and was more state-centric in context.[46]

Notwithstanding the duty imposed by Art. II (I)(e) of the Constitutive Act—to have "due regard to the Charter of the United Nations and Universal Declaration of Human Rights" (UDHR)—the AU continually ignored human rights violations in member States.[47] Eventually, in 1979, at the 16th Ordinary Session of the AU, the AU called for the preparation of 'a preliminary draft of an African Charter on Human and Peoples' Rights providing for the establishment of organs and for the promotion and protection of human and peoples' rights.'[48] After a series of meetings and drafts by African experts and the AU Council of Ministers, the Assembly of the AU adopted the Charter as recommended, on June 17, 1981.[49] Of the

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ROBERTS, THE AFRICAN UNION: THE EVOLUTION OF AFRICA'S MAJOR NATIONS (2014). For consistency, this article adopts AU.

[42] MURRAY (2004), *supra* note 39; Swanson, *supra* note 6, at 327; Turack, *supra* note 7, at 2.

[43] *A Guide to the African Human Rights System*, CENTRE FOR HUMAN RIGHTS 1 (2016), https://www.corteidh.or.cr/tablas/31712.pdf.

[44] MURRAY (2004), *supra* note 39, at 7.

[45] *Id.*

[46] *See* Constitutive Act of the AU, OAU Doc. CAB/LEG/23.15, Preamble and art. II (I)(e) [hereinafter Constitutive Act].

[47] Cobbah, *supra* note 6, at 310; Samb, *supra* note 4, at 62.

[48] Decision 115 (XVI) Rev. 1, O.A.U. Doc. AHG/115 (XVI) (1979). *See* Gittleman, *supra* note 1, at 667; Makau wa Mutua, *The African Human Rights System in a Comparative Perspective*, 3 REV. AFR. COMM'N HUM. & PEOPLES' RTS. 5, 7 (1993) (stating that "the [African] leadership had to reclaim international legitimacy and salvage its image. In 1979, shaken by these perceptions, the OAU Summit in Monrovia, Liberia, appointed a committee of experts to prepare a draft of an African human rights charter").

[49] Gittleman, *supra* note 1, at 669.

fifty-five Member States of the AU, only Morocco has not ratified the Charter.[50]

The Charter is unique in a number of ways. It contains not only 'human' rights,[51] but also 'peoples' rights.[52] It is maintained that the idea of including peoples' rights in the Charter is the notion that societal rights are greater than individual rights, a notion upon which the Charter is built.[53] According to Richard Gittleman, the term "peoples' rights" was included at the insistence of the socialist States, the most vocal of which were Ethiopia and Mozambique.[54] "They maintained that the individual had no greater rights than that of the society as a whole."[55] The positive impacts of the Charter have been exhibited by the Commission, the African Court on Human and Peoples' Rights (the African Court), and scholars through their writings.[56] Abiodun Osuntogun maintains that one positive impact of the Charter is that "it adopts a liberal approach on the issue of *locus standi* for those who can institute an action based on the rights provided therein."[57] The Commission has given credence to this liberal approach through its *actio popularis* approach as demonstrated in *Article 19 v. Eritrea*.[58] The Commission observed that:

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[50] *Cf. African Commission on Human and Peoples' Rights,* INT'L JUST. RECOURSE CTR. (2020), https://ijrcenter.org/wp-content/uploads/2020/05/ACHPR-one-pager-2020.pdf (noting that it is only Morocco); *and* African Freedom of Expression Exchange & 15 Others (Represented by FOI Attorneys) v. Algeria & 27 Others, Communication 742/20, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] ¶ ¶ 39, 40 & 41 (Apr. 26, 2021) (where the Commission noted that Somaliland has not ratified the Charter too).

[51] *See* African Charter art. 1-18.

[52] *See* African Charter art. 19-26.

[53] *See* Rachel Murray & Steven Wheatley, *Groups and the African Charter on Human and Peoples' Rights*, 25 HUM. RTS. Q. 213, 215 (2003) (stating that "…the values of the African societies differ from those of Western societies, with the notion of community central to the African way of life: a person is not regarded as an isolated and abstract individual, but an integral member of a community. In Africa, 'man is part and parcel of society.' The African Charter on Human and Peoples' Rights (ACHPR) makes clear that the rights of an individual are bound up with and thus only realized with the context of the community in which those rights are not restricted, but rather protected…").

[54] Gittleman, *supra* note 1, at 673.

[55] *Id.*

[56] *See* Okere, *supra* note 6, at 145 (enumerating some of these).

[57] Osuntogun, *supra* note 12, at 332.

[58] Article 19 v. The State of Eritrea, Communication 275/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (May 30, 2007).

> In the consideration of communications, the African Commission has adopted an *actio popularis* approach where the author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality. All the author needs to do is to comply with the requirements of Article 56. The African Commission has thus allowed many communications from authors acting on behalf of victims of human rights violations…[59]

Another positive impact of the Charter is that the rights contained therein are African in nature.[60] The Charter recognizes a contextual approach to human rights, where culture is an important factor in the construction and recognition of rights.[61] Also, the Charter is said to be the first major human rights instrument to recognize "new rights."[62] It recognizes all generations of rights as well as socio-economic rights as justiciable.[63] Unlike other human rights treaties, the African Charter uniquely recognizes collective rights, individual duties, and third generation rights, showing the interdependence between political, civil, economic, and sociocultural rights.[64] In addition, the Charter is unique for its imposition

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[59] *Id.* ¶ 65.

[60] Gumedze, *supra* note 2, at 119; Rose D'sa, *Human and Peoples' Rights: Distinctive Features of the African Charter,* 29 J. AFR. L. 72, 73 (1985).

[61] Swanson, *supra* note 6, at 308; NASILA S. REMBE, THE SYSTEM OF PROTECTION OF HUMAN RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: PROBLEMS AND PROSPECTS 3 (1991) (citing 17 O.A.U. Doc. CAB/LEG/67/3, Rev. 1 at 1).

[62] Swanson, *supra* note 6, at 308.

[63] Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Oct. 27, 2001).

[64] *See* Manisuli Ssenyonjo, *Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter*, 29 NETH. Q. HUM. RTS. 358, 389 (2011); Samb, *supra* note 4, at 62. Although Samb also notes that "there are several internationally recognized civil, political, and socio economic rights that are not included in the African Charter, or are not explicitly or fully recognized." *Id.* at 64. "However, the Charter itself provides for only few socioeconomic rights." *Id.* at 73.

of duties on individuals.[65] It is said that the imposition of duties on individuals underscores the notion that individuals must reciprocate to the State the human rights guaranteed by the States.[66] The Charter clarified the "vague" individual duties contained in other international human rights instruments before it.[67]

II. THE COMMISSION & ITS MANDATES[68]

The Commission is established by the Charter.[69] It has acted as the supervisory body for the Charter since 1987.[70] The Commission has four mandates as the human rights supervisory body in Africa.[71] First, the Commission is to *promote* human and peoples' rights.[72] According to the Charter, this may be done in three ways.[73] The Commission may collect documents, conduct research, and organize conferences to discuss human rights problems in Africa and inform African Governments.[74] The Commission may also formulate rules aimed at solving human rights problems.[75] Or, the Commission may cooperate with other African or

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[65] African Charter art. 27-29. Mutua (1995), *supra* note 2; Mutua (2000), *supra* note 2, at 3.
[66] Gittleman, *supra* note 1, at 676.
[67] *Id.* at 677.
[68] For a thorough discussion, see Kufuor, *supra* note 31; Emmanuel Bello, *The Mandate of the African Commission on Human and Peoples' Rights*, 1 AFR. J. INT'L L. 55 (1988); A. Bolaji Akinyemi, *The African Charter on Human and Peoples' Rights: An Overview*, 46 INDIAN J. POL. SCI. 207 (1985); Chidi Anselm Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples' Rights: The Development of Its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235 (1998); Solomon A. Dersso, *Role of the African Commission, in* PROMOTION OF HUMAN SECURITY IN AFRICA: THE ROLE OF AFRICAN HUMAN RIGHTS INSTITUTION (Dersso ed., 2008). For a recent review of the mandates of the Commission, see Manisuli Ssenyonjo, *Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and the African Court on Human and Peoples' Rights (1987-2018),* 7 INT'L. HUM. RTS. L. REV. 1 (2018).
[69] African Charter art. 30.
[70] Samb, *supra* note 4, at 66.
[71] African Charter art. 45.
[72] *Id.* art. 45(1).
[73] *Id.* art. 45.
[74] *Id.* art. 45(1)(a).
[75] *Id.* art. 45(1)(b).

international bodies to promote human rights on the continent.[76] Secondly, the Commission is meant to *protect* human and peoples' rights in accordance with the rules laid down in the Charter.[77] Thirdly, the Commission is to *interpret* the provisions of the Charter, either at the request of a State Party, an institution of the AU, or one that is recognized by the AU.[78] The last function is omnibus—to perform *any other tasks* which may be entrusted to it by the Assembly of Heads of State and Government.[79] To perform these mandates, the Commission can resort to any "appropriate method."[80]

The Commission consists of 11 members.[81] These members are nominated by State Parties to the Charter, and elected by the AU Assembly of Heads of State and Government.[82] However, no one State can have more than one Commissioner during a given period.[83] Members of the Commission are elected for a period of six years and are eligible for reelection.[84] Notwithstanding that the Charter provides that members of the Commission act in their personal capacity and not for their States,[85] at some point, members of the Commission had in fact been political office holders in their States.[86] This invariably affected the independence of the Commission.[87] To remedy this situation, the AU issued a *note verbale* in 2005, prescribing guidelines for nomination and excluding "senior civil servants and diplomatic representatives."[88] Further, though, not explicitly contained in the Charter, the Commission has said that the Assembly considers "equitable geographical and gender representation in electing the members of the Commission."[89]

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[76] *Id.* art. 45(1)(c).
[77] *Id.* art. 45(2).
[78] *Id.* art. 45(3).
[79] *Id.* art. 45.
[80] *Id.* art. 46; Akinyemi, *supra* note 68, at 210.
[81] African Charter art. 31.
[82] *Id.* art. 33.
[83] *Id.* art. 32.
[84] *Id.* art. 36.
[85] *Id.* art. 31(2).
[86] *Commissioners*, AFR. COMM'N ON HUM. & PEOPLES' RTS. (2022), https://achpr.au.int/en/commission/commissioners.
[87] Heyns, *supra* note 2, at 164.
[88] *Commissioners*, *supra* note 86.
[89] *Id.*

III. CRITICISMS OF THE CHARTER & THE COMMISSION'S RESPONSES

In this section, the Commission's responses to the following four criticisms, if any, shall be examined: (a) claw-back clauses; (b) absence of a privacy provision; (c) stringent seizure and admissibility criteria; and (d) impotent and toothless implementation.

A. Claw-Back Clauses

The inclusion of claw-back clauses in the Charter has received widespread criticism from scholars.[90] Though this might appear similar to a derogation clause, it is quite different. The Charter does not contain a derogation clause that delineates the circumstances during which a state may temporarily derogate from obligations to protect certain human rights.[91] Perhaps, one of the best descriptions of a claw-back clause is that given by Rosalyn Higgins, the first to use the term[92]: A claw-back clause is one "that permits, *in normal circumstances*, breach of an obligation for a specified number of public reasons."[93] This differs, according to Higgins, from derogation clauses which "allow suspension or breach of certain obligations in *circumstances of war or public emergency*."[94]

Another scholar who attempted to take a stab at the distinction between the two is Gittleman, who stated, "while derogation clauses permit the suspension of previously granted rights, claw-back clauses restrict rights *ab*

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[90] *See* Gino J. Naldi, *Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights*, 17 S. AFR. J. ON HUM. RTS (2001); CRM Dlamini, *Towards A Regional Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights*, 24 COMPAR. & INT'L L.J. S. AFR. 189 (1991); Mutua (2000), *supra* note 2, at 6 (stating that "perhaps the most serious flaw in the African Charter concerns its 'clawback' clauses.").

[91] For discussion, see Melkamu Aboma Tolera, *Absence of a Derogation Clause under the African Charter and the Position of the African Commission*, 4 BAHIR DAR UNIV. J. L. 229 (2014).

[92] Udombana, *supra* note 30, at 62.

[93] Rosalyn Higgins, *Derogations under Human Rights Treaties,* 48 BRITISH Y.B. INT'L L. 281, 281 (1978).

[94] *Id.*

initio."[95] By their natural implication, claw-back clauses allow State Parties to restrict the rights contained in the Charter by their own domestic law.[96] They give State Parties "almost unbounded discretion"[97] since they may be applied any time—insofar as a national law restricting the rights contained in the Charter is enacted by a State Party.[98] Within the context of the Charter, there is a general limitation clause and individual limitation clauses. The general limitation clause is Art. 27(2) of the Charter.[99] By that provision, the only limitations permitted on rights contained in the Charter are those relating to "the rights of others, collective security, morality and common interest."[100] The claw-back clauses contained in the different articles of the Charter operate as "individual limitation clauses."[101] In essence, these are limitation clauses.[102] They must operate within the general limitation clause in Art. 27(2) of the Charter.[103]

It is not clear from the jurisprudence of the Commission if it will allow the claw-back clauses to operate like the margin of appreciation doctrine. Under the margin of appreciation doctrine, though it is not contained in the European Convention on Human Rights (ECHR),[104] the European Court on

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[95] Gittleman, *supra* note 1, at 692.
[96] Sandhiya Singh, *The Impacts of Clawback Clauses on Human and Peoples' Rights in Africa*, 18 AFR. SEC. REV. 95, 100 (2009).
[97] Bondzie-Simpson, *supra* note 6, at 660.
[98] *Id.*
[99] Media Rights Agenda and Others v. Nigeria, Communications 105/93, 128/94, 130/94 and 152/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 68 (Oct. 31, 1998).
[100] African Charter art. 27(2).
[101] Paige Tapp, *To Derogate or Not to Derogate, that Is the Question: A Comparison of Derogation Provisions, Alternative Mechanisms Comparison of Derogation Provisions, Alternative Mechanisms and Their Implications for Human Rights*, UNIV. CHI. L SCH. INT'L PROGRAM PAPERS 1, 17 (2019).
[102] Different scholars have described claw-back clauses as limitations to the provisions of the Charter. See for instance, Tolera, *supra* note 91, at 240 (stating that "when it comes to the African Charter, its claw-back clauses provide for limitations to the Charter's guarantee which are almost totally discretionary in that these clauses seem to give precedence to domestic laws"). *See* Alisigwe & Obodo, *supra* note 27, at 162 (also stating that "the African charter normative inclusion of claw-back clauses permits state parties to enact laws limiting the enjoyment of the African Charter rights and freedoms."). In Communication 212/98 – *Amnesty International v. Zambia,* ¶ 42, the Commission referred to claw-back clauses as limitation clauses stating that "it is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter."
[103] Media Rights Agenda and Others v. Nigeria, *supra* note 99, ¶ 69.
[104] George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 706 (2006).

Human Rights (ECtHR) has created room for national authorities to "maneuver" their obligations under the ECHR for some social reasons.[105] In usage, the doctrine has been permitted with respect to the articles in the ECHR that have limitation clauses.[106] Under this doctrine, the ECHR will leave to State Parties a *margin of appreciation* discretion or deference in effecting the rights in the ECHR within the applicable domestic policies.[107] The doctrine is useful to ease the "tension between the ECtHR and the States."[108]

So far, the Commission has rarely referred to margin of appreciation in its decisions.[109] When it did in *Prince v. South Africa,*[110] it showed that like the claw-back clause, it would not allow State arbitrariness:

> Whatever discretion these…doctrine[s] may allow Member States in promoting and protecting human and peoples' rights domestically, they do not deny

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[105] John Reynolds, *The Margin of Appreciation Doctrine: Colonial Origin, in* EMPIRE, EMERGENCY AND INTERNATIONAL LAW 170 (John Reynolds ed., 2017) (stating that "the use of the doctrine has been become most prevalent in cases that relate to social issues on which competing religious, cultural or moral value systems engender a lack of consensus…").

[106] Ignacio de la Rasilla del Mortal, *The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine*, 7 GERMAN L.J. 1 (2006) (stating that "in the majority of cases, the doctrine has been used in connection to those articles in the Convention that have 'accommodation' or 'limitation clauses'").

[107] Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 845 (1999) (describing the rationale for the rule); HOWARD YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 13 (1996).

[108] Koen Lemmens, *The Margin of Appreciation in the ECtHR's Case Law*, 20 EUR. J. L. REFORM 78, 86 (2018).

[109] Gary Born et al., *"A Margin of Appreciation": Appreciating Its Irrelevance in International Law*, 61 HARV. INT'L L.J. 64, 78 (2020); Magnus Killander, *Interpreting Regional Human Rights Treaties*, 7 SUR INT'L J. HUM. RTS. 145, 152 (2010). The African Court too has shown apathy to the doctrine. *See* Adam Kassie Abebe, *Right to Stand for Elections as an Independent Candidate in the African Human Rights System: The Death of the Margin of Appreciation Doctrine?*, AFRICLAW (Aug. 19. 2013), https://africlaw.com/2013/08/19/right-to-stand-for-elections-as-an-independent-candidate-in-the-african-human-rights-system-the-death-of-the-margin-of-appreciation-doctrine-2/. In the other sub-regional human rights bodies considered by scholars, it was also found that the doctrine is rarely used. *See* Andreas von Staden, *Subsidiarity, Exhaustion of Domestic Remedies, and the Margin of Appreciation in the Human Rights Jurisprudence of African Sub-regional Courts*, 20 INT'L J. HUM. RTS. 1113 (2016). Thus, it is safe to conclude that the doctrine is unpopular in the African human rights system.

[110] Garreth Anver Prince v. South Africa, Communication 225/02, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R], (Dec. 7, 2004).

> the African Commission's mandate to guide…and insist upon Member States on better promotion and protection of standards should it find domestic practices wanting…what the African Commission would not allow, however, is a restrictive reading of these doctrines like that of the Respondent State, which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter.[111]

The claw-back clauses in the Charter are worded differently. Some of them are: "except for reasons and conditions previously laid down by law"[112]; "subject to law and order"[113]; "within the law"[114]; "provided that he abides by the law"[115]; "subject only to necessary restrictions provided for by law"[116]; "in accordance with the provisions of the [appropriate][117] law."[118] If *law,* as contained in these clauses, is interpreted as a reference to *domestic law,* State Parties would be able to use their domestic laws to "take away" the rights contained in those articles.[119]

1. The Commission's Response

This criticism seems to have come too early. One of the earliest scholarships where these clauses were criticized was the work of Gittleman. Gittleman, writing in 1982—after the Charter was adopted, but before it came into force—heavily criticized these clauses.[120] Subsequent works of notable African scholars and non-African commentators also contain

[111] *Id.* ¶ 53.
[112] African Charter art. 6.
[113] *Id.* art. 8.
[114] *Id.* art. 9(2).
[115] *Id.* art. 10(1); 12(1).
[116] *Id.* art. 11; 12(2)
[117] *Id.* art. 14.
[118] *Id.* art. 13.
[119] Adjei, *supra* note28, at 2.
[120] Gittleman, *supra* note 1.

criticism against these clauses.[121] While more recent works—from 2014,[122] 2016,[123] and 2019[124]—still continue to criticize these clauses, the Commission has developed a robust jurisprudence to address this criticism. At various times, where the Commission has interpreted "law" as domestic law, it has required these laws to satisfy the test of "proportionality, legality, compatibility, appropriate balancing, equality and non-discrimination, necessity, and transparency."[125] At other times, the Commission has interpreted "law" in reference to international law, so that any domestic law enacted to curtail the rights contained in the Charter that is contrary to international norms will be discountenanced.[126] Thus, it appears that Gittleman's criticism is inopportune, although he appears to have made the suggestion that the Commission may interpret "law" as "international law."[127]

Article 19 v. Eritrea[128] is apt in this regard. Rejecting Eritrea's argument that it could limit the right to freedom of expression[129] under its domestic law, the Commission reasoned that:

> [I]f 'law' is interpreted to mean any domestic law regardless of its effect, States Parties to the Charter would be able to negate the rights conferred upon individuals by the Charter. However, the

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[121] *See* note 21 and its accompanying text.
[122] C. Anno, *The African Charter on Human and Peoples' Rights: How Effective is this Legal Instrument in Shaping a Continental Human Rights Culture in Africa?*, LE PETIT JURISTE (Dec. 21, 2014), https://www.lepetitjuriste.fr/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/.
[123] Loveness Mapuva, *Negating the Promotion of Human Rights Through "Claw-Back" Clauses in the African Charter on Human and People's Rights*, 51 INT'L AFFS. & GLOB. STRATEGY 1 (2016).
[124] Adjei, *supra* note 28.
[125] *Id.*
[126] *Id;* Heyns, *supra* note 2.
[127] *See* Gittleman, *supra* note 1, at 701-02 (stating that "under a second and broader interpretation of the Charter, the Commission need not restrict itself to domestic law but may interpret the clawback clauses in light of international law.").
[128] Article 19 v. The State of Eritrea, *supra* note 58. (Though there are other communications. *See* Scanlen & Holderness v. Zimbabwe, Communication 297/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Apr. 3, 2009); Media Rights Agenda v. Nigeria, Communication 224/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], Nov. 6, 2000).
[129] African Charter art. 9(2).

> Commission's jurisprudence has interpreted the so-called claw-back clauses as constituting a reference to international law, meaning that only restrictions on rights which are consistent with the Charter and with States Parties' international obligations should be enacted by the relevant national authorities. The lawfulness of Eritrea's actions must therefore be considered against the Charter and other norms of international law, rather than by reference to its own domestic laws alone.[130]

In essence, the Commission reasoned that Eritrea could not use its domestic law to evade an international obligation. Similarly, in *Amnesty International v. Zambia,*[131] the Commission cautioned "against a too easy resort to the limitation clauses in the African Charter."[132] As may be gleaned from some of the recent decisions of the Commission, it seems that African States have heeded this warning as they rarely rely on these clauses.[133] Indeed, though some leading scholars believe that "the Commission has clearly been designed to accomplish very little,"[134] this radical approach with respect to claw-back clauses is one of the significant contributions by the Commission in the protection of human rights on the continent. The Commission has, thus, responded adequately.[135] The criticism on the clauses may now be foreclosed.

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[130] Article 19 v. The State of Eritrea, *supra* note 58, ¶ ¶ 91 & 92. It would seem that there can be "domestic law" limiting the rights, but which must conform with international norm. *But see* Samb, *supra* note 4, at 65.

[131] Amnesty International v. Zambia, Communication 212/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (May 5, 1999).

[132] *Id. ¶* 50.

[133] The words "claw-back clauses" have not appeared in the recent decisions of the Commission. The most recent decision of the Commission containing "clawback clause" – Gabriel Shumba and Others (represented by Zimbabwe Lawyers for Human Rights) v. The Republic of Zimbabwe, Communication 430/12, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Oct. 20, 2021) –– was decided in 2021. In it, it was the Commission that made reference to clawback clauses while discussing limitation to the Charter, see ¶ ¶ 72 & 109.

[134] *See* FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 293 (2007).

[135] There are scholars who do not believe in this approach. *See* Heyns, *supra* note 2, at 158 (stating that "from this point of view it could be argued that while it is true that the Commission has in substantial respects reinvented the Charter and compensated for its flaws, this is not a healthy development in the long run if these new interpretations are not followed up by the reform of the Charter itself. The rule of law demands that law is predictable, and as a result words used in legal texts should be given their ordinary meaning

B. Absence of a Privacy Provision[136]

Despite being contained in major international human rights instruments that precede it,[137] the Charter does not contain a privacy provision.[138] Furthermore, with the advent of technology comes the emergency of data privacy,[139] neither of which is covered under the Charter.[140] Both privacy and data privacy need "special protection"[141] in light of modern technology. The absence of a privacy provision has, thus, resulted in a weak enforcement mechanism of privacy rights in Africa,[142] notwithstanding that this right is contained in most African countries' constitutions.[143]

Different reasons have been proffered by scholars for why the Charter lacks a privacy provision. Makulilo—one of the leading African scholars on privacy[144]—believes that the right was omitted because there was no privacy

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as far as is possible. To retain its integrity, the Charter should in this sense be understood to say what it means, and to mean what it says. Where there are deviations, these need to be rectified, even if that means that the Charter has to be amended").

[136] For a thorough discussion, *see* Jimoh, *supra* note 23; Yilma, *supra* note 23; Makulilo, *supra* note 23.

[137] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 12; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 17; European Convention on Human Rights, art. 8; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 11.

[138] *See* Rachel Murray & Frans Viljoen, *Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union*, 29 HUM. RTS. Q. 86, 89 (2007) (stating that the omission was deliberate).

[139] Anneliese Roos, *Privacy in the Facebook Era: A South African Legal Perspective*, 129 S. AFR. L.J. 375 (2012).

[140] *See* Mujib Jimoh, *The Place of Digital Surveillance under the African Charter on Human and Peoples' Rights and the African Human Rights System in the Era of Technology*, 1 AFR. J. LEGAL ISSUES TECH. & INNOVATION 113 (2023).

[141] *Id.*; *Southern African Development Community (SADC) Model Law: Data Protection*, HARMONIZATION OF ICT POLICIES IN SUB-SAHARAN AFRICA, pmbl., cl. 10 (2013), https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_data_protection.pdf.

[142] *Id.*

[143] Yilma, *supra* note 23, at 115.

[144] Alex B. Makulilo holds a PhD on African privacy from the University of Leipzig (2012). He has since published two books on privacy in Africa. *See* ALEX B. MAKULILO, PRIVACY AND DATA PROTECTION IN AFRICA (2014) and ALEX B. MAKULILO, AFRICAN DATA PRIVACY LAW (2016).

in Africa before contact with the West.[145] Yilma—another leading African scholar on privacy—argues that the omission was "probably a mere drafting oversight."[146]

However, as discussed in a forthcoming paper titled *The Quest for Information Privacy in Africa: A Critique of the Makulilo-Yilma Debate*, both views are erroneous.[147] Perhaps, neither scholar considered the unique nature of the Charter in understanding the reasons for such absence. For example, the Charter does not make a provision for a court.[148] The African Court was established later via a protocol.[149] According to Swanson, this is because the drafters of the Charter believed that the use of a court system to settle a dispute was unknown to Africa: drafters felt that Africa encouraged an arbitration-like dispute settlement, providing more reason why the Commission operates like an arbitral body.[150] Furthermore, the view that is most persuasive in showing that a privacy provision was omitted is the view that the drafters felt the privacy provision contained in other international human rights treaties preceding the Charter was more Western oriented, thought to be too individualistic and contrasting with the communalistic foundation of the Charter.[151]

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[145] *See* Makulilo, *supra* note 23, at 321-22 (stating that "surprisingly, the critique fails to locate the place of privacy in the African culture and/or identify any society in Africa where the notion of privacy existed or was practiced independently of the influence from the West. My position is somewhat similar to other scholars with regard to the origins of privacy in non-Western cultures"). *See also* Alex B. Makulilo, *A Person is a Person through Other Persons – A Critical Analysis of Privacy and Culture in Africa*, 7 BEIJING L. REV. 192, 196 (2016).

[146] Yilma, *supra* note 23, at 115 (stating that the absence was an oversight because "several African countries have had some form of privacy protections in their constitutions and civil laws long before the Banjul Charter was adopted.").

[147] Jimoh, *supra* note 23.

[148] Umozurike, *supra* note 5, at 909.

[149] N. Barney Pityana, *Reflections on the African Court on Human and Peoples' Rights*, 4 AFR. HUM. RTS. L.J. 121 (2004).

[150] Swanson, *supra* note 6, at 330.

[151] Jimoh, *supra* note 140 (citing AKIN IBIDAPO-OBE, ESSAYS ON HUMAN RIGHTS LAW IN AFRICA 260 (2005)); OSITA OGBU, HUMAN RIGHTS LAW AND PRACTICE IN NIGERIA 280-81 (2013). *See also* Yohannes Eneyew Ayalew, *Untrodden Paths Towards the Right to Privacy in the Digital Era under African Human Rights Law*, 12 INT'L DATA PRIV. L. 16 (2022) (stating that "prioritizing collectivism is a cultural norm in number of states in Africa, and this may affect the way we conceive the right to privacy").

Recently, with the advent of technology, it has become imperative to evaluate the African conception of privacy.[152] A previous work[153] discusses how States infringe on the privacy rights of Africans through surveillance—in Algeria, Botswana, Cameroon, Côte d'Ivoire, Egypt, Ethiopia, Equatoria Guinea, Ghana, Libya, Malawi, Morocco, Nigeria, Rwanda, South Africa, Tanzania, Uganda, Zambia and Zimbabwe—with no one prosecuted for it yet.[154] The provision on privacy in subsequent AU treaties, such as the one contained in the African Charter on the Rights and Welfare of the Child, is insufficient to address the issue.[155] Although one major step taken by the AU in remedying this situation was the adoption of the African Union Convention on Cyber Security and Personal Data Protection (the Malabo Convention) in 2014—a comprehensive treaty on privacy and data protection. This Convention only entered into force in June 2023.[156] Despite the Malabo Convention, there are other privacy and data protection gaps within the African human rights system.[157]

1. The Commission's Response

Although the Commission has yet to consider a question on the right to privacy, it has been urged to expand the right to dignity contained in the Charter[158] to include a privacy provision, should such a question arise.[159] In the past, the Commission has adopted a derivative approach to the Charter,

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[152] Jimoh, *supra* note 140, at 114.
[153] *Id.*
[154] *Id.* at 123.
[155] *Id.* at 124. The African Charter on the Rights and Welfare of the Child is applicable to a person below the age of 18. *See* The African Charter on the Rights and Welfare of the Child art. II.
[156] Shamaa Sheik, *AU Convention on Cyber Security and Personal Data Protection: Malabo Convention*, MICHALSONS (Apr. 24, 2023), https://www.michalsons.com/blog/au-convention-on-cyber-security-and-personal-data-protection-malabo-convention/65281.
[157] Mohamed Aly Bouke et. al., *African Union Convention on Cyber Security and Personal Data Protection: Challenges and Future Directions* (2023), https://arxiv.org/ftp/arxiv/papers/2307/2307.01966.pdf.
[158] African Charter art. 5.
[159] Avani Singh & Michael Power, *The Privacy Awakening: The Urgent Need to Harmonise the Right to Privacy in Africa*, 3 AFR. HUM. RTS. Y.B. 202 (2019); Kinfe Micheal Yilma and Alebachew Birhanu, *Safeguards of the Right to Privacy in Ethiopia: A Critique of Laws and Practices*, 26 J. ETH. L. 94, 109-10 (2013).

where rights not expressly mentioned in it, are recognized.[160] For instance, in some of the communications to the Commission, the Commission has extracted the right to food,[161] water, and sanitation[162] from the existing human rights in the African Charter.

Notwithstanding that the Commission has not considered this question, the activities of the Commission tend to suggest that it has not shown sufficient interest in privacy rights in Africa. In fact, the African regional economic communities (RECs) are outperforming the Commission in the promotion and protection of this right.[163] The Supplementary Act of the Economic Community of West African States (ECOWAS) was the first, and remains the only binding international data privacy treaty in Africa.[164] The East African Community Legal Framework for Cyberlaws and the Southern African Development Community (SADC) Data Protection Model Law both predated the first substantial effort by the Commission to reference privacy rights.[165]

By its Rules of Procedure, the Commission may create subsidiary mechanisms such as Special Rapporteurs, Committees and Working Groups.[166] The Commission currently has six Special Rapporteurs,[167] four

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[160] For discussion on the derivative approach, *see* Brandon L. Garrett, Laurence R. Helfer & Jayne C. Huckerby, *Closing International Law's Innocence Gap*, 95 S. CAL. L. REV. 311 (2021); Lea Shaver, *The Right to Read*, 54 COLUM. J. TRANSNAT'L L. 1 (2015). *See also* Jimoh, *supra* note 26.

[161] Social and Economic Rights Action Centre (SERAC) and Center for Economic & Social Rights (CESR) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights, [Afr. Comm'n H.P.R.], (Oct, 27, 2001).

[162] Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, les Témoins de Jehovah v. Democratic Republic of the Congo, Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights, [Afr. Comm'n H.P.R.], (Apr. 4, 1996).

[163] Jimoh, *supra* note 140, at 120.

[164] Ololade Shyllon, *The Right to Privacy and the Protection of Personal Information in Africa: Challenges and Prospects* (2017) https://aanoip.org/wp-content/uploads/2018/07/Privacy-and-Data-Protection-IB-Dec-2017.pdf.

[165] The first substantial effort by the Commission to document privacy was in the 2019 African Declaration on Freedom of Expression and Access to Information. *See Declaration of Principles on Freedom of Expression and Access to Information in Africa*, AFR. COMM'N ON HUM. & PEOPLES' RTS. https://achpr.au.int/en/node/902#:~:text=The%20Declaration%20establishes%20or%20affirms,to%20express%20and%20disseminate%20information (Nov. 10, 2019).

[166] Commission's Rules of Procedure, Rule 25.

[167] These are: Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrant in Africa; Special Rapporteur on Human Rights Defenders and

Committees,[168] and seven Working Groups.[169] However, none of these have a clear mandate to promote privacy rights in Africa.[170] While the Special Rapporteur on Freedom of Expression and Access to Information, which was established in 2004 and has had 26 adopted resolutions and four mission reports,[171] only its 2019 Declaration expressly mentioned privacy.[172] Still, it is not comprehensive. Despite the efforts by some organizations, such as Privacy International, the Legal Resources Center, and International Network of Civil Liberties Organizations, the Commission has not adopted a Resolution on privacy in Africa.[173] Of the five Recommendations and 376 Resolutions adopted by the Commission between 1988–2017, none has privacy as its subject matter.[174]

Thus, the Commission has not responded adequately to this criticism and is encouraged to "urgently"[175] fix this issue through its subsidiary mechanisms and adoption of soft laws. The Commission in its promotional

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Focal Pont on Reprisals in Africa; Special Rapporteur on Freedom of Expression and Access to Information; Special Rapporteur on Rights of Women; Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa; and Special Rapporteur on Extra-judicial, Summary or Arbitrary Execution. *See Special Mechanisms*, AFR. COMM'N ON HUM. & PEOPLES' RTS. (2022), https://achpr.au.int/en/special-mechanisms#:~:text=The%20Commission%20may%20create%20subsidiary,shall%20be%20taken%20by%20voting.

[168] These are: Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV; Committee for the Prevention of Torture in Africa; Committee on Resolutions (Internal); and Advisory Committee on Budgetary and Staff Matters (Internal). *See id.*

[169] These are: Working Group on Extractive Industries, Environment and Human Rights Violations; Working Group on Rights of Older Persons and People with Disabilities; Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa; Working Group on Indigenous Populations/Communities and Minorities in Africa; Working Group on Communications (Internal); and Working Group on Special Issues Related to the work of the African Commission (Internal). *Id.*

[170] *See id.*

[171] *Special Rapporteur on Freedom of Expression and Access to Information*, AFR. COMM'N ON HUM. & PEOPLES' RTS. (2022), https://achpr.au.int/en/mechanisms/special-rapporteur-freedom-expression-and-access-information.

[172] Singh & Power, *supra* note 159, at 210.

[173] *Id.* at 211.

[174] *Recommendations and Resolutions adopted by the African Commission on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RTS. (2017), https://achpr.au.int/en/documents/2022-10-24/recommendations-resolutions-adopted-african-commission-human.

[175] *Id.*

role may employ promotional strategies. One of such promotional strategies could be publicity.[176] Adoption of a comprehensive resolution on privacy is one of the ways to achieve publicity.[177] The Commission may also use its engagement with State Parties to achieve this purpose in order to complement the provisions of the Malabo Convention.

C. Stringent Seizure & Admissibility Criteria[178]

Both the seizure and admissibility criteria are part of the communication procedures of the Commission.[179] The Commission utilizes the communication procedure for its human rights protectional mandate.[180] Under it, the Commission is requested to address questions of potential violation of the rights in the Charter.[181] When a communication is made to the Commission, either by a State Party,[182] NGO, or individual,[183] the Commission will have to, first, be "seized" of the communication.[184] If the Commission becomes seized, it then considers whether the communication is admissible.[185] If admissible, the communication is thereafter decided on merit.[186] Importantly, the seizure and admissibility procedures are governed by different laws. The Commission's Rules of Procedure provide

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[176] *See* U. O. Umozurike, *The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness*, 13 ANN. SURV. INT'L & COMPAR. L. 179, 189 (2007). *See also* Benedek, *supra* note 20, at 29 (discussing the importance of publicity to the work of the Commission).

[177] While resolutions are generally not binding under international law, they are important and may be persuasive. *See* JEFFREY DUNOFF, MONICA HAKIMI, STEVEN RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 79 (5th ed. 2020).

[178] For comprehensive discussion, *see* Jimoh, *supra* note 31; Gumedze, *supra* note 2.

[179] *Id.*

[180] African Charter art. 45(2); Gumedze, *supra* note 2, at 120.

[181] African Charter art. 47, 55.

[182] *Id.* art. 47-54.

[183] *Id.* art. 5.

[184] Jimoh, *supra* note 31, at 366.

[185] *Id.*; Gumedze, *supra* note 2.

[186] *See* Inutu Akolwa, *A Critique of the Efficacy of the Communications Procedure of the African Commission on Human and Peoples' Rights* (2017) (LL.M. dissertation, University of Pretoria), https://repository.up.ac.za/handle/2263/64620.

the seizure criteria,[187] while the Charter enumerates the admissibility criteria.[188]

In total, the author of a communication is required to fulfill fourteen conditions—seven each—before the Commission is seized and admits the communication.[189] These criteria are criticized as stringent and insensitive.[190] The provision on exhaustion of local remedies is one of the admissibility criteria that has been heavily criticized by scholars.[191] Exhaustion of local remedies means the utilization of domestic remedies before seeking remedies from regional or international human rights bodies. By Article 56(4) of the African Charter, the Commission *shall* only consider communication if local remedies, if any, have been exhausted.[192] However, Article 56(5) of the Charter provides that the Commission may consider a communication without the exhaustion of local remedies if it is "obvious that this procedure is unduly prolonged."[193] So, where an appeal was pending in a domestic court for 12 years, the Commission ruled that there was no need for exhaustion because the procedure was unduly prolonged.[194] Also, in *Free Legal Assistance Group and Others v. Zaire,*[195] the Commission held that it has "never held the requirement of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation."[196]

Yet, prominent African human rights scholars levy different criticisms against the exhaustion of local remedies. For example, Kufuor criticized it

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[187] *See* Commission's Rules of Procedure, 2020. Rule 109 deals with communications between State Parties. Rule 115(2) deals with 'other communication' submitted by any natural or legal person. *See* Jimoh, *supra* note 31 at 364.
[188] African Charter art. 56.
[189] African Freedom of Expression Exchange & 15 Others (Represented by FOI Attorneys) v. Algeria & 27 Others*, supra* note 50.
[190] *See* Kufuor, *supra* note 31, at 71.
[191] Lilian Chenwi, *Exhaustion of Local Remedies Rule in the Jurisprudence of the African Court on Human and Peoples' Rights*, 41 HUM. RTS. Q. 374 (2019).
[192] African Charter art. 56(5).
[193] *Id.*
[194] Embga Mekongo Louis v. Cameroon, Communication 59/91, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Mar. 22, 1995); Gumedze, *supra* note 2, at 132.
[195] Free Legal Assistance Group and Others v. Zaire, Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (1995).
[196] *Id.* ¶ 37.

on two main grounds: First, that it "fails to take into account the fact that in most undemocratic African States the exhaustion of local remedy is practically impossible."[197] Second, that "both the Commission and the Charter have failed to give a legal definition of what amounts to the exhaustion of local remedies within the framework of the African Charter."[198] Udombana also submits that the concept has influenced human rights jurisprudence, "for better and for worse."[199] Within the African human rights system, he argues that exhaustion of local remedies "is a source of both fascination and confusion; indeed, much confusion and complexity still surround the prerequisites for its application."[200]

1. The Commission's Response

The Commission can do little or nothing about the admissibility criteria. It is, to this author, one of the criticisms "inherent in the African Charter…beyond the powers of the Commission…even through creative interpretation."[201] This is because, there are two provisions in the Charter which would prevent the Commission from radically changing the jurisprudence on the admissibility criteria. Firstly, the Commission is mandated to perform its protectional mandate *in accordance with the rules laid down in the Charter*.[202] This provision presupposes that the Commission cannot ignore any of the admissibility criteria, even if it feels it is a clog on its protectional mandate. Secondly, the power to amend the Charter does not lie with the Commission, but with the AU Assembly of Heads of State and Government.[203]

Notwithstanding the criticisms against the admissibility criteria, especially the exhaustion of local remedies, the need to exhaust local remedies is a general principle[204] and has its uses under international

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[197] Kufuor, *supra* note 31, at 71.
[198] *Id*. at 72.
[199] Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L L. 1, 2 (2003).
[200] *Id*. at 3.
[201] Heyns, *supra* note 2, at 158.
[202] African Charter art. 45(2).
[203] *Id*. art. 68.
[204] Henry Onoria, *The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter*, 3 AFR. HUM. RTS. L.J. 1 (2003).

law.[205] The Commission has espoused that the rationale for the exhaustion of local remedies rule is to give notice to the respondent State and to give to the State an opportunity to address the situation.[206] As if it was responding to Kufuor's second criticism that it has not defined "exhaustion of local remedies," the Commission in *Jawara v. The Gambia,*[207] offered a definition stating that "three major criteria could be deduced from the practice of the Commission in determining this rule, namely: the remedy must be available, effective and sufficient."[208] Over the years, the Commission has reiterated these three criteria, and has shown flexibility in their application[209] and that each factual issue will be put into context in determining whether local remedies have been exhausted.[210]

The Commission does however, have the power to determine the seizure criteria.[211] In doing this, the Commission has constantly refined its rules to address the stringent criticism of the criteria.[212] Most recently, in its

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The exhaustion of local remedy is a key principle of international law that has been recognized by international human rights [quasi] judicial courts and tribunals. See for instance, the decision of the Inter-Am. Ct. H.R. (ser. C) No. 307 in *Velásquez Paiz Et al v. Guatemala* (judgment of Nov. 19, 2015) ¶ 23 (stating that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.").

[205] *See* ANTÔNIO AUGUSTO CANÇADO TRINDADE, THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW 1 (1983) (stating that the rationale for the rule on exhaustion of local remedies is that "a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question at [the] international level").

[206] Free Legal Assistance Group and Others v. Zaire, *supra* note 195, ¶ 36; George Iyanyori Kajikabi v. The Arab Republic of Egypt, Communication 344/07, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 76 (Oct. 20, 2021).

[207] Sir Dawda K. Jawara v. The Gambia, Communication 147/95, 149/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (May 11, 2000).

[208] *Id.* ¶ 31.

[209] For instance, the Commission has introduced constructive exhaustion of local remedies where local remedies are non-existent. *See* John D. Ouko v. Kenya*,* Communication 232/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 19 (Nov. 6, 2000). *See also* Eyob B. Asemie v. the Kingdom of Lesotho, Communication 435/12, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 64 (Jul. 29, 2014) (stating that "the concepts of availability, effectiveness and sufficiency of remedies has abundantly been dealt with in *Jawara v Gambia; Anuak Justice Council v. Ethiopia; Egyptian Initiative for Personal Right & Interights v. Egypt* etc.").

[210] Eyob B. Asemie v. the Kingdom of Lesotho, *supra* note 209, ¶ 66.

[211] African Charter art. 42(2).

[212] The Commission has had four Rules of Procedure since its inauguration. In 1988, 1995, 2010 and 2020. *See* Jimoh, *supra* note 31, at 364.

2020 Rules of Procedure, the Commission finally removed the admissibility criteria, which were hitherto, also included in its seizure criteria.[213] This development should provide for a more relaxed seizure stage, so that a communication can proceed to the admissibility stage in an easier fashion. Despite this welcome development, the Commission seems to continue to live in its past jurisprudence which required some proof of admissibility criteria at the seizure stage.[214] In *African Freedom of Expression Exchange & 15 Others (Represented by FOI Attorneys) v Algeria & 27 Others*, the Commission refused seizure, on the basis that the communication did not pass a preliminary test of the admissibility criteria.[215]

Further, under the 2020 Rules of Procedure, the Secretary has sixty days from receipt of the communication to communicate their decision on seizure to the parties.[216] The Rules do not make a special provision distinguishing the nature of the communications received. Under the Initial Processing Procedure of the Inter-American Commission on Human Rights—comparable to the seizure procedure of the Commission—the Inter-American Commission on Human Rights may expedite the initial evaluation of a communication if a delay would affect the effectiveness of the communication, such as when the alleged victim is an older person or a child;[217] when the alleged victim is terminally ill;[218] when it is alleged that the death penalty could be applied to the presumed victim;[219] when the object of the communication is connected to a precautionary or provisional measure in effect;[220] when the alleged victims are persons deprived of

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[213] *Id.* (stating that at the seizure stage, "…in *Uhuru,* the Commission 'decided not to be seized of the communication because it does not comply with Article 56 of the African Charter and does not fulfil the criteria for seizure provided under Rule 93(2) of the Commission's Rules of Procedure").

[214] *Id.*; African Freedom of Expression Exchange & 15 Others (Represented by FOI Attorneys) v Algeria & 27 Others (FOI), *supra* note 50.

[215] *Id.* ¶ 38. *See generally* Jimoh, *supra* note 31.

[216] *Rules Of Procedure of the African Commission on Human and Peoples' Rights, 2020*, Rule 115(8), (2020) https://achpr.au.int/sites/default/files/files/2021-04/rulesofprocedure2020eng1.pdf.

[217] *Rules of Procedure of the Inter-American Commission on Human Rights*, art. 29(2)(a)(i), Inter-Am. Comm'n H.R. (2013), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/rulesiachr.asp.

[218] *Id.* art. 29(2)(a)(ii).

[219] *Id.* art. 29(2)(a)(iii).

[220] *Id.* art. 29(2)(a)(iv).

liberty;[221] when the decision could have the effect of repairing serious structural situations that would have an impact in the enjoyment of human rights;[222] or when the decision could promote changes in legislation or state practices and avoid the reception of multiple petitions on the same matter.[223]

The Commission may include similar provisions in its Rules of Procedure to expedite certain communications that require urgent attention. For the foregoing reasons, while the Commission has adopted more relaxed seizure rules,[224] its continued application of previous seizure jurisprudence represents only a partial response to this criticism.[225]

D. Impotent & Toothless Implementation

One of the popular criticisms of the Charter is that it lacks adequate provisions on how the decisions and recommendations of the Commission can be enforced.[226] Though the African Court[227] serves as a stronger implementing body than the Commission,[228] the clog on the accessibility to the African Court by individuals makes the Commission more accessible.[229]

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[221] *Id.* art. 29(2)(b).
[222] *Id.* art. 29(2)(d)(i).
[223] *Id.* art. 29(2)(d)(ii).
[224] Jimoh, *supra* note 31.
[225] In *FOI,* at the seizure stage, the Commission held that the Complainants did not meet some admissibility criteria. *See* Jimoh, *supra* note 31, at 372.
[226] *See* Mutua (2000), *supra* note 2, at 3 (stating that "Although the Banjul Charter makes a significant contribution to the human rights corpus, it creates an ineffectual enforcement system").
[227] The African Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the "African Court Protocol"). The African Court came into existence in 2006. *See* Tom Gerald Daly & Micha Wiebusch, *The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court*, 14 INT'L J. L. CONTEXT 294 (2018); For one of the earliest discussions on the African Court, *see* Makau wa Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342 (1999).
[228] Ibrahim Ali Badawi Elsheikh, *The Future Relationship between the African Court and the African Commission*, 2 AFR. HUM. RTS. L.J. 252 (2002) (arguing that the African Court enjoys a higher status than the Commission). S*ee also* Nani Jansen Reventlow, *The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights Beyond the African Charter*, 33 EMORY INT'L L. REV. 203 (2019).
[229] For critical works, *see* Manisuli Ssenyonjo, *Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non-Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008– 2012*, 2 INT'L HUM.

For instance, if an application is made to the African Court by an individual, the African Court cannot exercise jurisdiction, unless the application fulfils the seven admissibility criteria contained in Art. 56 of the African Charter.[230] The State against which the complaint is brought must also have made a declaration under Art. 34(6) of the African Court Protocol, accepting the competence of the African Court to receive such complaints.[231] Indeed, only eight African States have accepted the competence of the African Court to receive such complaints.[232]

Human rights advocates have challenged the provision of Art. 34(6), but in each case, the African Court has declined jurisdiction. In *Femi Falana v AU*,[233] the Applicant, a human rights activist in Nigeria, recognized that Nigeria had not made such deposit and sued the AU instead, alleging that Nigeria's failure to make the deposit constituted a clog to accessing the African Court, and that the AU, who made the provision, did so in contravention of Arts. 1, 2, 7, 13, 26 and 66 of the Charter. The African Court ruled it had no jurisdiction against the AU, noting that the AU is not a State Party to the Charter and African Court Protocol.[234] Similarly, in *Atabong Denis Atemnkeng v AU*,[235] an application was brought to the African Court to declare Art. 34(6) *void* on the ground that it is incompatible with the

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RTS. L. REV. 17 (2013); Andreas O'Shea, *A Critical Reflection on the Proposed African Court on Human and Peoples' Rights*, 1 AFR. HUM. RTS. L.J. 285 (2001); Robert Wundeh Eno, *The Jurisdiction of the African Court on Human and Peoples' Rights*, 2 AFR. HUM. RTS. L.J. 223 (2002).

[230] African Court Protocol art. 6. *But see* Heyns, *supra* note 2, at 170 (stating that "the situation is aggravated by the fact that, in considering a case submitted directly by an individual to the Court, the Court is required by article 6(2) to rule on its admissibility 'taking into account' the admissibility criteria set out in article 56 of the Charter. The Court is consequently not bound by criteria such as the exhaustion of domestic remedies").

[231] African Court Protocol art. 34(6).

[232] These eight States are: Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Tanzania, and Tunisia. *See African Court on Human and Peoples' Rights*, IJRC https://adsdatabase.ohchr.org/IssueLibrary/AFRICAN%20COURT%20ON%20HUMAN%20RIGHT%20AND%20PEOPLES'%20RIGHTS.pdf.

[233] Femi Falana v. The African Union, No. 001/2011, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R., (2012), https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20001-2011-%20Femi%20Falana%20v.%20The%20AU.%20Application%20no.%20001.2011.EN.pdf.

[234] Three judges dissented – Sophia Akuffo, Bernard Ngoepe and Elsie Thompson. The judges felt that the AU had a legal personality and could therefore sue and be sued.

[235] Atabong Denis Atemnkeng v. The African Union, No. 014/2011, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], (Mar. 5, 2015), https://afchpr-commentary.uwazi.io/en/document/h6rksdx0urrdmma16gcgfd2t9?page=4.

spirit of the Constitutive Act of the AU. Like the *Falana case,* the Court ruled that it had no jurisdiction.[236] Sadly, many applications to the African Court against African States by victims of human rights violations have been denied on this ground.[237] Hence, the Commission remains more accessible than the African Court, but has its own problem—implementation of its decisions and recommendations.

Rachel Murray is one of the leading scholars who has written extensively on the implementation of the decisions and recommendations of the Commission,[238] though, leading scholars like Heyns,[239] Viljoen[240] and Umozurike[241] have also noted this problem. Viljoen noted that the Commission stated in one of its sessions that "the attitude of State Parties…with the exception of Cameroon has been to generally ignore its recommendations."[242] Human rights observers and advocates generally recognize that most African States do not feel bound by the recommendations of the Commission.[243] Derso, the Commission's Chairman (2019–2021), writing on the reasons for the weak implementation of the Commission's decisions and recommendations, stated:

> The Commission was not intended to serve as a full-fledged judicial body. According to the African Charter, it is empowered to make only those recommendations it deems useful. From a legal perspective, these recommendations are not binding

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[236] *Id.* ¶ 40.
[237] *See* Ssenyonjo, *supra* note 229, at 51–56.
[238] RACHEL MURRAY & DEBRA LONG, THE IMPLEMENTATION OF THE FINDINGS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 1 (2015); Rachel Murray & Debra Long, *Monitoring the Implementation of its Own Decisions: What Role for the African Commission on Human and Peoples' Rights?*, 21 AFR. HUM. RTS. L.J. 836 (2021); Rachel Murray & Elizabeth Mottershaw, *Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights*, 36 HUM. RTS. Q. 349 (2014).
[239] CHRISTOF HEYNS & FRANS VILJOEN, THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES 6 (2002).
[240] Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, 101 AM. J. INT'L L. 1, 33 (2007).
[241] Umozurike, *supra* note 5; Umozurike, *supra* note 176.
[242] Viljoen & Louw, *supra* note 240, at 3.
[243] Gino J. Naldi, *Interim Measures of Protection in the African System for the Protection of Human and Peoples' Rights*, 2 AFR. HUM. RTS. L.J. 1, 4 (2002).

> in the way court judgments are. Consequently, States comply with its recommendations essentially out of good will, not legal obligation.[244]

Commentors have argued that the Commission has contributed to the weak enforcement of its decisions and recommendations.[245] One attitude of the Commission criticized as contributory to weak enforcement, is that the Commission leaves the implementation "to the State concerned without follow-up and trusts that it will act accordingly."[246] Another contributory reason given by commentators is that the Commission has not put enforcement mechanisms in place.[247] The Commission has also been criticized for the inconsistency in its jurisprudence. For instance, the Commission has been accused of adopting inconsistent theories of interpretation of the Charter;[248] and that it has a "bifurcated" approach of deriving rights—with the practice of deriving certain rights in some communications and refusing to derive the same rights in other communications.[249] This inconsistency in the jurisprudence of the Commission creates uncertainty, impacts the reliability, and may impact the implementation of their decisions. Without the implementation of its decisions, the role of the Commission to promote and protect human rights in the continent is seriously hampered and leaves an enforcement vacuum.[250]

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[244] Dersso, *supra* note 68, at 19.
[245] Godfrey Musila, *The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights*, 6 AFR. HUM. RTS. L.J. 442 (2006).
[246] *Id.*
[247] Murray & Long (2021), *supra* note 238, at 842.
[248] Anneth Amin, *Assessing Violations of States' Socio-Economic Rights Obligations in the African Charter: Towards a Model of Review Grounded in the Teleological Approach*, 4 AFR. HUM. RTS. Y.B. 16, 18 (2020) (stating that "in its jurisprudence, the African Commission has been inconsistent regarding the model of review it applies").
[249] Abdi Jibril Ali, *Interpretation of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights*, 30 J. ETHIOPIAN L. 1, 17 (2018). To buttress his point, Ali cites The Nubian Community in Kenya v. The Republic of Kenya, Communication 317/06, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Feb. 28, 2015) and Mbiankeu Genevieve v, Cameroon, Communication 389/10, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Aug. 1, 2015) noting that the Commission failed to find a violation of a separate right to housing in the former but did so in the latter.
[250] Dersso, *supra* note 68, at 62.

Fairly, this problem is not unique to the Commission. The implementation of the decisions of human rights committees, councils, bodies, and courts is a general problem in human rights advocacy. Scholars have conducted different studies documenting the difficulty in enforcing these decisions.[251] One of the main reasons is the principle of State sovereignty under international law.[252] However, the problem manifests most in Africa, which has been described as, "an egregious human rights violator"[253] with little respect for human rights.[254]

1. The Commission's Response

One way the Commission responded to the above contributory reasons is by setting up subsidiary mechanisms.[255] The mechanisms address the criticisms by: first, as a means to implement its decisions; and secondly, as a means to follow-up on its decisions.[256] Rule 125 of the Commission's 2020 Rules of Procedure contains a substantial provision addressing this problem.[257] Under the Rule, a States Party has 180 days from the date a decision was made by the Commission, to inform the Commission, in writing, of all action taken or being taken to implement the decision.[258] If the Commission does not receive a response within the 180 days, the Commission may send a reminder to the State Party.[259]

The Rule also puts in place two measures to address the "follow-up" criticism. First, the Commission may request a national or specialized human rights institution with affiliate status to inform the Commission of any action it has taken to monitor or facilitate the implementation of the

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[251] *See generally* Cosette D. Creamer & Beth A. Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM. J. INT'L L. 1, 18 (2020).
[252] Hannah Moscrop, *Enforcing International Human Rights Law: Problems and Prospects*, E-INT'L RELS. (Apr. 29, 2014), https://www.e-ir.info/2014/04/29/enforcing-international-human-rights-law-problems-and-prospects/.
[253] Mutua (1995), *supra* note 2, at 342.
[254] Ssenyonjo, *supra* note 68, at 1.
[255] *See generally* Murray & Long, *supra* note 238.
[256] *Id.*
[257] *Rules Of Procedure of the African Commission on Human and Peoples' Rights, 2020*, *supra* note 216, Rule 125.
[258] *Id.* at Rule 125(1).
[259] *Id.* at Rule 125(4).

Commission's decision.[260] Second, the Commission's Rapporteur for the Communication, or any other member of the Commission designated for this purpose, is mandated to monitor the measures taken by the State Party to give effect to the Commission's decision.[261] Furthermore, the Commission has used its promotional and protectional missions to States and the "implementation hearings" to address this criticism.[262]

Notwithstanding these measures, scholars, like Murray, believe that the efforts are insufficient to address the problem.[263] Murray believes[264] the Commission can improve the implementation of its decisions and recommendations, "by clarifying its role" and "developing a more strategic approach to using both soft and more forceful approaches at various stages in the post-decision process."[265] Some of the soft approaches include dialogue and persuasion.[266] Also, one of the forceful approaches is to act by Rule 125(8) of the Commission's Rules of Procedure, and inform the relevant AU organ in a case where a State has refused to comply by its decision.[267] The Commission may also publicly name State violators, which could influence States' compliance with the Commission's decision.[268] With respect to this criticism, while the Commission has responded to some extent, it can do better. Murray's recommendations are apposite in this regard.

In addition, it has been opined that if human rights commissions, courts, and tribunals wish to ensure that their decisions are implemented by the

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[260] *Id.* at Rule 125(2).
[261] *Id.* at Rule 125(5).
[262] Murray & Long (2021), *supra* note 238, at 845.
[263] *Id.*
[264] Murray had earlier considered State Reporting as a mechanism for implementation, but she argued that it is insufficient. *See* Murray & Mottershaw, *supra* note 238. But with the Commission's Rules of Procedure, 2020, Murray still maintains her position that the Commission's Rules of Procedure, 2020, alone cannot solve the problem. *See* Murray & Long, *supra* note 238.
[265] *Id.* at 839.
[266] *Id.*
[267] *See Rules Of Procedure of the African Commission on Human And Peoples' Rights, 2020*, *supra* note 216.
[268] Christof Heyns & Frans Viljoen, *The Regional Protection of Human Rights in Africa: An Overview and Evaluation*, *in* HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA 129 (Paul Tiyambe Zeleza & Philip J. McConnaughay eds., 2004).

States, they ought to be "impartial, efficient and reliable."[269] It is recommended that the Commission be *intentional* and maintain a *consistent* approach to the issues it considers in order to attain reliability.[270]

CONCLUSION

Of the four criticisms of the Charter considered in this article, only the criticism of the claw-back clauses has been adequately addressed by the Commission. Through its interpretative jurisprudence on claw-back clauses, the Commission has required domestic laws to satisfy the test of "proportionality, legality, compatibility, appropriate balancing, equality and non-discrimination, necessity and transparency." Only when domestic laws fulfil these conditions are they considered valid under the claw-back clauses. It has also interpreted "law" as reference to international law, so that any domestic law that runs contrary to international norms will not be countenanced. With respect to other criticisms considered in this article, the Commission has not adequately addressed them. The Commission has not shown enthusiasm about privacy rights in Africa. Of the five Recommendations and 376 Resolutions adopted by the Commission

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[269] Li-ann Thio, *Equality and Non-Discrimination in International Human Rights Law*, THE HERITAGE FOUNDATION 1, 23 (2020) (citing Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNAT'L LEGAL THEORY 31 (2010)).

[270] Another prominent example of the inconsistency of the Commission is with respect to the rights of the LGBT in Africa. In two communications – Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/2002, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 169 (May 15, 2006); Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe, Communication 284/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 155 (Apr. 3, 2009) – in 2006 and 2009 respectively, the Commission included "sexual orientation" as a prohibited ground of non-discrimination under the Charter, despite the Charter not containing such ground. Yet, in 2022, the Commission rejected applications for Observer Status of three NGOs – Alternative Cote d'Ivoire; Human Rights First Rwanda; and Synergía – Initiatives for Human Rights, on the ground that "sexual orientation is not an expressly recognized right or freedom under the African Charter, and contrary to the virtues of African values, as envisaged by the African Charter." *See Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights*, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (20 Oct. – 9 Nov. 2022), ¶ 58.

between 1988 – 2017, none has privacy as its subject matter. In this regard, the RECs' efforts transcend that of the Commission.

To address this, the Commission should pay more attention to privacy rights in Africa through the use of its existing measures such as adoption of resolutions and soft laws and utilizing its subsidiary mechanisms to promote this right. Also, as commendable as it is that the Commission has removed the requirements of the admissibility criteria from its seizure criteria, the Commission seems to continue to require the complainant to fulfill certain admissibility criteria at the seizure stage. The Commission should also take note of this change in its Rule and change its seizure jurisprudence to reflect the flexibility introduced by its 2020 Rules of Procedure. As an addition to the seizure procedure, the Commission may take inspiration from the Initial Processing Procedure of the Inter-American Commission on Human Rights, whereby certain communications are treated urgently, rather than the sixty days timeframe given to the Secretary to seize all communications. Further, while the Commission is taking measures to ensure that its decisions are implemented by State Parties, these efforts are not sufficient. Murray's suggestions calling for more action through "soft and forceful" approaches, should be adopted. One forceful approach that may be devised is reporting State violators to the appropriate AU body. To address this implementation problem, it is also recommended that the Commission should be consistent in its jurisprudence to attain reliability.