

**THE RELEVANCE OF THE AFRICAN COMMISSION ON
HUMAN AND PEOPLE’S RIGHTS IN THE UNITED
REPUBLIC OF TANZANIA VIS A VIS IT’S PROMOTION
AND PROTECTIVE MANDATE FOLLOWING TANZANIA
WITHDRAWAL FROM THE AFRICAN COURT ON HUMAN
AND PEOPLE’S RIGHTS IN 2019**

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ABSTRACT

This article discusses how the Commission faces challenges in its promotion and protective mandates in the United Republic of Tanzania following the Tanzania’s withdrawal from the African court. The commission as the human rights instrument within the African Continent has been suffering numerous challenges in fulfilling its promotion and protective mandates as enshrined within the African charter under Article 45.

Since the ACHPR’s establishment in 2004, individuals and NGOs have brought the highest number of cases against the Tanzanian government, resulting in the Court delivering the most judgments against Tanzania as well. In general, individuals can only file cases with the Court if their country has signed an optional declaration agreeing to accept the Court’s jurisdiction. Only nine countries in Africa have done so—one of which was Tanzania.

The then Tanzania Minister of Foreign Affairs and East African Cooperation, Prof Palamagamba Kabudi, signed the notice of withdrawal of the declaration made under Article 34(6) of the African Court Protocol on 14 November 2019. This notification was sent to the African Union on 21 November.

Tanzania's decision to withdraw its Article 34(6) declaration comes barely a month after Amnesty International released a report detailing a spike in repression in the country under president John Magufuli.

The withdrawal has affected the Commission in its protective mandate as Tanzanian Individuals and NGOs cannot access the African Court Through the Commission basing on the fact that Tanzania does not recognize the competence of the African Court. Hence the victims continue suffering without obtaining their remedies. Also, the commission cannot refer any massive violations of human rights occurred in Tanzania to the African Court as provided by Article 5(1) of the court protocol.

INTRODUCTION

African Commission on Human and Peoples' rights is the quasi-judicial body which is established by the African charter on Human and Peoples' rights for the purpose of promotion and protection of human rights in Africa, the development of human rights in Africa goes back to the struggle for independence from colonization by African countries.ⁱ The wars of liberation declared by African states throughout the continent resulted into the independence of many states.ⁱⁱ However, even after achieving independence from colonization, grave violations of human rights continued to take place in African states ruled by military and political dictators.ⁱⁱⁱ From the late 1960s to the early 1980s dictators reigned in African states such as "Jean-Bedel Bokassa in Central Africa, Idi Amin in Uganda, Fernando Macias Nguema in the Republic of Equatorial Guinea, Mobutu Sese Seko of Zaire, Mengistu Haille Mariam of Ethiopia, Siad Barre of Somalia and Kamuzu Banda of Malawi."^{iv}

The Africa Union (AU) by then (OAU) was established in 1963 in Addis Ababa Ethiopia as the first inter-governmental organization with the aim of eliminating colonialism from Africa and creating unity among independent African states.^v Even though grave human rights violations pervaded the continent, the AU by then AU focused on achieving the self-determination and independence of African states rather than protecting human rights of the African people.^{vi} The AU failed to take adequate steps to eliminate the gross human rights violations African people suffered in the hands of their own leaders.^{vii} As a result of the

grievances made against the AU regarding its ineffectiveness in the protection of human rights, the AU by then OAU adopted the African Charter in 1981 as the first regional human rights instrument.^{viii} After the end of Apartheid in South Africa, the goal of the AU to achieve independence from colonialism was met and the idea of a united Africa regained a new impetus.^{ix} Consequently, in a meeting held in Durban, South Africa on 9 July 2002 the OAU was replaced by the African Union (AU).^x

The African Charter is the main instrument for the promotion and protection of human rights in Africa.^{xi} The enactment of the African Charter is a landmark in the protection of human rights in Africa.^{xii} The Charter consists of civil and political rights and economic, social and cultural rights.^{xiii} Moreover, it recognises and protects peoples' rights such as the right to development, the disposal of natural resources and the right to self-determination.^{xiv} Pursuant to article 30 of the African Charter, an African Commission on Human and Peoples' Rights was established in 1987, in Addis Ababa, Ethiopia.^{xv} The Headquarters of the Commission is in Banjul, The Gambia.

The Commission is composed of 11 members elected by the Assembly of Heads of State and Government of the African Union (AoHSG) from African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human rights, who serve in their personal capacity.^{xvi} State parties in their process of selecting nominees for the position of commissioner are expected to ensure that: their preferred candidates should at a minimum qualify for judicial appointment in that state; civil society participated in the selection process; and that the selection process was transparent and in impartial.^{xvii} It has been argued that the actual practice does not reflect the procedure outlined above. NGOs have made attempts to present names of potential nominees with the required attributes as outlined above. Such attributes would entail one having the capacity to condemn acts of the government which are deemed to be in violation of the Charter. A question which would then arise is, whether states parties would be willing to nominate such a person to point out their ills?^{xviii}

The process of selection of Commissioners has been characterized by horse trading block by block.^{xix} In such situations, you have countries quietly lobbying for their candidates. It has been argued that political horse trading has resulted in the failure of the African Commission to

impact meaningfully on the development and maintenance of human rights in Africa as this legitimizes certain institutional practices of member states, however discriminatory they may be,^{xx} an argument I tend to agree with. Horse trading is done at the risk of not selecting people who are competent to fulfil the mandate of the Commission to this end Non-governmental Organizations (NGOs) have in the past raised concerns about lack of independence of commissioners.^{xxi} This renders the Commission a political tool of African governments.^{xxii} The Commissioners elect Chairpersons from among themselves to form the Bureau of the Commission.^{xxiii} The Bureau coordinates the promotion and protection activities of the members of the Commission.^{xxiv} It also receives and considers requests for provisional measures when the Commission is not in session. This is necessary to prevent irreparable harm to the victim or victims of the alleged violation.^{xxv} The Charter provides for the appointment of a Secretary to the Commission to assist the Commission to effectively discharge its duties.^{xxvi} The Secretary is responsible for the Secretariat of the Commission providing professional, technical and administrative services to the Commission. The Commission has the mandate to employ any appropriate method of investigation in carrying out its responsibilities and on this basis, has over the years developed numerous mechanisms and specific tools to ensure these responsibilities are fulfilled. These include country visits, friendly settlement of disputes, and the State Reporting procedure to mention some. The African Charter also specifically establishes a Communications Procedure, as one of the mechanisms to be employed by the African Commission to ensure compliance of states with the human rights standard promulgated in the Charter.

Tanzania signed the African Charter on Human and People's Rights on 31 May, 1982 and ratified it on 18 February 1984 together with its human rights policies and practices which are monitored by the African Commission on Human and Peoples' Rights (ACHPR), which reviews the State's reports concerning its human rights situation and decides complaints of alleged violations. After ratifying the Charter our Bill of Rights and Duties was introduced into the Constitution of the United Republic of Tanzania under the fifth Amendment in February 1985, that was slightly over three years after Tanzania signed the Charter and a year after ratification.

Since then, Individuals and NGOs in Tanzania has been directly accessing the commission and the Court addressing their alleged human rights violations, however, since it's withdrawal from

Article 34(6) of the protocol, Tanzania denied a right to its Individuals and NGOs to direct access the court leaving only a room to the Commission. Basing on this fact the Commission remain a only regional human rights Instrument within Africa where individuals and NGOs from Tanzania can file their complaints. The challenge which arises as far as the Commission is concern is that, the Commission cannot refer any matter submitted by Tanzania`s Individuals and NGOs to the African Court as Tanzania does not recognize the competence of the Court hence those submitted cases i.e., of non-compliance of the Commission`s recommendations go unanswered without any remedies.

THE WITHDRAW OF THE UNITED REPUBLIC OF TANZANIA TO THE AFRICAN COURT ON HUMAN AND PEOPLES` RIGHTS

The African Commission on Human and Peoples` rights has been given a mandate to refer communications submitted to it by and Individual and NGOs to the African Court as enshrined under Article 5(1)(a) of the court protocol together with rules the rule`s procedures.^{xxvii} Article 5(1)(a) of the court protocol provides that the commission may refer the matter to the African Court at any stage i.e., before it has finalized a communication or after it has finalized the communication or where there is a serious massive human rights violation. The competence of the Commission to refer any complaints to the African Court depends on Article 34(6) of the African charter`s protocol which is the provision where by the state party to the African Charter declare its interest to recognize the competence of the African Court. As far as The United Republic of Tanzania is concern, the African Commission cannot refer any communication brought by Tanzania whose individuals and NGOs have suffered human right violations to the African Court simply because Tanzania withdrew its declaration to recognize the competence of the African Court in December 2019. This has negative impact to the protection of human rights in Tanzania as the victims of those violated rights will never get back their violated rights as the Commission will never be able to refer those complaints or communications to the African court, provided the African court is the only forum whereby a victim can obtain his or her remedies as the Court`s decisions are binding to the state parties compared to the decision of the Commission which are not binding (mere recommendations).

This entails that the Commission cannot refer any Communication or any issue of massive violations to the African Court from state that have withdrawing their declaration to the African Court, hence it poses a challenge to the power of the Commission in fulfilling its promotion and protective mandates.

Challenges Faced by the Commission following the withdrawal of the United Republic of Tanzania, the commission is facing the following challenges that hinders the commission in fulfilling its mandates as enshrined under Article 45 of the African Charter thence has led to be an obstacle to the Commission and to the victims in the exhaustion of their violated human and Peoples` rights to the Victims;

1. Non-recognition of the decisions adopted by the African Commission

When the African Commission rules against a state party, both parties must notify the commission within 180 days of notification of the decision of all measures, if any, taken or being taken by the state party to implement the decision of the Commission.^{xxviii} This is because there has been a lack of compliance with the provisional measures the African Commission has adopted. In order to ensure that its recommendations are implemented, the Commission may ask the state for additional details detailing the activities it has taken in response to the Commission's decision. It is the obligation of the rapporteur for the communication, or any other Commission member designated for this function, to keep track of the actions taken by the state party to implement the Commission's recommendations on each Communication. The Commissioner has the power to take any required action, including recommending that the Commission take additional action, in order to complete their task. The Commission updates its activity report with details of any additional actions it takes to monitor the application of its recommendations. According to the African Union's Constitutive Act, any member state that disobeys the Union's decisions may face sanctions, including the loss of transportation and communications links with other members, as well as other measures of a political and economic nature that will be decided by the assembly.

Some states including Tanzania have shown blatant disregard to the provisional orders of the African Commission, claiming that the interim measures of the Commission are not binding. For instance, in the issue of ***Tanzania`s eviction of Masai Pastoralist in 2022*** whereby Maasai Pastoralists from Ngorongoro conservation area were been relocated and the relocations was

described as unlawful Evictions. The indigenous community has lived in the reserve, a UNESCO world heritage site in Northern Tanzania for over a century. The Tanzania authorities alleged the growing population of Masai Community was encroaching on wildlife habitat.

The African Commission provided a recommendation to the United Republic of Tanzania to withdraw their intention of evicting the Masai Pastoralist from Ngorongoro but also effective reparations including destruction of property to the Masai who were affected by the forceful evictions. However, the United Republic of Tanzania ignored the recommendations of the Commission and continued with the forceful evictions which resulted into the loss of lives to some of the Masai.

From here we see how non-compliance with the decision of the African Commission affect the promotion and protection of human rights in Africa particularly in Tanzania. In connection with the Africa Court whereby the African Commission can refer any matter of non-compliance of the implementation of its recommendations to the African court as enshrined under rule 118 of the rules of procedure of the African Commission, also in line with Article 5(1) of the court protocol where the Commission can refer any matter involving massive violations of human rights to the African court as a part of its protective mandate but enough it can neither refer any massive violations concerning Tanzania nor refer issue of non-compliance of the commission's recommendations to the African Court basing on its withdrawal to the Article 34(6) of the Court protocol.

2. Due to withdrawal from the African Court, the Commission cannot refer any issue of non-compliance of its recommendations by Tanzania to the African Court

The Rules of Procedures of the African Commission provides that the African Commission can transfer cases of non-compliance by state parties of its recommendations to the African Court.^{xxix} Consequently, the transfer of cases of non-compliance to the African Court is expected to increase state compliance with the decisions of the Commission in fear of the sanctions imposed by the AU Executive Council. Tanzania withdrawal from the African Court it manifests its intention of not being bound by the decision of the African Court this means that the African Commission can not comply to this rule by referring any non-compliance matter to the African Court regarding its recommendations by The United Republic of Tanzania.

3. Due to withdrawal from the African Court, the commission cannot refer any matter concerning massive violations of human rights in Tanzania to the African Court.

The Protocol to the African Court on Human and Peoples' rights on the Establishment of the African Court^{xxx} provides that the commission may refer the matter to the African Court at any stage i.e., before it has finalized a communication or after it has finalized the communication or where there is a serious massive human rights violation. This means even when massive violations happen within the United Republic of Tanzania the Commission has nothing to do with it as Tanzania does not recognize the Competence of the African Court. This affects the protective mandates of the African Commission.

4. Lack of awareness by the Individuals and Non-governmental Organization (NGOs) on the admissibility requirements

Due to withdrawal from the African Court, Tanzania has denied its Individuals and NGOs to access the court directly, the Commission is the only forum from which remain for the Individual and NGOs from Tanzania to submit their grievances concerning human rights which has leads the victims to suffer without getting their remedies immediately, unlike to the Commission which is ineffective as it does not provide remedies to the victims as its decisions are not final and binding.

The Commission deals with the admissibility and Merits of Communications, the Charter sets out seven requirements for admissibility.^{xxxi} All of these requirements have to be complied with before a complaint will be declared admissible, failure to meet just one of these requirements renders the communication to be inadmissible. This has been a challenge to the commission whereby different individual and NGOs have been filing complaint to the Commission without observing the given requirements hence it has become difficult for some individual to exhaust their violated rights through the African Commission this is due to the reason that there is a low level of understanding regarding to the admission requirements, for instance in the case of *Capitao V. Tanzania*,^{xxxii} a communication Activity Report of 1994-2001 at 353 whereby the Complaintant filed a communication to the Commission without adhering to the admissibility requirements specifically exhaustion of local remedies hence the Commission recommended that local remedies were not exhausted as required by article 56 of the Charter and 114 of the rules of procedure and therefore declared the Communications inadmissible. Therefore, the complaintant failed to exhaust his right by not being aware of the admissibility procedures.

5. The delay in the submission of the periodic State Reports of the United Republic of Tanzania, the last having been submitted in May 2008.

Periodic state reports are the reports which are submitted to the Commission by the state parties to the African Charter informing the Commission about human rights developments in that particular country. And these periodic reports are submitted every two years as provided under Article 62 of the Charter. These periodic state reports are encouraged because one state's report is an opportunity for other states to benefit from that state's experience as it exposes how human rights issues are handled in that states hence other states learn through that experience. Also, the reports have educational goals as they published by the Commission for research purpose. Tanzania submitted her last periodic report in 2008 as it was reported by the African commission delegation which made an official visit to Tanzania from 23 to 28 January 2023, the visit was Promotion mission to Tanzania. The Commission held that Tanzania has been reluctant in submitting periodic reports which has led a challenge to the commission in monitoring the human rights promotion and protection particularly in Tanzania.

6. Remoteness of the Commission's Headquarters

The headquarter of the African Commission is located in Banjul, in the Republic of Gambia, this has been a challenge to the Commission as Individual and NGOs from Tanzania fails to access the Commission because of its location as most of this individual who suffer human rights violations are penniless hence, they can cannot accommodate the economic cost to Gambia which has led these victims of human rights violations to continue suffering without exhausting their remedies from the Commission. Hence there are few communications from Tanzania which are submitted at the Commission.

7. Lack of awareness among Individual and NGOs about the availability of the African Commission on human and People's rights.

Most the Individual and NGOs are not aware on the presence of the Commission, they have no awareness where to take their allegations/ complaints in case their human rights are violated. Most of the individuals who are the victims of human rights are laypersons with little knowledge about their rights, they don't know where to take their complaints especially at the international level, this has led most of the victim of these human rights violations to continue suffering as they have nowhere to seek for their remedies.

CONCLUSION

As manifested above, the said challenges need a great attention and immediate action to be taken by the Commission together with Tanzania as a state party to charter so as to speed up the promotion and protective mandate of the commission. The Tanzania`s withdrawal from the Commission affects the African Commission on Human and Peoples Rights in fulfilling its promotion and protective mandates. Some state parties to the charter have become an obstacle to the African Commission to perform its duties as in some situations the Commission fails to work together with the African Court due to the fact that some of those state parties to the African Charter have declared their intention of not recognizing the competence of the African Court as enshrined under Article 34(6) of the African Charter on Human and Peoples rights. Due to this the African Commission encounter challenges in resolving human rights grievances hence it remain a shadow human rights instrument with no positive impact in fulfilling what it was intended to do by the African Charter as per Article 45.

RECOMMENDATIONS

In order for the African Commission to be more effective and to accomplish what it was mandated to perform; the United Republic of Tanzania has to make redeclaration of recognizing the competence of African Court. The withdrawal of Tanzania to the African Court brings contradiction to the Commission as it raises conflict with different provision governing the Human rights Instrument in Africa such as Rules of Procedures of the African Court of 2010 particularly rules 118(1) and the Protocol to the African Court on human and Peoples Rights particularly Article 5(1)(a) as manifested above. In several cases the Commission will fail to comply with the said provisions. Therefore, Tanzania has to redeclare back her intention of recognizing the competence of the African Court as it will give back the right of the Individuals and NGOs to access the African Court directly. Also, by doing so it will give back the power to the commission to comply with Article 5(1)(a) of the Court protocol to refer matter to the African court at any stage and to refer matter any massive violations of human rights to the Court. Redeclaration of Tanzania to Article 34(6) of the Court protocol will reinstate back the power of the African Commission to fulfill its protective mandates by referring any matter of non-compliance of the implementation of its recommendations by the state parties which fails to comply with its recommendations.

ENDNOTES

ⁱ Nyanduga BT “Conference paper: Perspectives on the African Commission on Human and Peoples’ Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and Peoples’ Rights” 2006 *African Human Rights Law Journal* 259.

ⁱⁱ *Ibid.*

ⁱⁱⁱ *Ibid* 257.

^{iv} Wachira GM “African Court on Human and Peoples’ Rights: Ten years on and still no justice” *Minority Rights Group International* 2008, 8, available online at: <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf> (accessed on 15 October 2023).

^v *Ibid.*

^{vi} Du Plessis M and Stone L “A court not found?” 2007 (7:2) *African Human Rights Law Journal* 526.

^{vii} Centre for Human Rights “Celebrating the African Charter at 30: A guide to the African Human Rights System” University of Pretoria, 21 October 2011, 8, available online at www.pulp.up.ac.za (accessed on: 13 October, 2023).

^{viii} Du Plessis & Stone, note 6 above.

^{ix} Hestermeyer H “African Union replaces Organization of African Unity” available online at: <http://www.germanlawjournal.com/article.php?id=173> (accessed on 13 October 2023).

^x *Ibid*

^{xi} Gumedze S “Bringing communications before the African Commission on Human and Peoples’ Rights” 2003 (3:1) *African Human Rights Law Journal* 130

^{xii} *Ibid.*

^{xiii} Igweta RN *The African Commission on Human and Peoples’ Rights and the Promotion and Protection of Prisoner’s Rights: an Analysis* (LL.M thesis, Community Law Centre, University of the Western Cape, 2008) 23.

^{xiv} African Commission on Human and Peoples’ Rights “Main features of the African Charter” available online at: <http://www.achpr.org/instruments/achpr/main-features/>

^{xv} Centre for Human Rights, note 7 above.

^{xvi} Article 31 African Charter

^{xvii} F Viljoen ‘Promising profiles: An interview with the four new members of the African Commission on Human and Peoples’ Rights’ (2006) 1 AHRLJ 241 where a note verbale from the African Union (AU) Commission AU Doc BC/OLC/66/Vol XVIII, dated 5 April 2005 is discussed.

^{xviii} Thulani Maseko who has clashed on several occasions with the state of Swaziland was presented as a potential nominee for Swaziland by a consortium of NGOs, he was not nominated by the state party (Swaziland) though he had suitable qualifications

^{xix} Singh ‘The Impact of Claw Back Clauses on Human and Peoples’ Rights in Africa’ page 95.

^{xx} *Ibid.*

^{xxi} F Viljoen ‘Promising profiles: An interview with the four new members of the African Commission on Human and Peoples’ Rights’ (2006) 1 AHRLJ 239.

^{xxii} See S, Singh ‘The Impact of Claw Back Clauses on Human and Peoples’ Rights in Africa’ page 95

^{xxiii} Article 42(1) of the African Charter and Rules 10 and 11 of its Rules of Procedure.

^{xxiv} Rule 13 of the Rules of Procedure of the Commission.

^{xxv} Rule 98 of the Rules of Procedure of the Commission.

^{xxvi} Article 41 of the African Charter.

^{xxvii} Rules 118 of the rules of procedures.

^{xxviii} Rules 112(3) of the Rules of procedures.

^{xxix} Rule 118(1) of the Rules of Procedures.

^{xxx} Article 5(1)(a) of the court protocol.

^{xxxi} Article 56 of the African Charter.

^{xxxii} Communication no 53/90.