Understanding the African Commission’s role in combating TOCs in Africa

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Summary

A key premise of this study is that transnational organised crimes (TOCs) violate core human rights norms, principles and values of regional and international human rights instruments, including the Banjul Charter on Human and Peoples’ Rights. This study examines the African Commission on Human and Peoples’ Rights’ role and work in combating TOCs in Africa. Specifically, it looks at how the Commission has dealt with TOCs within the African human rights system (AfHRS) using its various internal mechanisms, and especially how it has used the African (Banjul) Charter on Human and Peoples’ Rights (the Charter) to combat TOCs in the region.

Recommendations

By aligning the efforts of the Commission with other regional and international initiatives like ECOWAS, African states can strengthen their responses to TOCs, promote accountability and protect the rights of individuals and communities. The Commission should:

• Formally extend its mandate to include TOCs.
• Establish a TOC unit with knowledgeable personnel.
• Adopt a more systematic and comprehensive approach including guidelines to address the human rights implications of TOCs.
• Adopt clear procedures for following up.
Understanding the African Commission’s role in combating TOCs in Africa

Introduction

In July 2012, the Assembly of Heads of State and Government (the Assembly) issued a Solemn Declaration condemning “the violations of human rights perpetrated by the various armed, terrorist and criminal groups.” It called upon the African Commission on Human and Peoples’ Rights (African Commission) to conduct a fact-finding mission to investigate transnational organised crimes (TOCs) in the Sahel.

This study examines the Commission’s role and work in combating TOCs in Africa. Specifically, it looks at how the Commission has dealt with TOCs within the African human rights system (AfHRS), using its various internal mechanisms, and especially how it has used the African (Banjul) Charter on Human and Peoples’ Rights (the Charter) to combat TOCs in the region.

States have an obligation to ensure, secure or restore the rights of victims

The study also explores the challenges faced by the Commission when dealing with TOCs, and the organisation’s potential in this arena into the future. It argues that while the Charter does not explicitly state that combating TOCs is part of its mandate, the Commission has essentially assumed this role, with the blessing of Africa’s highest Policy Organs, the Assembly and the Executive Council.

Both regional and international human rights law demand that as the main subjects of international law, states have the primary obligation to combat TOCs. The responsibility arises from a broader obligation by states to ensure, secure or restore the rights of victims and provide effective remedies. The International Covenant on Civil and Political Rights (ICCPR) imposes a duty on states to guarantee that individuals whose rights are violated, even if the violation is committed by state actors, have access to an effective remedy.

Even though the Charter does not explicitly mention victims of TOCs, Article 1 obliges states to respect and protect the rights enshrined in the Charter, implying an inherent obligation on states to protect individuals and communities from TOCs.

A key premise of this study is that TOCs violate core human rights norms, principles and values of regional and international human rights instruments, as well as the Charter. Since the Commission is Africa’s foremost regional human rights body tasked with the promotion and protection of all human rights in the region, assisting states to combat TOCs should be a key part of its regional response and work.

Study methodology, aims and rationale

This study examined what the Commission has done to combat TOCs in Africa within the framework of the AfHRS. It looked specifically at the Commission’s application of the Charter as a tool to counter TOCs in the region. The study addressed the following research questions:

• How has the Commission addressed TOCs over the last 36 years of its existence, considering that its official mandate does not explicitly include the fight against TOCs?
• How has it used its existing structures in addressing TOCs, and how successful has it been?
• Is there a case for expanding the Commission’s mandate to encompass combating TOCs?
• Is it the most suitable regional body to address TOCs?
• To what extent does the Charter’s formulation of rights and freedoms depart from or conform to existing or desired regional and international standards and practices to combat TOCs?
Despite the significant role that human rights play in shaping policies related to crime prevention and criminal justice, and the widespread adoption and ratification of the Charter by Member States, there is a scarcity of academic work exploring the connection between the Charter and the Commission’s increasing contribution in addressing TOCs.

As far as the author is aware, this is the first study to examine what the Commission has been doing in terms of TOCs, and what further role it could play into the future. More broadly, it aims to provide a resource for Member States and other stakeholders to develop and improve strategies and policies that leverage the full capabilities of the Commission to combat TOCs in Africa.

Desk-based research was conducted for all grey literature, including documents related to TOC decisions made at the African Union (AU) and by AU Member States. This was supplemented by interviews with key stakeholders such as government officials, law enforcement agencies and civil society organisations. However, given the sensitive political and diplomatic considerations of the subject under study, we were unable to access certain key stakeholders, including Commission members and state representatives.

**The AfHRS and TOCs**

The AfHRS is a comprehensive framework that seeks to promote and protect human rights on the African continent, consisting of both legal instruments (hard law) and non-binding instruments (soft law). The Charter is at the core of the AfHRS and serves as the foundational normative framework outlining the principles and standards of human rights that the Commission enforces.

However, neither the Charter nor the Commission was set up to address many of the current human rights challenges faced by the continent, including TOCs. Despite the Charter encompassing a wide array of rights that are useful to combat TOCs, it took several decades for the system to begin to directly tackle TOCs (discussed later).

The primary components of the AfHRS are the Commission, the African Court and the Children’s Committee. The system also includes non-governmental organisations (NGOs), civil society groups and individuals, who play a critical role by raising awareness of human rights issues, monitoring human rights violations and advocating for change.

Civil society participating at the NGO Forum, held alongside the 77th session of the African Commission, 2023, Arusha, Tanzania

*Source: Committee for Justice, www.cfjustice.org, 2023*
According to Hannah Forster, Executive Director at the Centre for Democracy and Human Rights,

This active engagement by civil society has amplified calls for intervention from the Commission and government accountability, to the point where even the Policy Organs, with the full knowledge that TOC is not part of the mandate of the Commission, have given the Commission a clear role to address TOC issues. It has done that by (re)interpreting various provisions of the Charter to find where TOCs violate its provisions.21

Other subregional organisations within the system with specific missions related to safeguarding human rights, including efforts to combat TOCs, include the Economic Community of West African States (ECOWAS) Court of Justice,22 the Southern African Development Community (SADC) Tribunal23 and the East African Court of Justice (EACJ).24

A range of AU treaties and soft laws relevant to combating TOCs also make up the system,25 including the Constitutive Act of the AU, the Maputo Protocol26 and the Children’s Charter.27 Unlike the African Charter, the drafters of both the Maputo Protocol and the Children’s Charter crafted the documents to reflect the current human rights realities of Africa to include clear provisions for combating TOCs.

**Human rights in Africa and the Commission**

One of the objectives of the AU is the promotion and protection of human rights in accordance with the Charter and other relevant regional and international human rights instruments.28 These include the Maputo Protocol29 and many other hard and soft laws that can be used to address TOCs.30 Human rights are a common thread running through the objectives enumerated in the AU’s Constitutive Act31 and in the principles governing the functioning of the AU. The Charter designates the Commission as the gatekeeper and guardian of human rights in Africa.32

TOCs often result in severe human rights violations.33 However, as noted by the Global Initiative Against Transnational Organized Crime (GI-TOC), ‘despite the undeniable impact of criminal activity on … rights, the criminal justice and human rights legal agendas are still largely disengaged. They are like separate committees that do not meet.’34

The complex nature of TOCs necessitates an integrated and comprehensive approach that transcends national boundaries.35 The role of (sub)regional organisations that have the reach to influence members is important, as they can contribute to strengthening both individual and collective actions against TOCs while upholding human rights standards.

The Commission is the lead regional organisation with the ability to foster such cooperation and coordination among Member States and regional economic communities (RECs).36 The Commission’s expertise can contribute to the development of informed policy recommendations, helping shape effective legal frameworks, policies and strategies that align with human rights principles and promote regional cooperation in addressing TOCs.

The colonial history of Africa and its struggle for independence fostered a commitment among African nations to safeguard their populations from further abuses. As an indigenous African-led institution, the Commission embodies these experiences and possesses an inherent commitment to upholding human rights. This aligns well with the Commission’s role in addressing TOCs, which frequently erode these fundamental principles.

Source: African Commission for Human and Peoples’ Rights
Finally, the two leading Policy Organs of the AU, the Assembly and the Executive Council, have given the Commission an implied mandate to address TOCs. A current member of the Commission notes that

the Commission was assigned these tasks [a fact-finding mission in Mali in 2013 and an investigation in 2017 into trafficked black migrants being sold as slaves in Libya] by the Assembly and the Council based on only one criterion – that these are human rights issues, and as the only regional multilateral human rights organisation responsible for securing all types of human rights in Africa, it is not only its responsibility, but also the only organisation that is equipped to combat TOCs, through use of the Charter, internal tools and mechanisms. The only element missing is for the Commission itself to formally expand its mandate to include TOCs.

Mandate and institutional structure of the Commission

The Charter provides for the establishment of a regional human rights body – the Commission – with the mandate to promote the observance of the Charter, monitor its implementation, ensure the protection of the rights and freedoms set out therein, interpret the Charter and advise on its implementation.

The Commission meets four times a year with different human rights stakeholders, including state delegates, representatives of international organisations and other members of civil society, to discuss the human rights situation on the continent.

The Commission has progressively developed mechanisms for addressing various human rights issues, including TOCs. Each specialised mechanism is supervised by a commissioner and regularly submits activity reports to the Commission. The Commission compiles annual activity reports for presentation to the Assembly.

The Commission considers complaints lodged by states, individuals and NGOs concerning alleged human rights violations. It also oversees Member States' adherence to the Charter. Article 62 of the Charter requires Member States to submit reports every two years, detailing the measures they have implemented to uphold the Charter's provisions, including all matters related to TOCs.

The Commission also conducts investigative and promotional missions to Member States, with the aim of monitoring human rights conditions. Promotional missions seek to raise awareness about the Charter while encouraging Member States to enhance their domestic human rights mechanisms.

The Commission has used these visits to address the issue of TOCs, and to make recommendations to governments on how to combat them. Investigative missions are geared towards probing allegations of significant and severe human rights violations.

The Charter’s alignment with regional and international norms and approaches to TOC

Historically, the failure to develop the normative content of rights which TOCs infringe meant the content of such rights remained vague. This led to the perception that the Commission was not mandated to address TOCs, and that TOCs were not justiciable.

However, Article 45(3) of the Charter empowers the Commission to interpret the Charter in alignment with prevailing regional and international norms and approaches, including rights and obligations connected to

Source: African Commission for Human and Peoples' Rights
TOCs. According to Nega Lulesa, the Commission effectively has the right to interpret the Charter ‘basically as it sees fit, including reading TOCs into it. That gives it enormous latitude to legislate on anything it wants Member States to address.’

The Commission’s reporting guidelines, for example, require states to report on rights not explicitly protected in the Charter. The effect of this is to read into the Charter all rights not stated in the Charter, including rights that TOCs might be violating. No state has challenged “implied” rights in the Charter, suggesting that the Commission’s approach of creative interpretation reflects a contemporary reading of the Charter which is consistent with the international human rights law approach.

Article 60 of the Charter provides that

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

In Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, the Commission borrowed language verbatim from the United Nations (UN) Basic Principles on the Use of Force and Firearms to stress that restrictions on the right to life must be narrowly tailored and strictly proportionate to the aim of protecting individuals against violence. Other examples of alignment with regional and international norms and approaches include:

- Addressing Human Rights Issues in Conflict Situations: the Commission referred to the UN Human Rights Council and Common Article 3 of the Geneva Conventions in clarifying the meaning of non-international armed conflicts involving transnational armed groups.
- Resolution on Illicit Capital Flight from Africa: the Commission took into cognisance the establishment by the UN Economic Commission for Africa of a High-Level Panel on Illicit Financial Flows from Africa to determine the nature, pattern, scope and channels of illicit financial outflows from the continent, connecting the Charter with established international human rights standards.
Additionally, some of the rights enshrined in the Charter, such as the right to life (Article 4) and freedom from torture (Article 5), resonate with international human rights instruments like the Universal Declaration of Human Rights and the ICCPR. These rights are fundamental to addressing TOCs, as these crimes often involve grave violations of human rights.

Overview of the Commission’s response to TOCs

This section gives an overview of some of the Commission’s work in addressing TOCs through its various mechanisms in the AfHRS.

State obligations

The Charter sets out the rights to which all people in Africa are entitled. It states that African Member States are the main subjects and therefore have the primary responsibility of promoting and protecting human rights. The general obligation of State Parties to the Charter is to ‘recognize the rights, duties and freedoms’ enshrined in the Charter and to ‘undertake to adopt legislative or other measures to give effect to them.’ A state’s failure to prevent violations of the rights enshrined in the Charter constitutes a violation in itself, even if the state or its agents are not directly responsible for the violation.

Over time, the Commission has clarified the scope of state obligations under the Charter or other international human rights instruments and practices to respect, protect and fulfil human rights in accordance with Articles 60 and 61 of the Charter.

Inter-state and other Communications

The Charter provides that a state may in writing call attention to another state if it considers that the latter has breached any of the rights guaranteed in the Charter. The Commission has considered only three such inter-state Communications: Communication 227/99 (DRC Case), Communication 422/12 (Sudan v South Sudan), and Communication 478/14 (Djibouti v Eritrea).

Communication 227/99 was brought before the Commission by the Democratic Republic of the Congo (DRC) in March 1999 against Rwanda, Uganda and Burundi. The DRC alleged that these countries had violated its territorial integrity and the human rights of its citizens by invading the DRC and committing atrocities such as mass killings, torture, rape, looting and trafficking of its natural resources.

In its 2003 judgment, the Commission agreed that Rwanda, Uganda and Burundi had indeed violated the Charter in a number of ways. According to human rights lawyer Dr Henry Carrol,

This is an important case. It was one of the very first times when the Commission was called upon to comment on a case where TOC was on the agenda … In the end the right decision was arrived at. Unfortunately, many of the recommendations were never carried out, begging the question about the effectiveness of the Commission’s decisions if it’s going to take on more TOC cases, and its follow-up mechanisms.

In another case, in 2000, the Commission found that Mauritania had violated numerous provisions of the Charter, and committed a series of human rights abuses against its black citizens. Close to 100,000 black Mauritians were forcibly expelled to Senegal and
Mali by the government. These expulsions were carried out in the wake of long-standing ethnic tensions between Arab and black Mauritanians.

The Commission’s decision was a landmark ruling in the fight against TOCs and other human rights abuses in Africa. It was also the first time that the Commission had found a state responsible for serious systemic TOC violations against its own citizens.65

Although today the connection between human rights and TOCs is evident, this was not the case two decades ago. Senegalese human rights activist Souleymane Sagne states that though the Commission recognised the transnational aspects, it lacked a comprehensive framework, policy, strategy and expertise to effectively address TOCs properly in these instances.

The governments of Senegal and Mali that absorbed thousands of refugees, regarded the situation as a cross-border migration and trafficking matter, and a matter of public order and immigration, with human rights considerations often treated as secondary. The Mauritanian government denied all the allegations, framing the expulsions, trafficking and accusations of slavery as an internal law and order issue.66

In 2002, in another landmark case under Article 55 of the Charter, the Commission found that Nigeria had failed in its obligation to adequately protect its citizens.67 The case alleged that the Nigerian government collaborated with oil exploration company Shell to contaminate air, water and soil in Ogoniland, thereby endangering the health of the Ogoni people. It further alleged that the Nigerian government violated the Charter and the human rights of its citizens by failing to protect them from the harmful effects of oil bunkering, pipeline vandalism, violence, intimidation and environmental degradation.68

These cases highlight that the Commission has interpreted the Charter broadly to ensure that people can fully enjoy their rights, even those that are not explicitly mentioned in the Charter. However, while these cases are illustrative of what the Commission has done to address TOCs, the responses have been reactive, inconsistent and often ad hoc.69 The focus is generally on addressing other human rights violations, rather than specifically targeting TOCs as a distinct category of violation. This hinders an effective response to TOCs and limits the Commission’s ability to apply a human-rights-based approach to addressing these challenges.

**General Comments 3 and 4**

General Comments are used to explain the meaning of certain rights and to clarify the steps that governments must take to realise the rights. The jurisprudence of the Commission has widely recognised the right to life as a foundational right. Without the right to life, other rights cannot be implemented. The Commission adopted General Comment No.3 on the African Charter on the right to the inviolability of life (Article 4) during its 57th Ordinary Session, held in Banjul, The Gambia, in November 2015. It is designed to guide the interpretation and application of the right to life under the Charter and to ensure its coherent application to a range of situations, including its implementation at the domestic level. Specifically, it outlines the Commission’s perspective on the right to life by elaborating on its scope and content, and also by clarifying the protections for individuals and the concomitant obligations of states. General Comment No. 3 makes clear, the African Charter should be broadly interpreted to mean the protection of a dignified life.
General Comment No. 3 states that

The Charter imposes on States a responsibility to prevent arbitrary deprivations of life caused by its own agents, and to protect individuals and groups from such deprivations at the hands of others. It also imposes a responsibility to investigate any killings that take place, and to hold the perpetrators accountable. This intersects with the general duty, recognized in the Charter, of all individuals to exercise their rights and freedoms with due regard to the rights of others. Organized crime and terrorism can pose significant threats to the enjoyment of the right to life and require a robust State response, but one that at all times takes into account the requirements of international human rights law.

According to Hannah Forster, General Comment No. 3 ‘covers human trafficking, child trafficking, forced marriages, cybercrime, and drug trafficking … including forced labour and sexual exploitation.’

General Comment No. 4 was adopted to ‘strengthen existing provisions on the right to redress in instruments adopted by the Commission’.

Kash Barrie, Registrar of the University of Sierra Leone, notes that

Comment No. 4 reminded Member States that they have a duty to prevent, investigate, and punish NSAs [non-state agents] who commit human rights abuses, even within the context of TOCs. The Comment also gave the Court the powers to prosecute NSAs for torture and other ill-treatment, especially when such cases are referred to it by the Commission. That includes TOCs like human trafficking for sexual exploitation and slavery.

The Comment also requested Member States to ensure that their legislation provides for reparations for victims of torture and other ill-treatment, including reparations from NSAs. Barrie further notes, ‘for those who think that the Commission is not mandated to address TOCs, the Commission is saying to States Parties that it has given itself that mandate, and given the resources available to it.’

Guidelines

The Commission’s Guidelines on the Protection of All Persons from Enforced Disappearances in Africa have significant implications for the way Member States should treat groups like migrants, and other vulnerable groups like women and girls. The Commission adopted the Guidelines to provide guidance and support to Member States on the effective implementation of their commitments and contributions to eradicate enforced disappearances throughout the African continent.
The Commission argued that the practice of enforced disappearances is widespread, and under international humanitarian law, states are obliged to prevent persons from going missing, even if they have gone missing because of the actions of an NSA. The Commission noted that enforced disappearance is not only a human rights violation but also an international crime, prohibited under any circumstances. The Commission called upon Member States to ‘strengthen regional and international cooperation in combating terrorism and trafficking in women and children.’

In a clear reference to an implied mandate that it has given itself through Article 45(1)(b) to combat TOCs in Africa, the Commission stated: ‘the Commission remains committed to combating enforced disappearances through the exercise of its mandate to promote and protect human and peoples’ rights on the continent.’

Studies

Human Rights Issues in Conflict Situations

In 2019, the Commission adopted a study entitled Addressing Human Rights Issues in Conflict Situations, with extensive commentaries on TOCs. According to Dr Alfred Abhulimhen-Iyoha, a human rights lawyer at the Ministry of Justice in Nigeria, the study ‘represents a groundbreaking achievement for the AU human rights and security system, as it offers an unparalleled analysis of the complexities surrounding human rights in conflict situations within the African human rights framework, standing in contrast to its previous ad hoc and reactive approach.’

Pilot Study on Migration and Human Rights

Also in 2019, the Commission adopted the Pilot Study on Migration and Respect for Human Rights. The focus of the study was Niger, which is used as a transit corridor for migrants travelling to North Africa and Europe via the Mediterranean.

The study concentrated on multiple TOC violations along the migration path from Niger to North Africa, and offered insights into the primary human rights obstacles experienced by migrants during their journey. It also looked at the profiles of migrant traffickers, analysing research initially carried out by the UN Office on Drugs and Crime (UNODC).

Human rights lawyer and activist Dr Edmund Foley of the Institute for Human Rights and Development in Africa says ‘the study is one of the most comprehensive works undertaken by the Commission on TOCs. The spotlight is on the state and their obligations to migrants, irrespective of the irregular manner in which they find themselves in North Africa.

Migrants expelled from Algeria to Niger, 2022

Source: www.infomigrants.net
State reporting procedure and role of NGOs

Under Article 46, the Charter empowers the Commission to resort to any appropriate method of investigation into allegations of rights violations in any State Party. In response, the Commission has adopted the state reporting procedure as well as inputs from civil society. This requires states to report to the Commission what steps they have taken to ameliorate TOCs in their territory.

Given that the Commission lacks an enforcement mechanism, the state reporting process stands as the most robust means to oversee state compliance with regional treaty obligations. Osai Ojigho, previous head of Amnesty International, Nigeria, notes, ‘It offers a platform for productive dialogues, guiding states towards concrete actions to take mitigating measures to secure human rights, including TOC violations.’

Since its inception, the Commission has accorded due respect to the work of NGOs in the field of human rights, as part of its work and interaction with the AfHRS. Rule 79(3) of the Commission’s Rules of Procedure invites ‘institutions, organizations or any interested party’ to submit contributions, including shadow reports, to help the Commission consider the state reports.

These ‘shadow reports’ enable the Commission to engage in a constructive dialogue with the representatives of States Parties when the Initial or Periodic Report of the specific country is under consideration by the Commission. ‘It’s an opportunity for all sides, but especially for the Commission, to understand how Member States are tackling TOCs.’

According to Ojigho, ‘Shadow reports provide independent, complementary, and alternative information that helps the African Commission get a more complete understanding of the human rights situation in the country being reviewed.’
Promotion and protection missions

During a promotion mission, the Commission seeks to develop cooperation and constructive dialogue with states and other stakeholders. It uses such visits to assess the human rights situation with a view to improving it, through discussions with government officials and local NGOs in the relevant country.\textsuperscript{92}

A Protection Mission or Fact-finding Mission seeks to gather accurate and comprehensive information regarding alleged human rights violations or issues within a particular country or region. The Commission may initiate a Protection Mission in response to complaints, communications or reports of human rights abuses.\textsuperscript{93}

Resolutions

Article 45 of the Charter requires the Commission to ‘formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights.’ Pursuant to this provision, the Commission has adopted numerous thematic\textsuperscript{94} and country-specific\textsuperscript{95} resolutions on TOCs. Resolutions are not legally binding, but they can be influential in shaping the law and practice of human rights.

Many of the Commission’s resolutions address a wide range of issues related to TOCs, including the impact of TOCs on human rights,\textsuperscript{96} the obligations of states to combat TOCs\textsuperscript{97} and the role of the AU, including the Commission, in promoting cooperation between states in combating TOCs.\textsuperscript{98}

Appeals, statements and press releases

Urgent appeals or letters of appeal are formal private letters sent to a country’s head of state or government by a special mechanism of the Commission, a commissioner serving as a rapporteur for that specific country, or the chairperson of the Commission, in accordance with Article 46 of the Charter.

These letters are issued when the Commission receives credible information indicating that an individual, a group or a community within a country faces, or is likely to face, severe human rights violations that could result in irrevocable harm to their lives, safety, freedom or other rights protected under the Charter. The purpose of these appeals is to proactively prevent such harm from occurring.

The Commission also issues statements and press releases to promote significant corporate news, and to communicate directly with its various publics within the AfHRS on topical human rights issues.

Understanding the Commission’s evolving approach to TOCs

Many of the terminologies and processes used now in TOCs, let alone the instruments, institutions, to combat them, were not even in existence at the time the Charter was forged.\textsuperscript{90} The Commission’s responses on TOCs have evolved over time, and you can see that as TOCs have taken some prominence within the international human rights discourse, the Commission has ramped up its responses in a slightly more organised way. Trying to reinterpret the Charter to address an issue that was not a priority in the 20th century, and which was certainly not envisioned in its mandate, is commendable. What it should do now is to formally make combating TOCs part of its mandate, and set up a working group to combat TOCs in a more structured manner.\textsuperscript{99}

When the Commission commenced its operations, it faced several limitations that affected the quality of its decisions related to TOCs: its lack of expertise in handling cases involving TOC violations, a shortage of legal experts knowledgeable about TOCs, and an initial reluctance to accord greater attention to TOC violations.

The Commission was hesitant to develop rights in areas where there was little established international jurisprudence. Indeed, during the 1990s, the UN system on TOCs was also not well developed and was just
beginning to formulate the normative content of TOC violations and the nature of state obligations. The UN
Convention Against Transnational Organized Crime (UNTOC) was adopted in November 2000, and came
into force in September 2003. Since then, the Commission has been clarifying the nature of state obligations
and remedies for victims, using a human-rights-based approach.

According to Dr Ayo Aniku, several reasons account for the Commission’s change in approach to
combating TOCs. First, as the AfHRS underwent changes, the Commission successfully expanded its
internal mechanisms by creating new ones to confront present human rights realities in the continent.
New institutions (e.g. Children’s Committee) and instruments (e.g. Maputo Protocol) were constructed with
distinct and clear roles for combating TOCs.

Second, it was influenced by developments in the international discourse on TOCs, including the trend
towards increasing the justiciability of TOC violations, and the development of new instruments, like the
UNTOC, to combat TOC. The Commission thus benefited from these developments in the clarification of
normative international standards as reflected in its increased use of international human rights law to
interpret the general provisions of the African Charter, with implications for addressing TOCs.

Third, a more structured approach to combating TOCs may be attributed to the appointment of
commissioners who were prepared to take on TOCs as part of their larger work on human rights.

Challenges faced by the Commission

A current commissioner observes that ‘lack of political will, human and financial resources will probably
be responsible for the Commission not being able to take on the full weight of TOC matters.’ This view
is echoed by Dwight Wilson, who asks how the Commission can take on TOCs when it is already buckling
under two reinforcing challenges: lack of political will by Member States and the Policy Organs to uphold
its own standards, and institutional ineffectiveness, including lack of funding. In 2017 the Commission
itself observed that insufficient funding impedes its capacity to follow up on implementation, resulting in a
weakening of its effectiveness.

According to a staff member at the African Court, the challenges facing the Commission in its attempt
to contribute to addressing TOCs include limited enforcement mechanisms, inadequate resources,
non-ratification and non-implementation of regional human rights instruments by Member States,
lack of compliance with the Commission’s decisions by Member States, political pressure and interference from the Policy Organs and Member States.104

An important feature of the Commission’s mandate is its Communications procedure. However, the system has not been effectively utilised to prosecute cases related to TOCs. One of the reasons for states’ reluctance to file complaints against other states is the prevailing culture of ‘non-interference by any Member State in the internal affairs of another,’ as outlined in Article 4(g) of the AU Constitutive Act.105 With respect to Communications from individuals and NGOs within the AfHRS, the Commission has not been proactive enough in encouraging civil society to bring cases.

The promotion mandate of the Commission is an underutilised tool, especially when it comes to awareness creation for general human rights work. The Commission’s promotion mandate is essential in raising awareness about TOCs in Africa.

Regarding Resolutions issued by the Commission, a lack of transparency and state involvement has fostered a perception of bias. States view this process as partial and often resist compliance. Additionally, the absence of procedural rules and a follow-up mechanism for resolution implementation hinders effective oversight.

Furthermore, various institutions within the AfHRS perceive the Commission’s decisions and remedial orders as mere recommendations. In Communications involving aspects of TOCs, none of the states have complied with the Commission’s recommendations. As Henry Carroll points out, ‘TOCs typically entail sovereignty concerns, especially when they require action in relation to the positions and actions of other states. I can envision a situation where many states will simply disregard the Commission’s decisions, orders and recommendations.’106

The Commission launching Guidelines on Shadow Reporting of the African Commission on Human and Peoples’ Rights 2022, 73rd Ordinary Session

Source: African Commission for Human and Peoples’ Rights
The state reporting system is a good avenue for interrogating TOCs. However, the challenge arises where states do not report or do not report regularly. There is currently no procedure for reviewing countries that have not submitted reports. The ability of the Commission to monitor state compliance with human rights obligations under the Charter has been largely limited by the fact that most states have not taken their reporting obligations seriously.

**Is the Commission the right organisation to combat TOCs?**

Some scholars and commentators argued that addressing TOCs is not within the mandate of the Commission and that it already struggles to cope with its current mandate. Although TOCs have human rights implications, they are not at the core of transnational crime. Furthermore, since addressing TOCs requires a comprehensive and multidimensional approach that integrates law enforcement efforts, intelligence sharing and regional collaboration – areas beyond the primary scope of the Commission – it might be more effective to include the Commission in an advisory capacity, in order to ensure a rights perspective is taken into account in any considerations. Organisations such as the AU, the UNODC and INTERPOL have more specialised mandates and resources dedicated to combating TOC, and the Commission could collaborate with them.

Other respondents felt that the Commission has an implied mandate to address any human rights violation, including TOCs, and that it already has structures and institutions doing similar work. The Commission cooperates with numerous institutions concerned with the promotion and protection of human rights. This coordination allows for the alignment of efforts to combat TOCs with broader peace and security initiatives. So, why reinvent the wheel by creating another organisation, when we can support the Commission to properly undertake TOC matters?

The question we should be asking is, ‘How can we strengthen the Commission, so that it can address TOCs properly, not whether it is mandated to combat TOCs?’ According to Dr Edmund Foley, formalising the Commission’s efforts through the establishment of a focal point or a working group dedicated to TOCs will be a crucial first step in systematising its work in this area.

**Conclusion**

This study is of the opinion that the Commission has immense potential to address TOCs. It is the only regional multilateral human rights organisation with the continental reach to influence all its members, and has interpretive, promotional and enforcement mandates, as well as collaborations with various entities.

The Commission has 12 specialised mechanisms focusing on distinct human rights themes, and some of these could potentially be assigned specific duties related to TOCs. Commissioners could utilise not only the Commission’s existing tools, such as drafting resolutions and issuing statements, but could also formulate normative instruments pertaining to TOCs for adoption by the Commission.

The position of this study is that the most effective approach might involve establishing a new mechanism dedicated to addressing the challenges posed by TOCs. The advantage of having a mechanism and commissioners responsible for TOC matters is that each commissioner would be assigned the duty of monitoring human rights in the specific countries under their care. The country rapporteur is typically the first to become aware of developments in their designated countries. If a TOC matter becomes a broader concern, they can bring it to the Commission’s attention for a coordinated response. Such collaborative efforts would enhance the effectiveness of the Commission’s mechanisms.
Human rights activist Michael Davies argues that ‘such a mechanism can assist in clarify the normative content of TOC violations through the consideration of complaints clearly labelled TOCs, not one in which TOC is thrown into the mix.”\(^7\) It could also provide a very clear, unambiguous interpretation of the Charter, clarifying how it can combat TOCs in accordance with Article 45(3) of the Charter.

The Charter empowers the Commission to collaborate with both African and international organisations dedicated to advancing and safeguarding human rights.\(^8\) The Commission has established partnerships with various AU entities to enhance the promotion and protection of human rights. ‘These are the institutions and relationships you need if you are to address TOCs properly, and there’s no other organisation in Africa that has that type of relationship apart from the Commission.”\(^9\)

However, the lack of a targeted approach and limited attention given to TOCs as a distinct category of violations hinders the application of a human-rights-based approach to addressing these challenges effectively. To fully address TOCs, the Commission should adopt a more systematic and comprehensive approach, including specific guidelines, studies and mechanisms for engagement with civil society organisations to effectively address the human rights implications of TOCs.

**Recommendations**

The recommendations presented aim to inform policymakers, practitioners and advocates involved in combating TOCs in Africa. By aligning the efforts of the Commission with other regional and international initiatives like ECOWAS, African states can strengthen their responses to TOCs, promote accountability and protect the rights of individuals and communities.

- The Commission should formally extend its mandate to include TOCs.
- It should establish a specialised unit for TOCs, with experienced and knowledgeable commissioners and staff members.
- It should adopt a more systematic and comprehensive approach, including specific guidelines, studies and mechanisms for engagement with civil society organisations to effectively address the human rights implications of TOCs.
- It should adopt clear procedures for following up.


7 In its 2012 Annual Report, the Commission stated that ‘Member States have a primary obligation to protect and promote human rights.’ It also stated that ‘Member States are obliged to take all necessary measures to prevent, investigate, prosecute and punish human rights violations.’ See https://archives.au.int/handle/23456789/6856.

8 The author was a senior staff member at the Commission for many years, and has been calling for such a study, even while at the Commission.


10 See Article 2 of the ICCPR: ‘each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.’ (https://www.oichr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights). See also Article 25 of the United Nations Convention against Transnational Organized Crime, which obliges State Parties to protect victims and provide appropriate measures to safeguard their rights.


At its 31st Ordinary Session in Addis Ababa, Ethiopia, the OAU Assembly requested the Commission to prepare a Protocol on the Rights of Women in Africa. See Resolution AHC/Res.240 (XXII), adopted in July 1995.


See articles 3(h), (c), (f), (g), (i), (k) and (n).

Article 30 of the African Charter states that ‘a Commission’ shall be established within the Organisation of African Unity to promote human and peoples’ rights and ensure their protection in Africa; Article 45 spells out its function.


GI-TOC, Four reasons why organized crime is a human rights issue. https://globalinitiative.net/analysis/organized-crime-human-rights/. The report draws attention to four areas where synergies between the human rights framework and the legal framework should be enhanced, so that safeguards for human rights are woven into states’ policy responses to TOCs.


Even though states are the primary subjects of international law, including international human rights law, international human rights law also binds other international legal persons, like Africa’s RECs. See United Nations Convention against Transnational Organized Crime (United Nations, Treaty Series, vol. 2225, No. 39574), art. 10. See also Piet Hein van Kempen, Human rights and criminal justice applied to legal persons: Protection and liability of private and public juristic entities under the ICCPR, ECHR, ACHR and ACHPR, Electronic Journal of Comparative Law 14, 3, 2010,13–24.


Telephone conversation with a current Member of the Commission, 30 July 2023. The interviewee requested to remain anonymous.


For example, the Working Group on Extractive Industries and Human Rights Abuse in Africa was specifically established in 2009 because the Commission was ‘deeply concerned by human rights violations by non-state actors in particular the sector of extractive industries, including mining, oil, gas, and timber extraction.’ See https://achpr.au.int/en/node/756.

Article 55(2). See also ACommHPR, Information Sheet No. 2: Guidelines for the submission of communications, https://archives.au.int/bitstream/handle/123456789/2071/ACHPR%20I%20sheet%20no2_E.pdf?sequence=1&isAllowed=y, 2.

This creates a forum for constructive dialogue between the Commission and states. States are able to take stock of their achievements and failures in the light of the Charter and other supplementary treaties. It also allows the Commission to monitor the implementation of the relevant treaties and be informed of challenges that states are facing in their implementation.

African Charter, Article 45(1)(a).


See, for example, Final communiqué: Fact-finding mission of the African Commission on Human and Peoples’ Rights to Burundi, www.peaceau.org/uploads/achpr-com-fact-finding-mission-burundi-13-12-2015.pdf. Acting on a request from the Peace and Security Council of the AU, a delegation of the Commission undertook a fact-finding mission to the Republic of Burundi from 7 to 13 December 2015. The mission was carried out in accordance with the promotion and protection mandate of the Commission and pursuant to Articles 45 and 58 of the Charter.

Telephone interview with Nega Lulesa, 28 September 2023. Legal assistant, Institutional and General Legal Services subdivision within the legal affairs division of UNFCCC. Lulesa was a legal officer at the African Commission.


See, https://achpr.au.int/en/documents/2022-10-25/guidelines-protection-persons-enforced-disappearances-africa. The Commission stated that certain groups like migrants are more vulnerable to being disappeared. It stated in paragraph 1.3.2: ‘Given the absence of safe, legal migratory routes throughout the continent and globally, and the corresponding increase in smuggling and trafficking along irregular routes, as well as the continued use of immigration detention to control borders, the risk of being forcibly disappeared is inherent in the full breadth of the migratory journey.’


54 Adopted by Resolution 61/177 of the UN General Assembly on 20 December 2006.


57 African Charter, Articles 47–52. Article 49 states, ‘Notwithstanding the provisions of Article 47, if a State Party to the present Charter considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organisation of African unity and the State concerned.’


61 The DRC alleged that ‘the plunder of the riches of the eastern provinces of Congo is also affecting endangered animal species such as okapis, mountain gorillas, rhinoceros, and elephants,’ https://caselaw.ihrda.org/en/entity/7?mx4blkn9?page=2, para. 7.

62 The Commission found the respondent states in violation of Articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22 and 23 of the African Charter.

63 Discussions with Dr Henry Carrol, Banjul, 14–16 March 2023.


65 Telephone interview with Justice Asiatou Jallow Sie, 11–21 August 2023.

66 Telephone interviews with Souleymane Sagne, 18 August 2023.


69 Telephone Interview with a former Member of the Commission, 8 August 2023. The Interviewee requested to remain anonymous.


71 Ibid., para. 41. A State can ‘be held responsible for killings by NSAs [non-state agents] if it approves, supports or acquiesces in those acts or if it fails to exercise due diligence to prevent such killings or to ensure proper investigation and accountability,’ https://achpr.au.int/en/node/851, paras 9, 38–39.

72 Telephone conversations with Hannah Forster, 27–30 September 2023.


74 Conversations with Kash Barrie, Registrar of the University of Sierra Leone, 15 March 2023, and telephone interviews between 1–8 October 2023.

75 Ibid. A key legal instrument which inspired the Comment was the 2015 Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa. Its 14 overarching principles emphasise governments’ obligations to prevent and protect civilians against transnational armed groups, ensure state accountability, provide effective remedies to victims, prohibit discrimination, safeguard judicial independence, and adhere to their human rights commitments while acting extraterritorially, among other duties. See https://achpr.au.int/en/documents/2022-10-25/guidelines-protection-persons-enforced-disappearances-africa. The Guidelines are based on existing legal obligations of African states under regional treaties and documents, such as the African Charter, the Maputo Protocol, the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa, and the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children of the International Conference of the Great Lakes. It also expands on the standards developed by the Commission through its jurisprudence and commentary, such as the Guidelines on Human and Peoples’ Rights while Countering Terrorism, and the Luanda Guidelines; see also its resolution on countering terrorism in Africa at https://achpr.au.int/en/adopted-resolutions/368-resolution-implementation-principles-and-guidelines-human-and-peopl; General Comment No. 3 on the Right to Life.

76 See https://achpr.au.int/en/documents/2022-10-25/guidelines-protection-persons-enforced-disappearances-africa. The Guidelines are based on existing legal obligations of African States under regional treaties and documents, such as the Maputo


83 Niger is a signatory to the UNTOC and its associated Protocol against the Smuggling of Migrants. It is also engaged in the Rabat Process, where the Rome Declaration prioritises addressing irregular migration, particularly migrant smuggling, through a human-rights-based approach. By endorsing the Global Compact for Safe, Orderly and Regular Migration, Niger has pledged to enhance the transnational response to migrant smuggling without criminalising those who have been smuggled, ensuring that measures against smuggling adhere to human rights. Additionally, it has affirmed the Niamey Declaration, which aims to improve coordination in combating TOCs.


87 Electronic communication with Osai Ojigho, 21 June 2023.


90 Telephone interview with Ambassador Sheikh Tijan Hydara, 10 March 2023. Hydara worked at the Commission for many years.

91 Electronic communication with Osai Ojigho, 21 June 2023.


93 See for example a Protection Mission undertaken by the Commission in 2013 to Mali. The Assembly after noting “the continued occupation of the northern part of Mali by various armed, criminal and terrorist groups is a serious threat to peace, security and stability in Mali, the region and beyond, requested the Commission to undertake another Fact-finding mission to the Republic of Mali “... as part of African-led Support Mission in Mali (AFISMA), and with the support of the African Commission on Human and People’s Rights, ... to create the necessary conditions for lasting reconciliation among the different components of the Malian population...” Meeting at its 20th Ordinary Session, in Addis Ababa, on 27 and 28 January 2013, at: https://www.peaceau.org/en/article/solemn-declaration-of-the-assembly-of-the-union-on-the-situation-in-mali. See also: https://www.peaceau.org/en/article/solemn-declaration-of-the-assembly-of-the-union-on-the-situation-in-mali, para 7(d).


100 Interview with Professor Ayo Aniku in Lagos, 20 April 2023, and further telephone conversations between 10–15 September 2023.

101 Interview with a current Commissioner in Banjul, The Gambia, 12 March 2023. The interviewee requested to remain anonymous.


Telephone conversation with a staff member of the African Court, 22 June 2023. The interviewee requested to remain anonymous.


Electronic communication with Professor Rachel Murray, University of Bristol, 11 July 2023; electronic communication with Professor Frans Viljoen, Director of the Centre for Human Rights at the University of Pretoria, 11 July 2023.

Ibid.

Telephone discussions and interviews with Barrister Bola Carroll, 10–25 August 2023.

Telephone interview, with Aiah Nabieu Mokuwah, Executive Director of the Institute For Drug Control and Human Security, and WARNOC Member, 24 June 2024.

Interview with Professor Ayo Aniku in Lagos, 20 April 2023, and further telephone conversations between 10–15 September 2023.

Telephone interviews with Ousman Marong of Niumi FM, between 20–30 September 2023.

Telephone conversations with Mamina Colley, head of Registry at the Commission, 17 September 2023; also, electronic communication with Osai Ojigho, 21 June 2023. Osai was also country director for Amnesty International Nigeria.

Discussions with Dr Edmund Foley, in The Gambia, 10 March 2023.


Interviews and discussions, Banjul, The Gambia, 15 March 2023, and also between 15 and 20 August 2023.


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About ENACT

ENACT builds knowledge and skills to enhance Africa’s response to transnational organised crime. ENACT analyses how organised crime affects stability, governance, the rule of law and development in Africa, and works to mitigate its impact. ENACT is implemented by the ISS and INTERPOL, in affiliation with the Global Initiative Against Transnational Organized Crime.

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