

## **An Appraisal of the Implementation of the African Charter on Human and People S Rights**

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**ABSTRACT:** *The observance of human rights on the African continent remains one of the poorest globally. And there are many reasons that account for this, including weak institutional structures. The African Union (AU) which constitutes the dominant political leadership on the continent has adopted and ratified the African Charter on Human and Peoples Rights and other supporting or complementary protocols. These instruments have also created the machinery for implementing the human rights provisions of the Charter including the African Commission and the African Court of Justice and Human Rights. This Paper therefore aims at appraising the effectiveness of these implementation apparatuses in particular and the status of human rights observance in Africa in general. The paper has discovered, among other things, that so many loopholes in the implementation procedure of the African Charter have made human rights observance in Africa weak and lukewarm. As panacea, the Paper has recommended, among other things, that both the African Commission and the African Court be adequately funded and that the institutional structure of the African Union should imbibe a strong political will to put into practice the recommendations and judgments of the African Commission and Court.*

**Keywords :** *Protocol, advisory jurisdiction, contentious jurisdiction, African Commission, African Court, promotional mandate, communication.*

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### **I. INTRODUCTION**

There are three principal institutions that have direct bearing to the implementation of human rights under the African Charter on Human and Peoples Rights and they include the African Commission on Human and Peoples' Rights, the African Court of Justice, and the African Court on Human and Peoples' Rights. The African Commission was the first implementation apparatus and the only one directly established by the African Charter on Human and Peoples Rights. The Court system is a later development created through subsequent protocols to the Charter. As we shall find in this work, the implementation apparatuses of the African Charter have suffered a number of setbacks that have weakened the observance of human rights on the continent.

#### **1. The African Commission on Human and Peoples Rights**

At inception, the African Charter provided for a Commission established under the auspices of the Organization of African Unity (OAU) now African Union (AU). By Article 30 of the Charter, the Commission's function was "to promote human and peoples rights and ensure their protection in Africa". The Commission therefore has promotional and quasi-judicial functions. Its promotional mandate is very broad and includes the power to undertake studies, convene conferences, initiate publication programmes, disseminate information and collaborate with international and local institutions concerned with human and people's rights.<sup>1</sup>By Article 45(1) the Commission may also give its views or make recommendation to government.<sup>2</sup>

In line with its promotional functions, the Commission has organized numerous seminars around the continent in collaboration with other organizations like the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Commission of Jurists, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and so forth. Again non-governmental organizations associated with the Commission give useful information relating to promotional and protective activities of the Commission. Most often, these organizations are better placed to present and highlight cases of human rights breach than victims who may be incarcerated and unable to establish contact with the Commission. The support and assistance of these Organizations who are closer to the people has enhanced the work of the Commission since inception.<sup>3</sup>

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<sup>1</sup>The Commission's early intervention could lead to amicable settlement as in *Kalenga V. Zambia*, Communication No. 11/88 (2009) A.H.R.L.R 217.

<sup>2</sup>See Rule 87, Commission's Rules of Procedure, 1995.

<sup>3</sup>See U.O. Umozurike (supra) pp. 71-74.

There were two variants of the Commission's quasi-judicial powers, namely, interpretative powers and powers applicable to the resolution of disputes involving allegations of human rights violations. By Article 45 (3), the Commission had jurisdiction to interpret all the provisions of the African Charter<sup>4</sup> at the request of a State Party, an institution of the OAU or an African organization recognized by the OAU (AU). As it concerned dispute resolution the African Charter established an inter-state complaint mechanism that provided two distinct methods of dispute resolution.<sup>5</sup> The inter-State complaint mechanism permitted a State Party which believed that another State had violated the Charter to bring the matter to that State's attention in a formal communication and copied to the Commission. The respondent State sent a reply within three months. Either State might submit the matter to the Commission within three months from the date on which the original communication is received by the respondent State if the issue was not settled by them through negotiation or any other peaceful means.<sup>6</sup> Again Article 47 permitted a State to file an inter-state complaint directly with the Commission without going through the above method.

All complaints that had reached the Commission were subjected to the requirement that all local remedies if they existed had to be exhausted unless it was obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.<sup>7</sup> When this condition had been met, the Commission embarked on a fact finding process to obtain all relevant information on the case. If an amicable solution based on the respect for human and peoples' rights had not been reached, the Commission then prepared a report stating the facts and its findings. This report was transmitted to the States with recommendations where necessary. The Charter did not contain any provision requiring any further action by the Assembly on the Commission's report.<sup>8</sup>

A communication might also be received from entities other than State Parties. Such communication might therefore emanate from individuals, groups, or non-governmental organizations. Certain conditions must however be fulfilled by such communications namely, (a) it must indicate the authors even if they request anonymity; (b) it must be compatible with the Charter of the OAU (AU) and with the African Charter on Human and Peoples' Rights; (c) it must not be written in language that is disparaging or insulting to the State, its institutions or to the OAU (AU); (d) it must not be based exclusively on the media; (e) it must have been sent after exhausting local remedies and within a reasonable time; (f) finally, it must not deal with matters which had been settled by other means.<sup>9</sup> It is important to note that the individual petition system of the African Charter is not designed to deal with individual cases of violations of human or peoples' rights for it permits the Commission to act only in relation to the special cases which reveal the existence of series of serious or massive violations of human and peoples' rights.<sup>10</sup>

When the Commission found that a particular complaint was admissible, it was required by Article 58 to forward the same to the Assembly of Heads of State and Government which had the prerogative of requesting it to make an in-depth study and report back. The in-depth study and report that the Commission prepared when authorized to do by the Assembly remained confidential until such a time as the latter decided that it should be published.<sup>11</sup> And by Article 59 (3), even the general or annual report of the Commission on its overall activities may only be published after it has been considered by the Assembly of Heads of State and Government.

## **2. Establishment of the African Union and the African Court of Justice**

The transition from the Organization of African Unity (OAU) to the African Union (AU) was consummated on 9<sup>th</sup> July, 2002, in a colourful ceremony in Durban. The transformation brought significant structural and functional changes to the Organization,<sup>12</sup> among them the establishment of the African Court of Justice as one of the enforcement organs of the African Charter. Article 18 of the Constitutive Act of the Union establishes the Court while Article 2 of the Protocol of the Court of Justice of the African Union confirms it as the principal judicial organ of the Union. Access to the Court is open to the African Commission, a State Party

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<sup>4</sup>.This jurisdiction now lies with the African Court on Human and Peoples Rights.

<sup>5</sup>.Article 47.

<sup>6</sup>.Article 48.

<sup>7</sup>.Article 50; Rule 97, Commission's Rules of Procedure, 1995.

<sup>8</sup>.R. Amoah, "The African Charter on Human and Peoples' Rights- An Effective Weapon for Human Rights" (Accra: *Journal of International and Commercial Law*, vol. IV, 1992) pp. 226-253.

<sup>9</sup>.Article 56.

<sup>10</sup>.Article 58 (1).

<sup>11</sup>.Article 59 (1).

<sup>12</sup>.A.I. Egiebade, "From OAU to AU: The Quest for Development" (Lagos: *The Constitution*, vol. IV no. 3 2004) pp. 73-91.

against whom a complaint is made, a State Party whose citizen is the victim of the violation, a State Party that has lodged the complaint before the Commission, and African inter-government organizations.<sup>13</sup>

The Court can also allow individuals and non-governmental organizations with observer status to bring cases. When this happens, it acts like a Court of first instance. The Court may call for the view of the Commission and have regard to Article 56 of the Charter on admissibility of cases emanating from non-state parties by the African Commission. The Court which is constituted by a minimum of seven judges<sup>14</sup> can provide remedies which include compensation and interim measures to forestall irreparable harm. Its judgment must be given within 90 days of conclusion of submissions. The onus of interpreting the African Charter or Constitutive Act, any question of international law and several other judicial functions lie with the Court.<sup>15</sup>

Article 3 of the Protocol provides that the jurisdiction of the Court covers all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol itself, and any other relevant human rights instruments ratified by the States concerned.<sup>16</sup> Some writers<sup>17</sup> have argued that this Article appears to confer an almost unlimited substantive jurisdiction on the Court and that because this is not confined to the African Charter, it potentially makes the Court an enforcement body for other human rights treaties ratified by African States. This situation, salutary as it might be, is prone to conflicts given that most United Nations treaties have their own implementation machinery. A possible way out is that the African Court would avoid issuing interpretations which are at odds with those of the United Nations treaty bodies. The Court also has the mandate to issue advisory opinions at the request of the African Union or any of its organs on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject-matter of the opinion is not related to a matter being examined by the Commission.<sup>18</sup> The substantive mandate of the Court is considerably broader than that of the Commission.<sup>19</sup> Earlier in 1998, the Assembly of Heads of State and Government of the Organization of African Unity had adopted a protocol to the African Charter on Human and Peoples' Rights for the creation of an African Court on Human and Peoples' Rights.

### **3. African Court on Human and Peoples' Rights**

Discussions for the creation of an African Court on Human and Peoples' Rights had been on-going since 1994 when the Assembly of Heads of State and Government of the then Organization of African Unity meeting in Tunis, Tunisia, adopted Resolution AH GeRes. 230 (XXX) requesting the Secretary-General of the Organization to convene a Government Experts' meeting to ponder in conjunction with the African Commission over the means to enhance the efficiency of the African Commission and to consider in particular the establishment of an African Court on Human and Peoples' Rights. The first and second Government Legal Experts meeting that was later convoked held respectively in Cape Town, South Africa in September, 1995, and Nouakchott, Mauritania in April, 1997. The third Government legal Experts meeting was held in Addis Ababa in December, 1997, and was enlarged to include diplomats. Eventually, a Protocol was adopted in 1998 creating the African Court on Human and Peoples' Rights. The Protocol came into effect on January 25, 2005.<sup>20</sup> Consequently, the Eight Ordinary Session of the Executive Council of the African Union meeting in Khartoum, Sudan, on January 22, 2006, voted to elect the first judges of the African Court on Human and Peoples' Rights.

The preamble to the Protocol expressed the belief that the attainment of the objectives of the African Charter on Human and Peoples' Rights required the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights which the Protocol recognized as being two-fold: namely, promotion and protection respectively of human and peoples' rights, freedom and duties. It further declared that freedom, equality, justice, peace and dignity were essential objectives for the achievement of the legitimate aspirations of the African peoples. Article 1 of the Protocol established the Court while Article 2 expressed its mission statement as being to "complement the protective mandate of the African Commission on Human and Peoples' Rights". The Court has both contentious and advisory jurisdictions. Its contentious jurisdiction extends to all cases and disputes submitted to it covering the interpretation and application of the Charter, the Protocol, and any other relevant Human rights instrument

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<sup>13</sup> See Article 5 and 6 of the Protocol of the Court.

<sup>14</sup> Article 16 of the Protocol of the Court.

<sup>15</sup> Article 19 of the Protocol of the Court.

<sup>16</sup> See Protocol on the African Court, Article 3 (1).

<sup>17</sup> J. Harrington, "The African Court on Human and Peoples' Rights" in M.D. Evans and R. Murray (ed.) *The African Charter on Human and Peoples Rights; The System in Practice, 1986 -2000* (Cambridge: Cambridge University Press, 2000) p. 318, 611 p.

<sup>18</sup> See Article 4 (1) of the Protocol of the Court.

<sup>19</sup> This is governed by Articles 45 (3), and 55 of the African Charter.

<sup>20</sup> As at 26/11/2004, 19 Countries had ratified the Protocol although it required only 15 ratifications to come into effect in line with Article 34 (3) of the Protocol.

ratified by the States concerned.<sup>21</sup> the Court may also provide an advisory opinion on any legal matter relating to the Charter or any other relevant human rights instruments at the request of a member State of the African Union, any of its organs, or any African organization recognized by the African Union, provided the subject-matter on which the opinion is being sought is not related to a matter being examined by the Commission.<sup>22</sup> By Article 5, access to the Court is open to the Commission; the State Party which had lodged a complaint to the Commission; the State Party against which the complaint has been lodged at the Commission; the State Party which citizen is a victim of human rights violation; and African inter-governmental organizations. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join. The Court may also entitle relevant non-governmental organizations with observer status before the Commission, and individuals to institute cases directly before it where at the time of ratification or any time thereafter, the State concerned makes a declaration accepting the competence of the Court to receive and deal with such cases.<sup>23</sup>

The Court is enjoined by Article 6 of the Protocol to decide the question of admissibility of any case before it by applying the test outlined in Article 56 of the African Charter on Human and Peoples Rights.<sup>24</sup> The case or communication must:

- a. indicate the author even if the latter requests anonymity;
- b. be compatible with the Charter of the African Union or with the African Charter on Human and Peoples' Rights;
- c. not be written in disparaging or insulting language directed against the State concerned and its institutions or to the African Union;
- d. not be based exclusively on news disseminated through the mass media;
- e. be sent after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged.
- f. be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter;
- g. not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the African Union or the provisions of the African Charter on human and Peoples Rights.

The Court may exercise the option of adjudicating over any case or transferring the same to the Commission to handle. And in the consideration of cases before it, the Court is guided by the principle of complementarity between it and the Commission. The Court consists of eleven judges who are nationals of member States of the African Union, elected on an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights. No two judges from the same State may be eligible at the same time.<sup>25</sup> All the judges except the President hold office on a part-time basis. The Court elects its president and one Vice President for a period of two years and they may be elected only once. Aside of performing his judicial functions full time, the president of the Court resides at the seat of the Court.<sup>26</sup> By Article 22, if a judge is a national of any State which is a party to a case submitted to the Court, the judge shall not hear the case. The Court shall examine cases brought before it; if it has a quorum of at least seven judges.

If the Court makes a finding that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. And in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.<sup>27</sup> The Court shall render its judgment within ninety days of having completed its deliberations and the majority judgment of the Court shall be final and not subject to appeal. The Court may review its decision in the light of new evidence as well as interpret its own decision. Reasons shall be given for the judgment of the Court which shall be read in an open court after due notice to the Parties. Where the judgment of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.<sup>28</sup> By Article 29, the Parties to the

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<sup>21</sup>.Article 3 of the Protocol.

<sup>22</sup>.Article 4 (1); By Article 4 (2) the Court is mandated to give reasons for its advisory opinion, and every judge who so elects may deliver a separate or dissenting decision.

<sup>23</sup>.See Articles 5 (3) and 34 (6) of the Protocol.

<sup>24</sup>.Note that this Article is specifically addressed to the African Commission. As it were, it now applies to both the Commission and the Court.

<sup>25</sup>.Article 11 of the Protocol.

<sup>26</sup>.Article 21 of the Protocol.

<sup>27</sup>.Article 27 of the Protocol.

<sup>28</sup>.Article 28 of the Protocol.

case shall be notified of the judgment of the Court and it shall be transmitted to the member States of the African Union and the Commission. The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.

It is mandatory on States Parties to the Protocol to comply with the judgment in any case to which they are Parties within the time stipulated by the Court and to guarantee its execution.<sup>29</sup> Furthermore, the Court shall submit to each regular session of the Assembly, a report on its work during the previous year, specifying in particular the cases in which a State has not complied with the Court's judgment.<sup>30</sup> On Tuesday, 15 December 2009, the African Court on Human and Peoples' Rights gave its first judgment in *In the Matter of Michelot Yogogombaye v. The Republic of Senegal*.<sup>31</sup> The Applicant, Michelot Yogogombaye is a Chadian national who brought this action to prevent the Government of Senegal from conducting the trial of the former Chadian Head of State, Hissene Habre in Dakar, Senegal. The Court decided that it lacked jurisdiction to hear the case as Senegal had not made the declaration under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples Rights granting individuals the opportunity to institute cases directly before the Court. The Senegalese judge, Judge El Hadji Guisse did not participate in proceedings in view of Article 22 of the African Court Protocol and Rule 8(2) of the Interim Rules that provide that a judge who is a national of any State which is a Party to a case submitted to the Court, cannot hear the case.

#### **4. Merger of the African Court of Human and Peoples' Rights with the African Court of Justice**

For reasons directly related to funding constraints, accessibility to justice and remedy, better infrastructure and conditions of service for judges and staff coupled with the overriding need to streamline, co-ordinate, and strengthen the African continental judicial system, the African Union through the Assembly of Heads of State and Government of recent took decisive steps to merge and integrate the African Court of Justice with the African Court on Human and Peoples' Rights through the adoption of an instrument fusing both Courts.<sup>32</sup> The draft instrument would replace the initial protocols establishing the two individual Courts.<sup>33</sup> The new Court named the African Court of Justice and Human Rights<sup>34</sup> (ACJHR) will comprise of two sections, that is, General Section and Human Rights Section.<sup>35</sup> Under the proposed Court locus standi has been broadened to include individuals and relevant human rights organizations accredited by the African Union or any of the Union's organs. Accordingly, the old requirement of an additional declaration to allow individual petitions and those of non-governmental organizations has been dispensed with, and the majority of victims can approach the African Court of Justice and Human rights directly.

Similar to the African Court of Justice, the proposed African Court of Justice and Human Rights will issue final and binding decisions.<sup>36</sup> And the Executive Council of the African Union will be charged with the responsibility of monitoring the execution of its decisions, on behalf of the African Union Assembly.<sup>37</sup> Again, the merger instrument requires the new Court to refer cases of non-compliance with its judgments to the African Union Assembly which shall decide upon measures to be taken to give effect to that judgment and which may thereby impose sanctions by virtue of Article 23 (2) of the Constitutive Act of the African Union. It is only the new Court in practice that will tell whether the structural and jurisdictional defects in the African rights enforcement mechanism sought to be cured by its creation have indeed been successful.

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<sup>29</sup>.Article 30 of the Protocol.

<sup>30</sup>.Article 31 of the Protocol. Recall that on 22/1/2006, the Eighth Ordinary Session of the Executive Council of the African Union elected the first eleven judges of the African Court on Human and Peoples' Rights. The Court had its first meeting on July 2 to 5, 2006. the eleven judges included: Fatsah Quguergouz , President (Algeria), Jean Emile Somda (Burki-na Faso), Gerard Niyungeko (Burundi), Sophia, A.B. Akuffo (Ghana), Kellelo Justina Mansafo-Guni (Lesotho), Hamdi Feraj; Fanoush (Libya), Modibo Tounty Guindo (Mali), Jean Mutsinsi (Rwanda), El Hadji Guisse (Senegal), Bernard Ngoepe (South Africa), George W. Kanyeihamba (Uganda). The Court is located in Arusha, Tanzania.

<sup>31</sup>.Application no. 001/2008, accessed on 12/8/2010 at [http://www.africancourtcoalition.org/editorial.asp?pge\\_id=180](http://www.africancourtcoalition.org/editorial.asp?pge_id=180) .

<sup>32</sup>.See The Draft Protocol on the Statute of the African Court of Justice and Human Rights, EXCL/253 (IX), Annex 11 Rev. submitted to the 9<sup>th</sup> Ordinary Session of the Executive Council of the African Union 25-29 June, 2006, Banjul, The Gambia.

<sup>33</sup>.Article 1 of the Draft Protocol.

<sup>34</sup>.See Article 2 of the Draft Protocol.

<sup>35</sup>.Articles 5 and 16 of the Draft Protocol.

<sup>36</sup>.Article 47 (1) and (2) Draft Protocol.

<sup>37</sup>.Article 44 (6) Draft Protocol.

To date, the African Charter on Human and Peoples Rights has been ratified by Fifty Four (54) African Union Member States of which the latest member that ratified it on 23<sup>rd</sup> October, 2013 is the Republic of South Sudan<sup>38</sup>. As at September 2019, the Court received a total of 238 Applications of which 223 came from individuals, 12 from Non-Governmental Organizations, and 3 from the African Commission. In *Femi Falana v. African Union*<sup>39</sup>, one of the major weaknesses of the Court came to light when the Court relied on Articles 5(3) and 34 (6) of the protocol establishing the it and the earlier decision in the case of *Michelot Yogogombaye v The Republic Senegal*<sup>40</sup>, to decline jurisdiction to entertain the Application. Specifically, Article 5(3) of the Protocol provides that the Court may entitle relevant Non-Governmental Organizations with observer statutes before the commission, and individuals to institute cases directly before it, in accordance with Article 34(6). For its part, Article 34(6) of the Protocol provides that at the time of ratification of the protocol or anytime therefore, the state shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of the Protocol. And the Court shall not receive any Petition under Article 5(3) involving a State Party which has not made such a declaration. The consequence of these provisions and the Court's judgment in this matter is that a great deal of Applications will be declined simply because an unwilling State Party has not made a declaration accepting the jurisdiction of the Court, notwithstanding that it has ratified the Protocol establishing it. This latitude of picking and choosing does not foster the objectives of the African Charter on Human and Peoples Rights which the Court was established to implement.

##### **5. Prospects and Setbacks of Implementation of Human Rights Instruments under the African System**

There a quite number of situations that give hope that the African Charter and its subsequent protocols are not after all a waste of ink and paper. And this may be illustrated by the following positive advances of African human rights. Article 22 of the Protocol establishing the African Court on Human and Peoples' Rights excludes nationals of any State which is a Party to a case submitted to the Court from hearing the case. This position is better than the reverse where a State having a case before a relevant Court world nominate one of its nationals or any other judge of its choice to sit on the panel as its judge advocate as we have in some other jurisdictions<sup>41</sup>This rule of exclusion makes for objectivity and forestalls any possible negative influences.

Again, the African system is the latest of the three major regional human rights systems and as such it took advantage of the benefit of hind-sight and gained experiences from its counterparts. A product of this is that the African Charter on Human and Peoples' Rights is more comprehensive and all-embracing taking into account all the three generations of human rights codifying them in a single document and making them all justiciable. Furthermore, after decades of autocratic governance in the African continent some dating back as early as the time of political independence that has impacted negatively on and in many respects stunted the political and economic development of most Countries, African nations have waken up to the challenges of democracy, human rights and good governance. This was amply demonstrated when on 30 January, 2007, the member States of the African Union adopted the African Charter on Democracy, Elections and Governance during the 8<sup>th</sup> ordinary session of the Assembly of Heads of State and Governments held in Addis Ababa, Ethiopia. The Charter was inspired by the objectives and principles enshrined in the Constitutive Act of the African Union, particularly Articles 3 and 4 which emphasise the significance of good governance, popular participation in the electoral process, the rule of law, and human rights. In the Charter, African governments commit to promote the universal values and principles of democracy, good governance, human rights and the right to development; to tackle unconstitutional changes of governments which almost always occasion insecurity, instability and violent conflicts; and to promote and strengthen good governance through the institutionalization of transparency, accountability and participatory democracy. To drive the message home, Article 23 of the Charter defines unconstitutional change of government to include: any putsch or coup d'Etat against a democratically elected government; any intervention by mercenaries to replace a democratically

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<sup>38</sup> There are actually 54 members of the African Union

<sup>39</sup> Application No 001/2011

<sup>40</sup> Application No 001/2008

<sup>41</sup> By Article 55 of the American Convention on Human Rights, if a judge is a national of any of the States Parties to a case submitted to the American Court of Human Rights, he shall retain his right to hear that case. In fact, under the said Article if a State Party to a case has no judge on the Panel hearing the case, it shall have the right to appoint its national as an *ad hoc* judge on the case. Article 27 (2) and (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms equally gives the State Party to a case before the European Court of Human Rights the right to be represented by a judge on the chamber or grand chamber trying the case in which the State is involved. The practice of *judgeadvocate* is also applicable at the International Court of Justice. In the International Court of Justice (ICJ) case *Cameroon vs. Nigeria* (2004) 1 FR 194 decided on October 10, 2002, Mr. Mbaye and Prince Bola Ajibola were *ad hoc* judges for Cameroon and Nigeria respectively.

elected government; any replacement of a democratically elected government by armed dissidents or rebels; any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; and any amendment or revision of the constitution or legal instruments which is an infringement on the principles of democratic change of government.

Article 25 imposes sanctions against unconstitutional change of government ranging from suspension of the illegitimate government from participating in the activities of the African Union; debarment of the perpetrators from participating in subsequent elections held to restore the democratic order or even holding any positions of responsibility in political institutions of their State; possible trial of perpetrators for various offences in a competent court of the African Union; sanctioning of governments that support, induce or encourage unconstitutional changes of government in other nations; and imposition of various dimensions of economic sanctions. The Charter shall come into force, thirty days after it has been ratified by fifteen members States. There is no doubt that with its lofty and noble objectives both in design, content and implementation, the Charter when it does come into force shall lift the ugly spectre of authoritarianism, coup d'état and sit-tight political hegemonies from the continent. Nevertheless, the ultimate judge will be the Charter in practice.

However, in spite of the above positive developments a number of factors still militate against the observance and human rights on the continent including the lack of political will to enforce international human rights obligations. The peculiarities of political development in Africa continue to constitute obstacle to human rights practice in the continent. With the exception of perhaps Ethiopia and Liberia, most African Countries were subject to many decades of colonialism and neo-colonialism with attendant economic and political stagnation. On achievement of self-government and political independence, the continent went into another sad era that threw up political dictatorships, intolerance, violence and instability. Visionless and dictatorial leaders emerged in almost all Countries of the continent employing raw force, electoral violence and massive rigging to achieve their sit-tight predispositions in the political governance of their Countries. For some of them human rights was a matter that should lie within the domestic affairs of States following the hallowed doctrine of state sovereignty. As such, a mandatory international treaty on human rights is something that should be enforced sparingly. Such Countries employ all manner of devices to whittle down the impact of their human rights obligations including calculated refusal to meet contributory financial obligations and political influences on the reporting system of both the African Commission and Court on Human Rights. For most African Countries, certain human and peoples' rights, example, the right to self-determination, are absolutely unacceptable particularly the variant that could lead to secession. Unfortunately the African Commission appears, sometimes, to be influenced by this pre-disposition in the handling of cases before it. A case in point is the *Katangese Peoples' Congress v. Zaire*<sup>42</sup> where the Commission declared that Katanga though had the right to self-determination was obliged to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of Zaire.

Furthermore, the African Commission and Court on Human and Peoples Rights saddled with the responsibility of implementing the Charter's human rights provisions have enormous problems in executing both promotional and protective functions. The sheer size of the continent and the number of Countries that the Commission has to work in, make its available human and material resources inadequate for effective promotion. With one Commissioner, working part time and responsible for promoting the Charter in three to five Countries chances for effective promotion are far between. With respect to the protective activities of the Court, the Charter with the Protocol establishing the Court, it must be pointed out, was a compromise between the few States that genuinely wanted to promote human rights and the many that were concerned with entrenching non-interference with what they thought to be matters of internal affairs. This compromise resulted in provisions such as the confidentiality principle and the initial restriction of the Commission's concern to investigations and recommendations all of which had tended to lessen the Commission's effectiveness. Again, the most common impediment in pursuing a complaint is the failure by the accused State to respond. And without the resources to make on the spot investigations, protective action is delayed forcing the Court to keep issuing reminders while the victim or victims languish or the situation continues to degenerate.

Similarly, the in-dept study and report that the Commission prepares when authorized to so do by the Assembly of Heads of State and Government of the African Union remains confidential until such time as the Assembly decides that it be published. Even the general or annual report of the Commission is under same inhibition. The apprehension may not be wrongly placed that some untoward thing may happen to suppress such reports or recommendations in the circumstances. Nevertheless, the African Court on Human and Peoples' Rights may provide a panacea. But this is only assured if political intrigues and economic and ideological considerations are not brought to bear on its output. Again, the provision under Article 15 (4) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, to the effect that all judges of the Court with the exception of the President of the Court shall

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<sup>42</sup>.Case No. 75/92, 13 NQHR, 1995, p. 478.

serve on a part-time basis is not helpful to the effectiveness of the Court considering the volume of work that is required of the Court. All the judges ought to have been mandated to perform their functions on a full-time basis. Under the European system the judges serve on a full-time basis.<sup>43</sup>

Finally, the vicious circle of poverty and under-development in Africa permeates State commitments to human right obligations. At the domestic level, some States are apprehensive of domesticating the African Charter because of its socio-economic implications being that some social and economic rights may have become justiciable. At the regional level, poverty, corruption and inadequate expendable resources lead to poor funding of African human rights enforcement mechanisms since subscriptions are not adequately and timeously taken by member States.

## **II. RECOMMENDATIONS**

For effective implementation of the African Charter in particular and the observance of human rights on the continent in general, it is recommended that two chambers should be created out of each operating Court so that while one, the lower chamber, acts as the court of first instance, the other, the higher chamber, would act as a court of appeal. It is important that parties to a matter before the Court have opportunity of appealing an apparently unfair ruling, for this is a major attribute of fair hearing and fair trial. The European system already operates a good example of this proposition. The European Court of Human Rights operates two chambers, namely, the chamber, which operates as a court of first instance and a grand chamber, which operates as a court of appeal.<sup>44</sup> To dispel any element or likelihood of bias judges who sat over a matter at the chamber level excepting the president of the chamber and the judge who sat in respect of the State Party concerned are precluded from sitting over the same matter at the grand chamber.<sup>45</sup> This example has obvious advantages and ought to be adopted by other regional human rights Courts, with the amendment that no judge whatsoever who sat over a matter at the first instance shall sit over the same matter on appeal.

Furthermore, the tenure of all judges and commissioners should be made permanent. All the judges in the European Court of Human Rights are full time,<sup>46</sup> and are ordinarily elected for a period of six years.<sup>47</sup> There is also security of service in that a judge cannot be dismissed from his office unless the other judges decided by a majority of two thirds that he has ceased to fulfill the required conditions of service.<sup>48</sup> In the Inter-American system while the commissioners are elected for a term of four years, the judges are elected for a term of six years ordinarily.<sup>49</sup> Again, there is job security in that according to Article 73 of the American Convention, the General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission, or judges of the Court when there are justifiable grounds for such action. And the vote of a two-thirds majority of the member States of the Organization of American States shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required. Members of the African Commission are elected for a term of six years<sup>50</sup> and in line with Rules 1, 2, and 3 of the Commission's amended Rules of Procedure adopted on 6<sup>th</sup> October, 1995, their term of office is part-time. However, the security of their service is as stringent as those under the European and inter-American systems.<sup>51</sup> Again, judges of the African Court are elected for a term of six years all things being equal. However all judges except the President of the Court shall perform their functions on a part-time basis.<sup>52</sup> In view of the enormous responsibilities shouldered by the Commission and the Court which have been discussed extensively in this work, we recommend that the terms of office of both commissioners and judges be made full-time.

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<sup>43</sup>.Article 21 (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that a judge shall not among other things engage in any activity incompatible with the demands of a full-time office.

<sup>44</sup>.Aside of a Committee of three judges which the Courts Chambers may set up for a fixed period of time to handle specific details like questions of admissibility of petitions.

<sup>45</sup>.Article 27 of the European Convention.

<sup>46</sup>.Article 27 of the European Convention.

<sup>47</sup>.Article 23 (1) European Convention.

<sup>48</sup>.Article 24 European Convention.

<sup>49</sup>.Article 37 and 54 respectively of the American Convention. It is not stated specifically in the Convention whether the terms of office of the commissioners and judges are full time or part-time but a combined reading of Articles 71 and 72 draws the irresistible conclusion that they are both full-time.

<sup>50</sup>.Article 36 African Charter.

<sup>51</sup>.Article 39 African Charter.

<sup>52</sup>.Article 15 of the Protocol Establishing the African Court of Human and Peoples' Rights.



Similarly, international human rights treaties including the African Charter must be reformed to insist on creation of visible and effective national structures and institutions for implementation of international judgments and awards. This may be done by States Parties passing domestic legislations that make international human rights awards enforceable directly within the national judicial system. This example has already been taken by Nigeria through the combined effect of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act,<sup>53</sup> and the Fundamental Rights (Enforcement Procedure) Rules, 2009. Article 68(2) of the American Convention providing that that part of a judgment which stipulates compensatory damages may be executed in the Country concerned in accordance with domestic procedure governing the execution of judgments against the State, partly reflects this proposition. It should expand to cover all judgments of the Inter-American Court.<sup>54</sup> If other States in Africa are constrained to follow the Nigerian example, the problem of enforcement of international human rights awards at the domestic forum would be greatly reduced. It is further recommended that African leaders summon the necessary political will to be faithful to their financial obligations to the African Union and that the funding of the Union's important organs and institutions such as the African Commission and African Court on Human and Peoples' Rights be increased and stabilized to enable the institutions effectively discharge the onerous responsibilities placed on their shoulders.

It is finally recommended that Africa should take an innovative step by adopting an obligatory protocol on legal aids. Such protocol should spell out details of assistance by States Parties to persons unable to access regional human rights Courts on account of their impecuniosities and also mandate States Parties to introduce domestic measures to make such assistance effective. Nigeria already has such legislation but it should be expanded to include matters submitted to international human rights Courts and all human rights questions that have become or might become subjects of litigation.<sup>55</sup>

### III. CONCLUSION

This Paper has discussed the implementation machinery of the African Charter on Human and Peoples Rights including their strengths, weaknesses and prospects. The Paper has concluded that for a better observance of human rights on the African continent the Charter should be strengthened through the infusion of adequate funding and political will on the part of State Parties of the African Union to be faithful to their obligations under the African Charter including the creation of effective, realistic and affordable municipal remedies in cases of human rights violations.

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<sup>53</sup> .Laws of the Federation of Nigeria, 2004.

<sup>54</sup> .There is no equivalent provision in the African and European systems.

<sup>55</sup> .See Legal Aid Act Cap. L 9 vol. 8 Laws of the Federation of Nigeria, 2004. This Act replaced the Legal Aid Act, 1977. It is to be noted that the legal aids scheme in Nigeria is as yet grossly underfunded.