

Realising the effective enforcement of civil and political rights in Africa: an analysis of the African Charter on Human and Peoples' Rights.

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2019

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**REALISING THE EFFECTIVE ENFORCEMENT OF CIVIL AND
POLITICAL RIGHTS IN AFRICA: AN ANALYSIS OF THE AFRICAN
CHARTER ON HUMAN AND PEOPLES' RIGHTS**

**THIS THESIS IS SUBMITTED IN FULFILMENT OF THE
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ROBERT GORDON UNIVERSITY**

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AUGUST 2019

Declaration

I, Chimere Arinze Obodo, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work, nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the university to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

Student number.....

Signature

Dedication

This thesis is dedicated to my wife, Chinazor Doris Obodo, and children, Chimerendu, Chizirim, and Chizigaram, who have always loved me unconditionally.

Acknowledgement

I want to express my sincere gratitude to my principal supervisor, Dr Paul Arnell, who saw me as a person to be nurtured and encouraged. His dedication to duty, patience, motivation, immense knowledge and guidance helped me all through my research and writing of this thesis. Besides my principal supervisor, I would like to thank Dr Elimma Ezeani, my second supervisor, whose enlightenment, encouragement, motivation, ideas and insightful comments made me keep a clear vision while on this journey.

I would especially thank my family. Words cannot express how grateful I am to my parents Prof Godfrey and Lady Nnenna Obodo, my siblings and in-laws for all the sacrifices that you have made on my behalf, helping to nurture and take care of my children in my absence and your dedicated partnership for success in my life.

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Abstract

The task of drafting the standard of human rights is largely complete, and monitoring and enforcement institutions are functioning as intended. However limited that intent may have been, research has shown that the violation of human rights, particularly civil and political rights, are prevalent in many African countries. In this thesis, the focus is on realising effective enforcement of civil and political rights, using the normative and institutional framework of the African Charter on Human and Peoples' Rights to inform the understanding and challenges to African regional enforcement. This thesis places emphasis on advancing thoughts that are normatively and institutionally open to improvement in the African human rights system. It proposes a reform to the African Charter system that considers the African Court and African Commission jurisprudence instead of transplanting from other regional or international treaties.

This thesis reviews the African Charter as well as scholarly arguments on civil and political rights protection. First, it analyses the international protection of contemporary human rights under the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights in addition to the European Convention on Human Rights and the American Convention on Human Rights. This is done to emphasise the relevance and recognition of civil and political rights in the international sphere and to lay a foundation on which the normative and institutional protection of the African Charter is analysed. Thereafter, it relates the African Charter normative and institutional protection to member states obligations in order to understand the general overview of the prospects and challenges of the African Charter civil and political rights enforcement. Using Nigeria, Tanzania and Benin as case studies to understand state party implementation of African Charter civil and political rights provisions, it examines whether African countries meet their African Charter obligations. In conclusion, this thesis demonstrates that with appropriate reforms, the African Charter civil and political rights provisions can be effectively enforced.

Keywords: Human rights, African Charter, African Union, Organisation of African Unity, African Court, African Commission, International Human rights, Civil and Political Rights, Domestic Enforcement, National Institutions

List of acronyms

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AHSG	Assembly of Heads of State and Government
AG	Attorney General
AU	African Union
CAR	Central African Republic
CBDH	Coimmission Beninoise des Droits de l'Homme
CESR	Centre for Economic and Social Rights
CHRGG	Commission for Human Rights and Good Governance
CLO	Civil Liberties Organisation
CPA	Criminal Procedure Act
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
ECOMOG	Economic Community of West African States Monitoring Group
EU	European Union
FOIA	Freedom of Information Act
HRC	Human Rights Committee
HRGCC	Human Rights and Good Governance Commission
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRDA	Institute for Human Rights and Development in Africa
LDA	Lunatic Detention Act

N	Note
NEPAD	New Partnership for Africa
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission
NHRIs	National Human Rights Institutions
OAU	Organisation of African Unity
OHCHR	Office of the UN High Commissioner for Human Rights
P	Page
Pt	Part
PAP	Pan African Parliament
PARA	Paragraph
SERAP	Social Economic Rights and Accountability Project
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US/USA	United States/United States of America
V	Versus

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CHAPTER ONE: GENERAL INTRODUCTION

1.0 Introduction

The struggle for human rights recognition has evolved alongside world events and revolutions. Alongside these came mechanisms for human rights protection and promotion. For instance, contemporary discourse on human rights protection at the global level is traced to the Universal Declaration on Human Rights (UDHR), enacted under the auspices of the United Nations (UN) in 1948 to forestall a repetition of the atrocities of World War II.¹ The success of the UDHR as a pacesetter of contemporary human rights law has a tremendous positive impact on international human rights discourse.² Whereas the UDHR acts as a common standard of achievement for all peoples and all nations,³ it has influenced many international and domestic human rights instruments across the globe.⁴ This development ranks among the most significant accomplishment of the international community since 1945. At present, the normative standards of human rights are disproportionate to their enforcement because international human rights law enforcement lacks uniformity, which necessitates the need for

¹ Zeid Al-Hassan, 'The United Nations at 70' (2015) 6 *European Human Rights Law Review*, 555; George Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Transnational Publishers, 2003) 16. See also, paragraph 6 of the preamble to Universal Declaration on Human Rights.

² Miia Halme-Tuomisaari and Pamela Slotte, 'Revisiting the Origins of Human Rights: Introduction' in Pamela Slotte and Miia Halme-Tuomisaari (eds), *Revisiting the Origins of Human Rights* (Cambridge University Press, 2015) 6; Andrew Clapham, *Human Rights: A Very Short Introduction* (Oxford University Press, 2015) 5; For a more detailed discussion of the UN and promotion of human rights; see, Myres McDougal and Gerhard Bebr, 'Human Rights in the United Nations' (1964) *American Journal of International Law*, 603; William Wagner, 'The Emergency of International Human Rights Law, Universal Human Rights, The United Nations, and the Telos of Human Dignity' (2005) 3 *Ave Maria Law Review*, 197; George Edwards, 'Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs' (2010) 18 *Michigan State Journal of International Law* 167.

³ Paragraph 8 preamble to the UDHR.

⁴ Andrew Clapham, *Human rights: A Very Short Introduction* (note 2 above) 5; Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited, 2010) 10; Dejo Ololu, *An Integrative Rights-based Approach to Human Rights Development in Africa* (Pretoria University Law Press, 2009) 22; Harold Koh and Lawrence Gostin, 'Introduction: The Human Rights Imperative' in Stanley Herr, 'et al' (eds), *The Human Rights of Persons with Intellectual Disabilities: Different by Equal* (Oxford University Press, 2003) 1. Examples of international human rights instruments influenced by the UDHR include the American Convention (preamble, paragraph 5) and ICCPR (preamble, paragraph 4).

reforms to appropriate human rights instruments when and where necessary to meet human rights concerns.

The contemporary international effort to codify human rights has been progressive. For instance, in addition to the UDHR at the international level, the UN further enacted the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) as distinct instruments for diverse human rights categories.⁵ With the UN adoption of the ICCPR and ICESCR, human rights under the UN auspices comprise rights distilled from these three crucial UN instruments, sometimes referred to as the International Bill of Rights.⁶ However, despite the UN approach, some member states' of the UN soon after the adoption of the UDHR adopted a continental (regional) approach.⁷ At present, mechanisms for human rights protection attract attention both under the UN and the regional systems.

Regional human rights systems have created another form of human rights assessment following the success recorded by the first regional human rights treaty, the European Convention on Human and Rights 1950 (ECHR).⁸ The ECHR success brought about the UN General Assembly Resolution 32/127 of 16 December 1977 encouraging states to consider the establishment of regional machinery for human rights protection.⁹ While the emergence of regional human

⁵ The United Nations General Assembly adopted the ICCPR on 19 December 1966 and it came into force on 23 March 1976 after meeting Article 49 (1) requirement on ratification. The ICCPR has a record of 169 state party ratification, 6 state party signatories, and 22 no action. See, United Nations Human Rights Status of ratification, available at ><http://indicators.ohchr.org/>< accessed 31 May 2018. Similarly, the United Nations General Assembly adopted the ICESER on 16 December 1966 and it came into force on 3 January 1976. See also, Nsongurua Udombana, 'Mission Accomplished? An Impact Assessment of the UDHR in Africa' (2008/2009) 30 Hamline Journal of Public Law and Policy 335.

⁶ According to Jack Donnelly, International bill of Rights comprises of the UDHR, ICCPR and the ICESER. See Jack Donnelly, *International Human Rights* (4th edn, Westview Press, 2013) 7. Further discussion on the relevant UN instrument to this study will be undertaken in chapter two.

⁷ A regional human rights approach allows UN member states to adopt human rights systems with a view to localise international human rights norms and standards, reflecting the particular human rights concerns of the continent. See, United Nations Office of the High Commissioner for Human Rights, 'An Overview of Regional Human Rights System', available at > <https://bangkok.ohchr.org/programme/regional-systems.aspx>< accessed 05 September 2019.

⁸ Rhona Smith, *International Human Rights* (5th edn, Oxford University Press, 2012) 86.

⁹ United Nations General Assembly Resolution 32/127, available at > <http://www.un.org/documents/ga/res/32/ares32r127.pdf>< accessed on 18 March 2019.

rights systems in international human rights discourse has come to stay, it is adjudged to be a distinct human rights system with its norms, institutions and jurisprudence.¹⁰ A practical example is the American Convention on Human Rights (American Convention) 1969.¹¹ Another example is the African Charter on Human and Peoples' Rights (African Charter) 1981 and its enforcement mechanisms- the African Commission and the African Court.¹²

The evolution of the African regional human rights started after the independence of many African countries in the late 1950s and the subsequent pressure on them to recognise the UDHR due to their UN membership.¹³ This is because the European colonisation rules rested on a set of coercive practices that violated democratic values and human rights.¹⁴ Hence, the emergence of independent African countries came with high human rights expectations from within and outside the region.¹⁵ Unfortunately, however, this expectation was dashed in many countries. Instead, many of the newly independent African countries were plunged into various internal armed conflicts; for instance, military dictatorship shortened the implanted constitutional democratic system the colonial masters propagated.¹⁶ In some countries such as Tanzania and Nigeria, opposition politicians were treated as enemies by the ruling elites, amid heightened political

¹⁰ Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Human Rights Protection' (2010) 9(4) Washington University Global University Studies Law Review, 639; Christof Hynes, David Padilla and Leo Zwaak, 'A Schematic Comparison of Regional Human Rights' (2005) 5 African Human Rights Law Journal, 308.

¹¹ The American Convention was adopted on 22 November 1969 and became effective on 18 July 1978. Detailed discussion on the American Convention is found in chapter 2.

¹² The African Charter was adopted by the Organisation for African Unity (OAU) General Assembly on 27 June 1981 in Nairobi, Kenya and came into force on 21 October 1986 after meeting the absolute majority ratification. See OAU Doc. CAB/LEG/67/3/Rev.5. As of January 2019, fifty-four of fifty-five member states of the African Union have ratified the African Charter. Morocco was readmitted into the African Union in January 2017 and at present, is in the process of ratifying the African Charter. The Charter comprises three categories of rights- civil and political rights; social, economic and cultural rights, and group rights.

¹³ Osita Eze, *Human Rights in Africa: Some Selected Problems* (Macmillan, 1984) 23.

¹⁴ Alice Conklin, 'Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895-1914' (1998) 103 American Historical Review, 419.

¹⁵ Oji Umzuruike, *The African Charter on Human and Peoples' Right* (Martinus Nijhoff Publishers, 1997) 22.

¹⁶ Instances of countries where conflicts erupted included Nigeria (civil war of 1967); Sudan (First Sudanese Civil War 1955-1972); Libya and Egypt (1977 Libyan-Egyptian War); Somalia (Algerian Ethio-Somali War of 1977-1978). See, Alade Fawole, 'A Continent in Crisis: Internal Crisis and External Interventions in Africa' (2004) 103 African Affairs, 297.

rivalry; multiparty democratic systems were turned into one party or authoritarian systems; and, military coup d'états swept across many states in the continent.¹⁷ In all these events, violations of international civil and political rights were common, with little or no interference from the OAU.¹⁸

An overall assessment by researchers reveals that human rights suffered a significant blow in many post-independent African countries.¹⁹ For instance, the undemocratic rule that swept many of these countries deteriorated into open hatred and discrimination amongst ethnicities. As a result, there were killings, torture and other human rights violations, and the expulsion of non-nationals from some other African countries.²⁰ Given these instances, the human rights situation in Africa distressed international and local observers and scholars. For instance, while Ikome argued that many African states attained political independence as fragmented states,²¹ Eno submitted that the European colonial masters left the continent in disarray and a deplorable shape at the time of the independence of many African countries.²² However, these assertions cannot be entirely accurate given that human rights violations perpetrated by the new African leaders were as a result of their failure to take human rights seriously. Instead, in their quest

¹⁷ Oji Umzuruike, *The African Charter on Human and Peoples' Right* (n 15 above) 22. Take, for instance, Nigeria, soon after gaining independence in 1960 witnessed two coup d'états and a civil war between 1960 and 1970, and this resulted in the death of millions of people and the destruction of property. See Wanye Nafziger, 'The Political Economy of Nigeria's Relentless Conflicts' (2010) 5 (2) *The Economics of Peace and Security Journal*, 10.

¹⁸ Ben Kioko, 'The Right of Intervention under the African Union Constitutive Act: From Non-Interference to Non-Intervention' (2003) 85 *International Review of the Red Cross*, 807; Makau Mutua, 'The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa' (1996) 17 (3) *Michigan Journal of International Law*, 591.

¹⁹ Ibid. see also, Oji Umzuruike, *The African Charter on Human and Peoples' Right* (n 15 above) 24.

²⁰ Notable amongst these examples include, Uganda deportation of all non-Ugandan citizens in the 1970s, Ghana's deportation of all foreigners between 1969 and 1970, Cameroon's deportation of Nigerians soon after independence, and many other examples. See, Aderanti Adepoju, 'Illegals and Expulsion in Africa: The Nigerian Experience' (1984) 18 (3) *The International Migration Review*, 426.

²¹ According to Ikome, many African states at independence lacked physical or institutional infrastructure to engender development and compete favourably with European counterparts. Francis Ikome, *From the Lagos Plan of Action (LPA) to the New Partnership for Africa's Development (NEPAD): The Political Economy of African Regional Initiatives* (PHD Thesis, Department of International Relations – University of Witwatersrand, December 2004) 1.

²² Robert Eno, *Human Rights, Human Development and Peace: Inseparable Ingredients in Africa's Quest for Prosperity* (PHD Thesis, School of Law- University of Witwatersrand, January 2008) 4.

to consolidate power and control, African leaders gave human rights protection and enforcement a back seat.

Currently, regional human rights safeguards in the African continent are intensely debated, mainly, under the African Charter and its institutions- the African Commission and the African Court.²³ The African Charter comprises the following categories of rights- civil and political rights, peoples' rights and socio-economic rights, and as of July 2019, fifty-four of the fifty-five member states of the African Union (AU) have ratified the African Charter.²⁴ In addition to the ratification of the African Charter, many AU member states are also signatories to other international human rights treaties such as the UDHR, ICCPR, ICESCR, and other AU human rights treaties.²⁵ Being a state party to these instruments demands some human rights obligations, which states ought to respect.

For instance, article 1 of the African Charter specifically mandates state parties to recognise the rights, duties and freedoms enshrined in the Charter by adopting legislative or other measures to give effect to them. To meet this

²³ Nsongurua Udombana, 'Eyeing the Promised Land: The Wearisome Quest for an Effective Regional Human Rights Enforcement Mechanism in Africa' (2014) 1 *Transnational Human Rights Review*, 179; Nsongurua Udombana, 'Mission Accomplished? An Impact Assessment of the UDHR in Africa' (n 5 above); Morris Mbondenyi, *International Human Rights and their Enforcement in Africa* (Law Africa Publishing, 2011); Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', (1995) 35 *Virginia Journal of International Law*, 342; Osita Eze, *Human Rights in Africa: Some Selected Problems* (n 13 above); Vincent Nmeihelle, *The African Human Rights System: Its Laws, Practices and Institutions* (Martinus Nijhoff Publishers, 2001); EI-Obaid Ahmed EI-Obaid and Kwadwo Appiagyei-Atua, 'Human Rights in Africa -A New Perspective on Linking the Past to the Present' (1996) *McGill Law Journal*, 819; Oji Umozuruike, *The African Charter on Human and Peoples' Right* (n 15 above); Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law*, 902; Oji Umozuruike, 'The African Charter on Human and Peoples' Rights: Suggestions for more Effectiveness' (2007) 13 *Annual survey of international and comparative law*, 1; Fatsah Onguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers, 2003); Ziyad Motola, 'Human Rights in Africa: A Cultural, Ideological, and Legal Examination' (1998-1999) 12 *Hastings International and Comparative Law Review*, 373; Christof Heyns, 'The African Human Rights System: In need of Reform' (2001) 2 *African Human Rights Law Journal*, 155; Vincent Nmeihelle, 'Development of the African Human Rights System in the Last Decade' (2004) 11 (3) *Human Rights Brief*, 6; Magnus Kilander, 'Human Rights Developments in the African Union during 2014' (2015) 15 *African Human Rights Law Journal*, 537; Racheal Murray and Lloyd Amanda 'Institutions with Responsibility for Human Rights Protection under the African Union' (2004) 48 (2) *Journal of African Law*, 165.

²⁴ Details on list of ratification is found on African Charter on Human and Peoples' Rights Ratification Table, available at > <https://www.achpr.org/ratificationtable?id=49> last accessed 05 September 2019.

²⁵ Such include Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003; African Charter on the Rights and Welfare of the Child 1990; African Charter on Democracy, Elections and Governance 2011.

mandate, state parties are expected to enshrine human rights in domestic legislation and constitutions. At present, many African state constitutions contain human rights provisions.²⁶ That notwithstanding, human rights violations by state actors, especially in the civil and political rights category, have remained rife in many African countries.²⁷ This is not to suggest that African countries are alone in human rights violations.²⁸ This concern is legitimate and must be taken seriously by ensuring state parties meet their international human rights treaty obligations. To this end, it is essential to note that despite the highlighted international, regional and domestic recognition of human rights as a distinct branch of law with its norms and institutions, the concept of human rights has remained difficult to define.²⁹

Human rights discourse shows that the international community has not been able to define human rights in any of the existing human rights instruments. Whether this is intentional due to the cultural and economic divide cannot be ascertained. However, since the recognition of human rights by the international community, several scholars have offered various definitions. The most common definition is that human rights are inherent to the condition of humanity and cannot be taken away except in the circumstances considered and reasonably provided by law.³⁰ This definition seems to be acceptable and reflects the idea of contemporary human rights instruments. Similarly, Donnelly,³¹ Villiers,³²

²⁶ Examples are sections 33-46 of 1999 Constitution of Nigeria; articles 8-40 of 1990 Constitution of Benin; and, articles 12-30 of 1977 Constitution of Tanzania.

²⁷ Amnesty International, *Africa 2017/2018*, available at > <https://www.amnesty.org/en/countries/africa/report-africa/>< accessed 10 April 2019; United Nations Human Rights Office of the High Commissioner, *UN Human Rights Report 2017*, available at > https://www2.ohchr.org/english/OHCHRreport2017/allegati/Downloads/1_Whole_Report_2017.pdf< accessed 10 April 2019; Human Rights Watch, *Africa*, available at ><https://www.hrw.org/africa>< accessed 10 April 2019.

²⁸ Human rights violation is also visible in some Asian countries such as Saudi Arabia, China and Yemen, and South America countries such as Venezuela.

²⁹ Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 (4) *The American Journal of International Law*, 783; Osita Eze, *Human Rights in Africa: Some Selected Problems* (n 13 above) 1.

³⁰ Magdalena Supulveda, 'et al', *Human Rights Reference Handbook* (3rd edn, University for Peace Press, 2004) 3.

³¹ Jack Donnelly, *Universal Human Rights: In Theory and Practice* (Cornell University Press, 2013) 17; Jack Donnelly, *International Human Rights: Dilemmas in World Politics* (2nd edn, Westview Press, 1998) 18.

³² Peter Villiers, *Human Rights: A Practical Guide for Managers* (Kogan Page Limited, 2001) 1.

Dembour³³ and Howard³⁴ associated human rights as being inherent to every human being, a right which is owed to the entire human family. The above definitions support the universal ideology of human rights, which suggests that every individual is entitled to human rights. Indeed, the central ideology of universal human rights promoters is that human rights should be applied at all times irrespective of culture, political background, economic situation and moral values attributable to any state.³⁵

Furthermore, a human right has been defined as 'a universal moral right, something which all men, everywhere, at all times ought to have, something which no one may be deprived of without a grave affront to justice, something which is owing to every human being simply because he is human'.³⁶ Similarly, while Gordon defines human rights as moral rights of high priority,³⁷ Baehr thinks that human rights are values, standards or rules regulating state actions towards their citizens and non-citizens.³⁸ However, understanding human rights on the basis of morality that are not internationally agreed can be detrimental to an international consensus and understanding of human rights because of the culturally diverse nature of the globe. For instance, protection of rights may be subject to domestic religious/cultural values or legal system, which makes it problematic to advance the UN human rights approach under the UDHR.

Human rights definition has been attempted from its legal relationship characteristics. For instance, human rights law provides a relationship between the state and the individual on the one hand, and between the state and the

³³ Marie- Beneditcte Dembour, *Who Believes in Human Rights?* (Cambridge University Press, 2001) 1.

³⁴ Rhoda Howard, *Human Rights and the Search for Community* (Westview Press, 1995) 57.

³⁵ *Ibid*; Iigu Ozler, 'The Universal Declaration of Human Rights: Progress and Challenges' (2018) 32 (4) *Ethics and International Affairs*, 395; Durga Das Basu, *Human Rights in Constitutional Law* (Prentice-Hall of India, 1994) 5. However, such an approach seems to be too generalised because not all entitlements to human beings can be classified as human rights in our relativistic world. According to Henkin, human rights are universal rights accruing to all human beings that are fundamental to human existence, which can neither be forfeited, transferred nor waived. See, Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 2.

³⁶ Alison Rentein, *International Human Rights: Universalism versus Relativism* (Sage, 1990) 47.

³⁷ John-Stewart Gordon 'Human Rights and Cultural Identity' (2015) 8 (2) *Baltic Journal of Law and Politics*, 112.

³⁸ Peter Baehr, *Human Rights: Universality in Practice* (Palgrave Macmillan Press Limited, 1999) 1.

international community, on the other.³⁹ In this regard, abuse of human rights establishes a possibility of investigation and litigation in either the international (regional) or national institutions.⁴⁰ Hence, Easterly⁴¹ defines human rights as 'one where a human rights crusader could identify WHOSE rights are being violated and WHO is the violator'. In his analysis, Easterly further asserts that such an understanding of human rights is what has historically led to human rights progress across the globe.⁴² The main benefit of this definition is that it provides a clear understanding of the parties to human rights complaints.

In spite of the above attempts at defining human rights, there is no unanimity of view in the definition of human rights by legal and political writers.⁴³ In this vein, Gasiokwu concluded that every attempted definition of human rights is often blighted by the authors' philosophical and ideological predisposition.⁴⁴ Despite the absence of an internationally accepted definition of human rights, one thing that is certain in the 21st century is that human beings have rights: human rights. Hence, the difficulty of accepting an international definition of human rights is not a problem in the contemporary world because virtually every international human rights treaty contains a list of rights which member states must recognise, respect and enforce. Nevertheless, enforcement of international law is linked with recognition.

For many decades since the international recognition of contemporary human rights, enforcement is very often problematic.⁴⁵ Nakagaki refers to

³⁹ Todd Landman, 'The Scope of Human Rights: From Background Concept to Indicators' (2005) Paper prepared for the AHRI-COST Action meeting, Oslo, available at ><http://www.corteidh.or.cr/tablas/R22302.pdf>< accessed 26 September 2018.

⁴⁰ Sirkku Hellsten, 'Human Rights in Africa: From Communitarian Values to Utilitarian Practice' (2004) 5 (2) Human Rights Review, 61.

⁴¹ William Easterly, 'Poverty is not a Human Rights Violation' (Aid Watch, 5 June 2009), available at ><http://www.nyudri.org/aidwatcharchive/2009/06/amnesty-international-responds-to-poverty-is-not-a-human-rights-violation>< accessed 26 September, 2018.

⁴² *Ibid.*

⁴³ John-Stewart Gordon 'Human Rights and Cultural Identity' (n 37 above); Andrew Clapham, *Human Rights: A Very Short Introduction* (n 2 above) 5; Christian Fernandez and David Puyana, 'Building Human Rights, Peace and Development within the United Nations' (2015) 3 Russia Law Journal, 58.

⁴⁴ Martin Gasiokwu, *Human Rights: History, Ideology and Law* (Fab Anieh Ltd, 2003) 1.

⁴⁵ Douglas Donoho, 'Human Rights Enforcement in the Twenty-First Century' (2006) 35 Georgia Journal of International and Comparative Law, 1.

implementation gaps as the difference between laws on paper and how they function in practice, which can be caused by a combination of political, legal, economic, social and cultural factors.⁴⁶ According to Nakagaki, a state is bound to enforce rights that are recognised in its statutes as well as fulfil obligations in international treaties to which it is a party.⁴⁷ In this regard, considerable international and regional efforts have been expended over time to improve human rights enforcement due to gaps in international human rights protection.⁴⁸

The extensive scope of human rights has led to the involvement of other international and sub-regional institutions in the enforcement of human rights in Africa. For instance, the establishment of the International Criminal Court (ICC)⁴⁹, and subregional bodies such as the Economic Community of West African States (ECOWAS) Court⁵⁰ and Southern African Development Community (SADC) Tribunal.⁵¹ The ICC is an international independent judicial institution for

⁴⁶ Maiko Nakagaki, 'Closing the Implementation Gap' in Centre for International Private Enterprise and Global Integrity (eds), *Improving Public Governance: Closing the Implementation Gap between Law and Practice*, (2013) Centre for International Private Enterprise, available at > https://www.cipe.org/wp-content/uploads/2012/10/GI-CIPE_Implementation-Gap_for-web.pdf< accessed 14 June 2018.

⁴⁷ Ibid.

⁴⁸ Douglas Donoho, 'Human Rights Enforcement in the Twenty-First Century' (n 45 above).

⁴⁹ The Rome Statute was adopted in 1998 as the first permanent international tribunal to prosecute heinous crimes and by meeting Article 126 requirement, the Rome Statute came into force on July 1, 2002. The ICC is a creation of the Rome Statute, which is the product of extensive efforts to commit states towards an international judicial system, resulting from the successful outings of the Nuremberg and Tokyo tribunals respectively, as well as the ad hoc tribunals for the trial of Rwandan and Yugoslavian genocides. The ICC is an international independent judicial institution for prosecutions of heinous international crimes such as genocide, crimes against humanity, and war crimes. See, Benjamin Appel, 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' (2016) 62 (1) *Journal of Conflict Resolution*, 3; Catherine Gegout, 'The International Criminal Court: Limit, Potential and Conditions for the Promotion of Justice and Peace' (2013) 5 *Third World Quarterly*, 800; Enyew Alebachew, 'The Relationship between International Criminal Court and Africa: From Cooperation to Confrontation?' (2015) 3 *Bahir Dar University Journal of Law*, 1.

⁵⁰ The West African sub-regional institution known and called ECOWAS was established on May 28, 1975, by Heads of States and Governments in West Africa sequel to the signing of the treaty of Lagos. It originally comprises of sixteen states within the West African sub-region, but Mauritania opted out in 2000. These are Benin, Burkina Faso, Cote D'Ivoire, The Gambia, Ghana, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Cape Verde. For further details, see, Femi Falana, *ECOWAS Court: Law and Practice* (Legaltext Publishing Company, 2010) 1; Muhammed Ladan, *Introduction to ECOWAS, Community Law, Integration, Migration, Human Rights, Access to Justice, Peace and Security* (Ahmadu Bello University Press, 2009) 1.

⁵¹ The Southern African Development Community (SADC) is a political and economic institution that provides a framework for regional integration. Although the SADC started as the Frontline States whose objective was political liberation of Southern Africa, it was preceded by the Southern African Development Coordination Conference (SADCC), which was formed on April 01, 1980 with the adoption of the Lusaka Declaration.

prosecutions of heinous international crimes such as genocide, crimes against humanity, and war crimes.⁵² As a court of last resort in the fight to end impunity and grievous crimes, its jurisdiction covers crimes committed by State Parties and non-State Parties where such state willingly accepts the court's jurisdiction or where a situation is referred to the prosecutor by the United Nations Security Council (UNSC) under article 13 (b). On the other hand, sub-regional bodies such as the ECOWAS and SADC focus more on inter-governmental relations through the advancement of economic integration in West Africa. The trends towards sub-regionalism are in part, an outcome of the necessity of pooling national resources for protection in a divided world buffeted on all sides by conflicts and economic crisis.⁵³ In 1992, however, ECOWAS commissioned a review of its founding treaty, and the resultant report recommended a shift from an exclusive focus on inter-governmental relations to other factors including human rights.⁵⁴ The Revised ECOWAS Treaty as part of its fundamental principles, urged states parties to among other objectives to recognise, promote and protect the human and people's rights in accordance with the provisions of the African Charter on Human and Peoples Rights.⁵⁵ The recognition of human rights as a fundamental value in the Revised Treaty is of great importance as it assimilates human rights into common political values underpinning integration that will lead to the establishment of an economic union. Similarly, the Treaty of the SADC being mindful of the need to involve the people of the region further recognised human rights as one of its principles.⁵⁶ However, in recent years, SADC governments have taken retrogressive steps to weaken and undermine key human rights protection mechanisms – SADC Tribunal, by stripping it of its mandate to receive complaints

⁵² See generally, Sixth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 2012. Serious international crime is defined in article 2 (b) of the Organized Crime Convention as meaning 'conduct constituting an offence punishable by maximum of deprivation of liberty of at least four years or a more serious penalty'. See also, article 5-8 of the Rome Statute.

⁵³ Henry Alisigwe, 'Regionalism as a Tool for International Economic Development' in Uba Nnabue (ed) *Themes on Law of Development* (ApplauseB Multi-Sectors Ltd, 2017) 273.

⁵⁴ Femi Falana, *ECOWAS Court: Law and Practice* (n 50 above) 3.

⁵⁵ See Article 4(g) of the Revised Treaty. In the main, the Community Court was clothed with a human rights jurisdiction. See also, Muhammed Ladan, *Introduction to ECOWAS, Community Law, Integration, Migration, Human Rights, Access to Justice, Peace and Security* (n 50 above) 268.

⁵⁶ Paragraph 7 to the preamble of the SADC and article 4 (c) of the SADC Treaty.

from individuals and organisations, leaves it only to adjudicate between member states disputes.⁵⁷

The fundamental question of this thesis is: are human rights adequately recognised and enforced under the African Charter, especially the civil and political rights category?⁵⁸ Where the answer to this question is positive, then one is left with the challenges of enforcement. However, where the answer is negative and indicates normative inadequacies as to coincide with the justification for this thesis, it raises other fundamental questions. It will be highlighted in this thesis that both normative shortcomings and weak enforcement mechanisms erode the essence of having regional human rights systems as safety nets. Therefore, this thesis will demonstrate that with appropriate reforms to the African Charter frameworks, the civil and political rights provisions can be effectively realised. Such reform has become necessary given the increasing violations of civil and political rights in many African countries and the ineptitude of existing AU organs in meeting their human rights obligations.⁵⁹ Meanwhile, this thesis will examine the provisions of the UDHR, ICCPR, the ECHR and American Convention as a foundation for the analysis of the African Charter protection of civil and political rights. Specifically, it is essential to note that these human rights instruments

⁵⁷ Human Rights Watch, 'SADC: Recommit to Human Rights Protection' (2017) available at > <https://www.hrw.org/news/2017/08/07/sadc-recommit-human-rights-protection>< accessed 19 October 2019.

⁵⁸ In this study, therefore, while the term 'African human rights system' refers to the numerous human rights norms and their institutions under the African Union, the term 'African Charter system' remains specific to the African Charter and its enforcement institutions; namely, the African Commission and African Court. Further, in the light of the above discussion, categories of rights are used to refer to various classification or generation of human rights; namely, civil and political rights, socio-economic rights, and group or collective rights.

⁵⁹ Extensive discussion on the AU is conducted in chapter 4 to evaluate the role and relevance of the AU to regional human rights enforcement.

predate the African Charter and have the potential to act as a source of inspiration to African Charter jurisprudence⁶⁰ and reforms.⁶¹

1.1 Background and statement of the problem

The world over, human rights litigators, activists, and scholars actively seek for means to ensure effective enforcement of human rights. This is evident following the international, regional and national struggle to effectively guarantee the full enjoyment of rights enshrined in various human rights instruments. However, in spite of the normative success in different human rights instruments, the focus on human rights has shifted to the enforcement of the distinct human rights instruments, including the African Charter.⁶² In this regard, overcoming enforcement gaps would require approaches that focus on improving the quality of laws and enhancing entities that have the mandate of enforcement.⁶³ This study is undertaken because institutions and norms for human rights protection in Africa are inadequate to guarantee the effective realisation of civil and political rights enforcement.

Human rights, primarily civil and political rights violations have remained rife in many African countries. Evidenced in the case law jurisprudence at the African Court and the African Commission, complaints against arbitrary killing,

⁶⁰ Article 60 provides that the African ‘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 Organisation 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 provisions of various instruments adopted within the Specialised Agencies of the United Nations’. However, article 61 enshrines that ‘the Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or specific international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine’.

⁶¹ Article 68 of the African Charter enshrines that the African Charter may be amended at the request of a state party.

⁶² Hurst Hannum, ‘Reinvigorating Human Rights for the Twenty-First Century’ (2016) 16 Human Rights Law Review, 409; Eric Posner, ‘The Case against Human Rights’ available at > <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights>< accessed 14 December 2018; Terry Collinsworth, ‘The Key Human Rights Challenge: Developing Enforcement Mechanism’ (2002) 15 Harvard Human Rights Journal, 183.

⁶³ Maiko Nakagaki, ‘et al, ‘Closing the Implementation Gap’ in Centre for International Private Enterprise and Global Integrity (eds) *Improving Public Governance: Closing the Implementation Gap between Law and Practice* (n 46 above).

torture or cruel, inhuman or degrading treatment, oppression of press freedom, restriction on movement and expression, severe discrimination and killing of unarmed protesters have remained dominant across the African continent.⁶⁴ However, these violations seem to have more resonance in states which are under oppressive regimes,⁶⁵ pre and post-electoral violence,⁶⁶ internal armed conflicts,⁶⁷ and terrorism.⁶⁸ Part of the reason for the poor realisation of effective enforcement of the African Charter rights is because the African Charter lacks 'teeth' to ensure its implementation,⁶⁹ and other peculiar challenges such as restricted access to the African Charter institutions⁷⁰ and poor state party compliance with decisions

⁶⁴ See generally, chapter 3 discussion on case law jurisprudence and the several reports of international human rights bodies on several African states such as Amnesty International, Human Rights Watch, amongst others. For instance, between January and May 2019, armed security agents in Nigeria, Sudan, Mali and Benin have killed many unarmed protesters. See, BBC News, 'Sudan Crisis: Official admits to 46 Protest Deaths' 2019, 06 June, available at > <https://www.bbc.co.uk/news/world-africa-48535165>< accessed 23 September 2019.

⁶⁵ According to Freedom House Report 2018, several African states including Ethiopia, Libya, Central African Republic, Sudan, Equatorial Guinea, Eritrea, Nigeria, South Sudan, Gabon, Burkina Faso, Zimbabwe, Mauritania, Chad, Algeria, Angola, Congo, and South Sudan are some of the leading states with the least civil liberties and political rights. Furthermore, elections have over time brought about violence in some African states such as Nigeria, Kenya, Cote d'Ivoire, Uganda, Egypt, Zimbabwe, Zambia, and Ethiopia. See, Analysis from Freedom House: Freedom in the World 2018, available > <https://freedomhouse.org/report/freedom-world/freedom-world-2018><, accessed 28 June 2018.

⁶⁶ Electoral violence is another dominant factor in many African states. See, Arthur Goldsmith, 'Elections and Civil Violence in New Multiparty Regimes: Evidence from Africa' (2015) 52 (5) *Journal of Peace Research*, 607.

⁶⁷ Some of the states affected by armed conflicts in Africa are South Sudan, Central African Republic, Cameroon, Ethiopia, Democratic Republic of Congo, Libya and Somalia. Electoral violence prior and after the Nigeria 2019 elections resulted in the destruction of property and killing of over 39 persons. See, 'Dozens killed in election violence in Nigeria' available at ><https://www.cnbc.com/news/africa/2019/02/25/dozens-killed-in-election-violence-in-nigeria/>< accessed 24 May 2019.

⁶⁸ According to 2017 Global Terrorism Index, available at > <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf>< accessed 22 June 2018, the following African states are engulfed in different forms of terrorism: Nigeria, Niger, Mali, Libya, Egypt and Somalia. Terrorism is a major threat to civil and political rights enjoyment in many African countries in a twofold way. First, the armed groups have no obligation to abide by international human rights treaties. Secondly, governments in their quest to fight terrorism either limit the enjoyment of some human rights such as the right to freedom of expression and the press, prohibition of cruel and inhuman treatment, and right to personal liberty.

⁶⁹ According to Claude Welch, not establishing a judicial body for enforcement is an indictment on the African region and a clear signal of refusal to give up bad human rights habits. Although the creation of the African Court may have remedied this defect, it seems not to have wholly solved the challenge facing the region. See, Claude Welch, *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organisations* (University of Pennsylvania Press, 1995) 151.

⁷⁰ Kevin Hopkins, 'The Effect of an African Court on the Domestic Legal Order of African States', (2002) 2 (2) *African Human Rights Law Journal*, 235. Article 58 of the African charter mandates the African Commission to draw the attention of the Assembly of Head of States and Government to cases when it finds series of serious or massive violations of human and peoples' rights and the Assembly of Heads of State and Government may further request the African Commission to undertake an in-depth study of this violations.

of the Court and the Commission.⁷¹ Notwithstanding, this thesis will demonstrate that the following may be contributory to poor civil and political rights enforcement in many African countries- (i) absence of a human rights department in the African Union (ii) inadequate post-adjudication procedure for enforcement of findings (iii) inadequate pressure from the AU on member states, and (iv) inadequate or conflicting constitutional protection in many African countries. In all, there is no gainsaying that the success of the African Charter depends on the willingness of African states to incorporate, respect and enforce human rights in their national laws even when in conflict with national courts, laws or ideologies.

1.2 Argument

Contemporary challenges in the area of international human rights discourse have moved from the desirability of rights to enforcement. In its entirety, one can agree that the process of norm-setting has been positively achieved through the adoption of the UDHR, ICCPR, and other UN and regional human rights treaties. On the regional level, efforts are being made to promote and protect human rights in Africa using the African Charter and its mechanisms. In the same vein, the European regional human rights system has been applauded for protecting human rights and fundamental freedoms using the ECHR and its Protocols.⁷² However, the same cannot be said about the effectiveness of the African regional system.⁷³ This is because the African Charter norms and institutions are inadequate to

⁷¹ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7 *International Human Rights Law Review*, 1.

⁷² James Hart, 'The European Human Rights System' (2010) 102 *Law Librarian Journal*, 533; Jean Allen, 'Comparing the European and the Inter-American Courts of Human Rights' in Jean Allen (ed) *A Century of International Adjudication: The Rule of Law and its Limits* (T. M. C. Asser Press, 2000) 93; Jean-Claude Mignon, 'European Court of Human Rights is not Perfect, but it's still Precious' (April 19, 2012) *The Guardian*, available at > <https://www.theguardian.com/law/2012/apr/19/european-court-of-human-rights-human-rights>< accessed 22 March 2019. However, the European system cannot be said to be wholly comprehensive, it is also facing difficulties such as backlog of cases and state party compliance with decisions.

⁷³ George Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, (note 1 above) pg 26. However, it is also argued that that the adoption of the African Charter reflected the will and aspirations of the African people and therefore has met the standards of an international bill of rights. See generally, El-Obaid Ahmed and Kwadwo Appiagyei-Atua, 'Human Rights in Africa: A New Perspective on Linking the Past to the Future' (n 23 above). See also, James Fawcett, *The Application of the European Convention on Human Rights* (Clarendon Press, 1987); John Wright, 'The European Convention on Human Rights: An Analysis and Appraisal' (1977) 3 (2) *Brooklyn Journal of International Law*, 119.

effectively guarantee human rights protection across the continent.⁷⁴ This assertion is founded on human rights abuse history in many African countries and several ongoing violations across all regions of the continent.⁷⁵ Therefore, in the absence of effective enforcement of human rights treaties, the idea of 'free human beings enjoying civil and political freedom and freedom from fear and want'⁷⁶ remain empty thoughts. On this note, this thesis will argue that despite making some progress in the area of human rights law protection, Africa has not adequately realised the effective enforcement of civil and political rights.

1.3 Justification of the thesis

This thesis consists of different components prompting an interesting subject in need of scholarly justification. This section is relevant because it looks at the underpinning reasons for conducting this research.

1.3.1 Justification for analysing the African Charter

The context of the African Charter norms and enforcement institutions have continued to attract scholarly attention due to the unfortunate human rights situation in many African countries. Therefore, this analysis of the African Charter is essential for two primary reasons. First, the African Charter, as the core regional human rights instrument, contains different categories of rights, which permit scholarly appraisal of any of the categories of rights. As will be seen in the literature review, while the socio-economic rights and peoples' rights have received considerable attention, there is a paucity of academic literature on a holistic analysis of the African Charter civil and political rights. Where such literature exists, such analysis focuses on specific rights that form part of the civil

⁷⁴ Vincent Nmehielle, 'Development of the African Human Rights System in the Last Decade' (n 23 above); Osita Eze, *Human Rights in Africa: Some Selected Problems* (n 13 above).

⁷⁵ At present, the following countries are undergoing one form of conflict or another- Sudan, South Sudan, Mali, Democratic Republic of Congo, Central African Republic, Burundi, Somalia, Benin, Chad, Cameroon, Uganda, Egypt, Nigeria, and Niger. Suffice to mention that human rights abuses in these countries are caused by one or more of the following- totalitarian leadership, terrorism, lack of rule of law, lack of independent judiciary, poor electoral procedures, and internal armed conflicts. See, Amnesty International, 'Rights Today in Africa-2018', available at > <https://www.amnesty.org/en/latest/research/2018/12/rights-today-2018-africa/> accessed 29 September 2019.

⁷⁶ See paragraph 3 to the preamble of the ICCPR.

and political rights at the national level but not as a group of rights/category promulgated by the African Charter.

Secondly, the drafters of the African Charter did not intend it to be static.⁷⁷ Although the African Charter has witnessed some level of transformation such as the establishment of the African Commission and the African Court on Human and Peoples Court,⁷⁸ it is still awaiting the coming into force of the African Court of Justice and Human Rights. On this note, new insights towards realising the Charter rights can be accommodated given the opportunity provided in articles 66 and 68.⁷⁹ Primarily, the idea of articles 66 and 68 demonstrate that the Charter is dynamic and can be amended or reformed. Principally, this thesis analyses the African Charter civil and political rights category with a view to suggesting effective means of enforcement.⁸⁰

1.3.2 Justification for studying civil and political rights

Civil and political rights have both instrumental and intrinsic value to human dignity. The inherent value of civil and political rights focuses on the legitimacy of civil and political rights which will not be denied to any individual on the basis of race, colour, sex, religion, national origin, or disability while the instrumental value focuses on the realisation of civil and political rights as a means of enhancing human dignity and equality.⁸¹ Civil and political rights promote individual entitlement to an entirely adequate scheme of equal fundamental liberties.⁸² Therefore, the realisation of civil and political rights creates a duty for state parties to ensure that their institutions do not interfere in the protection and observance of these rights. In other words, the enjoyment of civil and political rights has the

⁷⁷ Articles 66 and 68 of the African Charter permits the enactment of Special Protocols or agreements, if necessary, and the amendment of the present Charter.

⁷⁸ This has been applauded as a significant evolution in the African Charter system. See, Nsongurua Udombana, 'Towards the African Court of Human and Peoples' Rights: Better Late than Never' (2000) 3 (2) Yale Human Rights and Development Journal, 1.

⁷⁹ See note 69 above.

⁸⁰ An 'analysis' principally involves a detailed examination or inquiry into something. See generally, English Oxford Living Dictionary, available at > <https://en.oxforddictionaries.com/definition/analysis>< accessed 11 December 2018.

⁸¹ See the preamble to the ICCPR, paragraphs 1 and 3.

⁸² John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 42.

potential to restrict government interference in issues such as the individual ownership of property.⁸³ However, guaranteeing this category of rights does not involve enormous economic or financial resources, unlike socio-economic rights.⁸⁴

Civil and political rights enjoy universal recognition and acceptance.⁸⁵ In the international sphere, while this category of rights forms the bulk of the UDHR, the UN through the ICCPR has further accepted it as the binding rights of individuals. In addition, the ICCPR has been adjudged one of the most important human rights treaties in the contemporary world, given its universal coverage of rights and broad application to individuals.⁸⁶ Such recognition accorded to civil and political rights is evident in African countries' constitutions which guarantee most civil and political rights as fundamental rights as against socio-economic rights which are recognised as Fundamental Objectives and Directive Principles of State Policy.⁸⁷

In comparison with socio-economic rights, some international human rights instruments forbid violations of certain civil and political rights by state parties even in time of war or public emergencies.⁸⁸ No socio-economic right enjoys this privilege. Whereas this attests the importance of civil and political rights to human dignity and existence, it indicates international rejection of some of the pre-World Wars atrocities such as slavery, torture, and arbitrary deprivation of life. In this regard, there is a need for academic research towards realising effective enforcement of this category of human rights.

⁸³ Reed Amar, *The Bill of Rights* (Yale University Press, 1998) 216-217.

⁸⁴ While this position is maintained because some socio-economic rights such as the right to healthcare, education and work require huge financial commitment in terms of construction, recruitment, training and remuneration. However, such is not required for the enjoyment of many civil and political rights. This is not to suggest that the use of law enforcement agents to maintain peace and order or the conduct of elections do not impose financial burden on government.

⁸⁵ Berta Hernandez-Truyol, 'Civil and Political Rights- An Introduction' (1997) *University of Miami Inter-American Law Review*, 223.

⁸⁶ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, Oxford University Press, 2013) 4. To further show the level of interest by African States in the enforcement of civil and political rights, all African states have ratified the ICCPR except South Sudan and Western Sahara whereas the ICSECR is ratified by all African States except South Sudan, Mozambique, Botswana, and Western Sahara. See, Status of Ratification Interactive Dashboard, available at > <http://indicators.ohchr.org/>< accessed 18 March 2019.

⁸⁷ For instance, see chapter 2 and 4 of 1999 Constitution of Nigeria.

⁸⁸ For instance, see article 4 of ICCPR and article 15 of ECHR.

1.3.3 Justification for studying 'realising effective enforcement'

Human rights are meaningless when they cannot be exercised; hence, enforcement is vital to international law. Enforcement remains a significant problem facing international law, and this is primarily due to the principle of sovereignty.⁸⁹ Enforcement signifies the efforts in making sure a rule, standard, policy or court order is appropriately followed.⁹⁰ Thus, enforcement is a relative term that is synonymous with fulfilling rights and privileges highlighted in international laws. In practice, state parties, while ratifying international treaties commit themselves to its realisation, which includes compliance with the decisions from related monitoring and enforcement bodies.⁹¹ However, this has turned out to be the most difficult challenge facing 21st-century international human rights law.⁹² Therefore, in the absence of effective enforcement, efforts put together during negotiation and enactment of international human rights treaties are a waste of time and resources.

In order to achieve effective enforcement, international human rights instruments have monitoring and enforcement mechanisms.⁹³ Therefore, realising effective enforcement of the African Charter provisions entails the use of the African Court and the African Commission to compel state party obedience or the use of national courts and other related institutions against persons and government agencies, where African Charter rights and freedoms are recognised in state party legislation or constitution. However, the power of these institutions to compel obedience to the provisions of these treaties may vary.

⁸⁹ Andrew Guzman, 'The Consent Problem in International Law' (2011) Berkeley Program in Law and Economics, Work Papers, available at > <https://escholarship.org/content/qt04x8x174/qt04x8x174.pdf>< accessed 11 December 2018; Anu Bradford and Omri Ben-Shahar, 'Efficient Enforcement in International Law' (2010) Chicago Journal of International Law, 375.

⁹⁰ Blacks Law Free Online Dictionary, (2nd edn), available at > <https://thelawdictionary.org/enforcement/>< accessed 11 December 2018.

⁹¹ Roger-Claude Liwanga, 'From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies' (2015) 41 Brooklyn Journal of International Law, 99.

⁹² Douglas Donoho, 'Human Rights Enforcement in the 21st Century' (n 45 above) 1.

⁹³ For example, while the ICCPR is enforced and monitored through the Human Rights Committee, the various regional human rights treaties are enforced through specific regional institutions established for such purpose.

1.4 Research aim and objectives

Civil and political rights promote 'the ideal of free human beings enjoying civil and political freedom and freedom from fear and want'.⁹⁴ To enjoy such freedom, the international community need to strengthen human rights instruments to enhance effective realisation. Thus, this thesis will add to existing knowledge of the African human rights system and will suggest new insights into how civil and political rights can be effectively enforced. As such, this study seeks to explore:

- i. How effective enforcement of civil and political rights can be realised by examining the African Charter normative and institutional provisions.

1.5 Research questions

The central question this thesis seeks to investigate is:

"How and what extent can the enforcement of civil and political rights in the African Charter be effectively realised in contemporary Africa?"

The sub-questions arising from the research question are:

- i. What are the prospects and challenges to effective enforcement of the African Charter civil and political rights provisions?
- ii. To what extent does the African Charter meet the international standard on civil and political rights?
- iii. How has the African Charter institutions interpreted and applied civil and political rights provisions and to what extent have state parties met their obligations under the African Charter?

⁹⁴ See generally, preamble to the ICCPR, paragraph 3.

1.6 Contribution of the thesis

Previous studies of the African human rights system have dealt in detail with issues such as socio-economic rights,⁹⁵ the country-based human rights approach,⁹⁶ the separate analysis of the African Charter institutions,⁹⁷ or the evaluation of the African Charter system.⁹⁸ These studies have raised different issues on the challenges facing the African human rights system. Nonetheless, this thesis will go further by analysing the entire African Charter civil and political rights, how these rights have been interpreted, and the state party compliance with civil and political rights decisions from the African Charter institutions. In so doing, this thesis will provide a piece of updated information on state party compliance with decisions from the African Charter institutions.⁹⁹ In particular, this thesis will contribute to knowledge in many ways:

- Firstly, this thesis closes the gap in literature by analysing civil and political rights provisions under the African Charter. It advances the academic debate on the African human rights system by adding to the body of literature on the African Charter system and international civil and political

⁹⁵ Tulia Ackson, 'Justiciability of Socio-economic Rights in Tanzania' (2015) 23 (3) African Journal of International and Comparative Law, 359; Oguagu Ikepeze, 'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development' (2015) 5 (18) 48; Christain-Jr Nkongolo, 'The Justiciability of Socio-economic Rights under the African Charter on Human and Peoples' Rights: Appraisal and Perspective Three Decades After its Adoption' (2014) 22 (3) African Journal of International and Comparative Law, 492; Taiwo Olaiya, 'Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria' (2015) 8 (3) Journal of Politics and Law, 23; Ajepe Shehu, 'The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience' (2013) 2 Afe Babalola University Journal of Sustainable Development Law and Policy, 101.

⁹⁶ John Mubangizi, 'Some Reflections on Two Decades of Human Rights Protection in South Africa: Lessons and Challenges' (2014) 22 (3) African Journal of International and Comparative Law, 512; Micheal Wambali, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (2009) 53 Journal of African Law, 34.

⁹⁷ Gina Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations' (2013) 13 (3) Human Rights Review, 499; Michelo Hansungule, 'African Courts and the African Commission on Human and Peoples' Rights' in Anton Bosl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (Macmillan, 2009) 233; Gina Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interest of African States' (2007) 51 Journal of African Law, 151.

⁹⁸ Ziyad Motala, 'Human Rights in Africa: A Cultural, Ideological and Legal Examination' (n 23 above).

⁹⁹ The only attempt at investigating the implementation and compliance of the findings of the regional institutions was by Racheal Murray and Debra Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press, 2015). This work, however, concentrated only on the African Commission on Human and Peoples Rights without understudying the African Court findings.

rights under the ICCPR by submitting contemporary issues in this subject area.

- Secondly, through an analysis of civil and political rights norms and case law jurisprudence, this thesis will evaluate whether the African Charter meets the international standard on civil and political rights. Therefore, it fits into a more extensive research geared towards understanding the international concept, origin, development and pursuit of human rights with particular reference to civil and political rights.
- Thirdly, this study advances academic knowledge of state party compliance with the decisions of the African Court and African Commission. This contribution is necessary because it will highlight the difference between human rights theory and practice, and the overall state party attitude towards their human rights obligations.
- Finally, this study will suggest new insights for realising the effective enforcement of civil and political rights and the African Charter in general. Hence, this research findings would act as a guide for policymakers in reforming the regional human rights system.

1.7 Overview of literature

Particularly in the international human rights context, there is a wealth of scholarly writing to demonstrate its progress, prospects and challenges. Against this backdrop, a review of literature is necessary for academic research of this sort because it sets out to acknowledge and critique existing research on the subject of this thesis. However, this thesis does not attempt to review the exhaustive list of literature in the international human rights field but would concentrate on relevant articles under the following two categories: universalism and regional human rights; and, the African Charter system.

Reviewing the literature under these headings is directly relevant to the aim and objective of the thesis. For instance, while the literature on universalism and regional human rights is essential to demonstrate international efforts and

agreement on the minimum standard of rights, the literature on the African Charter system will illustrate the progress and challenges that face the regional system.¹⁰⁰ In this vein, the relevant primary and secondary source is vital to this section. For instance, while literature contained in non-governmental organisations reports are expository to expose human rights situations in countries, the several human rights treaties¹⁰¹ and resolutions¹⁰² drafted by the OAU (now, AU) towards adequate human rights protection are examined against the reality and practice in concerned state parties.¹⁰³

1.7.1 Universalism and regional human rights literature

This section is relevant to this thesis because it forms the basis of chapter two, which partly examines the UN standards of civil and political rights under the UDHR and the ICCPR. The standards set in these instruments form the basis on which the African Charter normative provisions are appraised in order to verify if they meet the international standard on civil and political rights. Thus, the first

¹⁰⁰ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights' (n 71 above); Tom Daly and Micha Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a young Court' (2018) 14 (2) *International Journal of Law in Context*, 294; Edward Kannayo, *Human rights in Africa: Problems and Prospects* (1980) A Report prepared for the International League for Human Rights (Human Rights Working Paper); Fatsah Onguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (n 23 above); Ziyad Motola, 'Human Rights in Africa: A cultural, Ideological and Legal Examination' (n 23 above); Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (n 23 above); Oji Umozuruike, 'The African Charter on Human and Peoples' Rights: Suggestions for more' (n 23 above); Rachel Murray, 'The African Charter on Human and Peoples' Rights 1987-2000: An Overview of its Prospects and Problems' (2001) 1 *African Human Rights Law Journal*, 1; Vincent Nmehielle, 'Development of the African Human Rights System in the Last Decade' (n 23 above); Osita Eze, *Human Rights in Africa: Some Selected Problems* (n 13 above); Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprints: An Evaluation of the Language of Duties' (n 23 above); EI-Obaid Ahmed EI-Obaid and Kwadwo Appiagyei-Atua, *Human Rights in Africa: A New Perspective on Linking the Past to the Future* (n 23 above).

¹⁰¹ See for instance, the African Charter on Human and Peoples' Rights of 1981, The African Charter on the rights and Welfare of the Child 1990, Protocol to the African Charter on the Rights of Women 2003; African Charter on Democracy, Elections and Governance 2007.

¹⁰² See for instance, African Commission Resolution on Migration and Human Rights 2007, Resolution on the Protection against Violence and other human rights Violations against Persons on the basis of the real or Imputed Sexual Orientation on Gender Identity 2014.

¹⁰³ This is because some African human rights system literature focuses on diverser rights such as women's rights, rights of the elderly, etc., and jurisdiction. See, for instance, Bukola Faturoti, 'Women's Rights in Africa: An Examination of African Human Rights System in the Context of CEDAW and the Universalism Versus Cultural Relativism Debate' (2016) 3 *Journal of Comparative Law in Africa*, 149; Kehinde Anifalaje, 'Implementation of the Right to Social Security in Nigeria' (2017) 17 (2) *African Journal of Human Rights*, 413; Micheal Wambali, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (n 96 above).

significant feature identified as a useful foundation for this thesis relates to the debate among scholars on the application and recognition of a common standard of international human rights. This debate gained prominence following the adoption of the UDHR, which is acclaimed as comprising a common standard for human rights.¹⁰⁴ However, this debate has been informed by the divide arising from the clash of socio-cultural and ideological differences between various scholars and political leaders.¹⁰⁵

Eide and Gudmundur¹⁰⁶ emphasised that the philosophical source of the UDHR after World War II are the intrinsic human dignity and inalienable nature of rights. Whether this emphasis is correct, one can argue that the atrocities of World War II exposed the capacity of nations to debase the human being. Thus, in the absence of such international standards, there may be a repeat of such atrocities. Further, Donnelly¹⁰⁷ and Lassen¹⁰⁸ agree that human rights are based on natural law and remain the rights of every individual solely by their being human and irrespective of any contingencies or conditions. These scholars have two things in common. The first is the consensus on a universal right approach, which is justified based on the inherent dignity and freedom of human persons. The second is that a common standard presupposes a common idea for the new international order.

A significant feature identified by the proponents of the universal human rights approach is that human rights standards must be applied and justified at all times irrespective of religion, political, culture, or the social and economic background of states'.¹⁰⁹ This approach supports total conformity to the shared

¹⁰⁴ Article 1 of the UDHR provides that 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.

¹⁰⁵ Brooke Ackerly, *Universal Human Rights in a World of Difference* (Cambridge University Press, 2008); Kathryn McNeilly, 'Reclaiming the Radical in Universal Human Rights' (2015) 4 *International Human Rights Law Review*, 256.

¹⁰⁶ Asbjorn Eide and Alfredsson Gudmundur, 'Introduction' in Asbjorn Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, 1992) 5.

¹⁰⁷ Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly*, 281; Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 (4) *Human Rights Quarterly*, 400.

¹⁰⁸ Eva Lassen, 'Universalism and Relativism' in Jack Donnelly and Rhona Howard (eds), *International Handbook on Human Rights* (Greenwood Press, 1987) 39.

¹⁰⁹ The World Human Rights Conference further strengthened this idea following the adoption of the Vienna Declaration and Programme of Action in 1993. See, paragraphs 1, 5, and 32. For a full understanding of the Vienna

perception of the standard to safeguard and preserve harmony in international communities for the existence and dignity of all persons. To further achieve this, more international instruments were adopted in 1966 to constitute a comprehensive codification of human rights and fundamental freedoms. On this note, however, Nowak¹¹⁰ asserts that the UDHR and the 1966 International Covenants represent the most authoritative minimum standard of contemporary human rights discourse. The adoption of further instruments at the global level attests to the UN determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.¹¹¹ Acceptance of a universal human rights approach is evident in the increasing practice of states to ratify UN human rights instruments.¹¹²

This ideology has not gone down well with several stakeholders due to its idea of human rights protection which places more value on the individual and is often characterised as a reflection of Western liberalism.¹¹³ As a result, such ideas of Western imperialism amongst other grounds have formed the basis for opposing a universal approach to an international human rights standard by proponents of the cultural relativism school of thought. Notably, proponents of cultural relativism are mostly scholars from the African and Asian regions.¹¹⁴ For example, African scholars argue that a universal human rights idea is inadequately suited to the peculiar nature of Africa's values and situation.¹¹⁵ However, their

Declaration and Programme of Action, visit, >
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>< accessed 18 March 2019.

¹¹⁰ Manfred Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel Publishers, 1993) xviii.

¹¹¹ Paragraph 2 Charter of the United Nations, 1945.

¹¹² Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 1989) 49.

¹¹³ Asbjorn Eide and Alfredsson Gudmundur, 'Introduction' in Asbjorn Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary* (n 106 above) 5. As will be discussed in chapter 2.2, the position of the individual and Western involvement in international human rights corpus is traced back to both Magna Carta and early revolutions in Europe and America.

¹¹⁴ However, the discussion in this thesis would concentrate on the African approach to cultural relativism because of its direct relevance.

¹¹⁵ See, for instance, Josiah Cobbah, 'African Values and the Human Rights Debate: An African Perspective', (1987) 9 *Human Rights Quarterly*, 309; Thaddeus Metz, 'African Values and Human Rights as Two Sides of the same Coin: A Reply to Oyowe' (2014) 2 *African Human Rights Law Journal*, 306; Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprints: An Evaluation of the Language of Duties' (n 23 above); Surya

arguments do not contain a dissenting view on whether the UDHR standard of human rights is inadequate to protect human dignity.¹¹⁶

Accordingly, An-Na'im,¹¹⁷ Mutua,¹¹⁸ Subedi,¹¹⁹ Lawry-White,¹²⁰ have all argued that the world comprises diverse cultures, traditions, political ideologies and religions which cannot be understood, covered and controlled by a single set of encoded standards. These scholars based their arguments on the need for respect of strong, diverse values and local autonomy, which were lacking in some of the international human rights instruments. What these scholars may have failed to consider, however, is that explicit recognition of cultural sensitivity in human rights discourse has the potential to limit and sacrifice human rights on the altar of narrow-minded leaders or repugnant cultural values.¹²¹

On the other hand, Lenzerini agrees that efforts to have an effective human rights system will require upholding human rights recognised in the cultural needs of societies while at the same time safeguarding a certain degree of rights for international human rights harmony. He further maintained that this concept would ensure that all persons enjoy the minimum human rights guarantee, which will be considered as sacred and essential for global integration.¹²² Similarly, Ibhawoh argued that the increasing globalisation of the international system and the interaction of diverse nations, cultures, and socio-religious ideas based on the universal human rights standards would be counterproductive if commendable

Subedi, 'Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of the Human Rights from the Perspectives of Hinduism' (1999) 30 (1) *California Western International Law Journal*, 45; Makau Mutua, 'The Ideology of Human Rights' (1996) 36, *Virginia Journal of International Law*, 592. See also, Joseph Asomah, 'Cultural Rights Versus Human Rights: A Critical Analysis of the Trokosi Practice in Ghana and the role of Civil Society' (2015) 15 *African Human Rights Law Journal* 129.

¹¹⁶ Alfred Hennessey and John Langan, (eds), *Human Rights in Americas: The Struggle for Consensus* (Georgetown University Press, 1982) 1.

¹¹⁷ Abdullahi An-Na'im, 'Human Rights in the Muslim World' (1990) 3 *Harvard Human Rights Journal*, 23.

¹¹⁸ Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprints: An Evaluation of the Language of Duties' (n 23 above).

¹¹⁹ Surya Subedi, 'Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of the Human Rights from the Perspectives of Hinduism' (n 115 above).

¹²⁰ Meryll Lawry-White, 'Universality and Cosmopolitanism: Some Insights from the World of Moral Damage' (2014) 3 (3) *Cambridge Journal of International and Comparative Law*, 719.

¹²¹ This is because some cultural values, especially those with religious backing, may be supported by leaders even when they conflict with basic recognised human rights.

¹²² Federico Lenzerini, *Culturalization of Human Rights Law* (Oxford University Press, 2014).

cultural values are ignored.¹²³ However, it may seem difficult for the world to agree which commendable cultural values it would comprise, given that values may also vary from one state to another. However, Asomah, in his analysis, opined that cultural rights should cease to exist when its observance promotes the violation of the rights of others.¹²⁴ The implication is that human rights will take prominence over custom whenever a violation occurs.

However, given this nuance of the contemporary human rights system and the universalism and cultural relativism debate, the regional human rights arrangement has become relevant to the effective realisation of human rights enforcement. It is significant because it recognises, and can be traced to the local politics, values, and history of the particular region.¹²⁵ Thus, Smith, in his work, admitted that regional systems are homogenous insofar as member states have similar political and cultural accounts.¹²⁶ To a great extent, however, Houghton agrees that a regional human rights system promotes a universal element of human rights while also being culturally sensitive and without posing a barrier to the human rights universal ideologies.¹²⁷ For example, Mbaye and Ndiaye¹²⁸ in extolling the African Charter accept that it is today recognised as representing an African concept of rights and remains an extraordinary and powerful instrument of liberalisation and an unprecedented event in the history of Africa. In addition, it is significant to mention that the African Charter reaffirmed the universal promotion and protection of human rights as having due regard to the UDHR while

¹²³ Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22 (3) Human Rights Quarterly, 838.

¹²⁴ Joseph Asomah, 'Cultural Rights Versus Human Rights: A Critical Analysis of the Trokosi Practice in Ghana and the role of Civil Society' (n 115 above).

¹²⁵ Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights* (Hurst and Company, 2014) pg 152, 160-161.

¹²⁶ Rhona Smith, *International Human Rights* (n 8 above) pg 87.

¹²⁷ Ruth Houghton, 'Publication Review of Rosa Freedman *Failing to Protect: The UN and the Politicisation of Human Rights*' (2015) 28 Leiden Journal of International Law, 171.

¹²⁸ Keba Mbaye and Birame Ndiaye, 'The Organisation of African Unity' in Karel Visak and Philip Alston (eds), *The International Dimension of Human Rights* (2nd edn, Greenwood Press, 1982) 583.

also taking into consideration the historical tradition and values of African civilisation.¹²⁹

The idea of a regional human rights system has reduced the impact of the universalism and cultural relativism debate, while also providing a unique platform for effective enforcement of human rights. Viljoen,¹³⁰ in discussing African regional protection, concentrated more on Africa's contribution to international human rights development. In his work, he identified some attributes of the African human rights system that have added value to universal human rights discourse; for instance, the inclusion and justiciability of various categories of rights.¹³¹ Mutua¹³² agrees that another contribution is the novel creation of peoples' rights to reflect the pre-colonial African societies' communal foundation without underscoring the individual scope of the international human rights system. He acknowledged that individual rights were defined in group or peoples' rights through which the individual would express such rights.¹³³ However, one will agree that the atmosphere of the debate over human rights standards seems to have reduced in Africa since the adoption of the African Charter. This polarised debate appears to have given way to a broad consensus that there is indeed a set of standard rights which Africa has accepted through its indigenous human rights standard. Therefore, contemporary human rights discourse has shifted to innovative suggestions towards ensuring enforcement of these regional instruments.

1.7.2 Inspiring literature on the African Charter system

This section explains what is known on this subject area. It will form the basis of the additional finding of this thesis to the body of existing knowledge of the African

¹²⁹ Preamble of the African Charter, paragraphs 4 and 5. In a similar vein, article 37 of Vienna Declaration emphasised the importance of a regional approach in the promotion and protection of universal human rights standards.

¹³⁰ Frans Viljoen, 'Africa's Contribution to the Development of International Human Rights and Humanitarian Law' (2001) 1 African Human Rights Law Journal, 18.

¹³¹ Paragraph 8 of the African Charter, and 5 of Vienna Declaration.

¹³² Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprints: An Evaluation of the Language of Duties' (n 23 above).

¹³³ *Ibid.*

human rights system. Consequently, this section identifies and reviews what has been said previously regarding the African human rights system, its enforcement and challenges. Without a doubt, there is a wealth of scholarly writing in the area of the African human rights system.¹³⁴ For instance, this wealth of scholarly literature has attracted considerable attention from different academic fields of study¹³⁵ and can be found as primary and secondary sources.¹³⁶ Thus, this task would include examining relevant academic literature on the African Charter system.

Consequent upon the advent of the African Charter, it received accolades as the first significant attempt by African governments at giving Africans indigenous instruments for human rights protection.¹³⁷ However, Umozuruike,¹³⁸ Eze,¹³⁹ and Bello,¹⁴⁰ in their assessment of the newly adopted African Charter, opined that governments were unwilling to give up their privileges of human rights violations. According to them, this fear was exemplified in the five years it took for the Charter to come into force in 1986 and the period it took to establish the African Commission.¹⁴¹ They faulted this document for several reasons, namely; the use of claw-back clauses, the absence of a regional court, and the absence of a derogation clause.¹⁴² In the main, their opinions were mixed with both outright enthusiasm and rejection of the African Charter provisions. For example,

¹³⁴ Instances of scholarly writings on the African human rights system can be seen in the following; Osita Eze, *Human Rights in Africa: Some Selected Problems* (n 13 above); EI-Obaid Ahmed EI-Obaid and Kwadwo Appiagyei-Atua, 'Human Rights in Africa; A New Perspective on Linking the Past to the Future' (n 23 above); Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (n 23 above); Ziyad Motola, 'Human Rights in Africa: A Cultural, Ideological, and Legal Examination' (n 23 above).

¹³⁵ For example, scholars from the following fields of study have contributed to the available materials on human rights in Africa namely; international law, sociology, political science and even international relations.

¹³⁶ See generally, the bibliography, table of cases, articles, Reports and media reports of this study.

¹³⁷ Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (n 23 above); Osita Eze, *Human Rights in Africa: Some Selected Problems* (n 23 above); Emmanuel Bello, 'Human Rights and African Developments' (1985) *Encyclopaedia of Public International Law*, 287.

¹³⁸ Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (n 23 above).

¹³⁹ Osita Eze, *Human Rights in Africa: Some Selected Problems* (n 13 above).

¹⁴⁰ Emmanuel Bello, 'Human Rights, African Developments' (n 137 above) 287.

¹⁴¹ The African Commission was initiated on 2nd November 1987, but its Headquarters was established in 1989 at Banjul, Gambia.

¹⁴² Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (n 23 above); Osita Eze, *Human rights in Africa: Some Selected Problems* (n 13 above); Emmanuel Bello, 'Human Rights, African Developments' (n 137 above).

Gittleman¹⁴³ described the Charter as a political document with some vague provisions and flexibility for the Commission from the aspect of interpretation. However, this observation does not fall short of the contemporary situation regarding the African Charter because it has not been amended since its adoption.

Having thus underscored their initial concerns about the African Charter, more scholars further examined the content, structure and functions of the African Charter and highlighted some prospects and challenges of human rights protection under this system. For instance, D'Sa,¹⁴⁴ and Rembe¹⁴⁵ agree that although the adoption of the African Charter restored the tarnished image of Africa in human rights issues and introduced an innovative context by the inclusion of the three categories of human rights, its organs of protection exhibit procedural and structural defects. Having examined the African Charter, Rembe, for example, concluded that the regional commitment to upholding human rights was merely rhetorical rather than demonstrative. This conclusion was supported mainly by the absence of a regional court.¹⁴⁶ On the other hand, while extolling the importance of African Charter rights, Odinkalu,¹⁴⁷ for instance, concentrated more on the implementation of socio-economic rights. His study criticised the OAU for not considering the economic situation of member states and other factors in its theoretical desire to guarantee socio-economic rights.¹⁴⁸ However, socio-economic rights are today recognised as non-justiciable rights in many African countries'

¹⁴³ Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 Val. Journal of International Law, 667; Richard Gittleman, 'The African Commission on Human and Peoples' Rights: Prospects and Procedure' in Hurst Hannum (eds), *Guide to International Human Rights Practice* (Macmillan, 1984) 153-161.

¹⁴⁴ Rose D'Sa, 'African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action' (1983) 10 Australian Year Book of International Law, 101; Rose D'Sa, 'Human and Peoples Rights: Distinctive Features of the African Charter' (1985) 29 Journal of African Law, 72.

¹⁴⁵ Nasila Rembe, *The System of Protection of Human Rights under the African Charter on Human and Peoples' Rights: Problems and Prospects* (National Institute Southern African Studies, 1991) 1-61.

¹⁴⁶ *Ibid.*, 1-61.

¹⁴⁷ Chidi Odinkalu, 'Analysis of Paralysis or Paralysis of Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 Human Rights Quarterly, 237.

¹⁴⁸ *Ibid.* See also, Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 African Human Rights Law Journal, 333. Mbazira found that the African Charter reflects a desire to produce a distinctly human rights instrument for the enjoyment of international human rights especially for not making the socio-economic rights subject to the available state party resources.

constitutions in defiance of the African Charter.¹⁴⁹ What this practical attitude has shown is support for Odinkalu's argument of failing to consider state party peculiar circumstances before adopting a mandatory approach of implementation and enforcement.

From the preceding, it is essential to note that the demand for reform of the African Charter began within a few years of its existence. This demand was heightened following various shortcomings discovered in the African Charter. For instance, Heyns,¹⁵⁰ Mbondenyi,¹⁵¹ and Udombana¹⁵² emphasised the need for the establishment of a regional court to aid in providing effective enforcement of African Charter rights. Furthermore, Nmehielle, in his analysis, admitted that although the Commission has both a promotional and protective mandate under article 30 of the African Charter, its protective powers are limited when compared to a court.¹⁵³ Thus, the Commission, being the sole enforcement mechanism prior to the establishment of the African Court, was the first to attract scholarly criticisms and scrutiny.

Mutua posited that incredibly slow progress was recorded in the activities of the African Commission in carrying out article 30 mandate. He further concluded that the Commission has been overtly incompetent due to the disregard of member states in not complying with its decisions, the absence of a follow-up mechanism in the African Charter, and the language of the Commission in its

¹⁴⁹ Tuli Ackson, 'Justiciability of Socio-economic Rights in Tanzania' (n 95 above); Oguagu Ikpeze, 'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development' (n 95 above); Christain-Jr Nkongolo, 'The Justiciability of Socio-economic Rights under the African Charter on Human and Peoples' Rights: Appraisal and Perspective Three Decades After its Adoption' (n 95 above); Taiwo Olaiya, 'Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria' (n 95 above); Ajepe Shehu, 'The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience' (n 95 above).

¹⁵⁰ Christof Heyns, 'The African Human Rights System: In need of Reform' (n 23 above).

¹⁵¹ Morris Mbondenyi, 'Improving the Substance and Content of Civil and Political Rights under the African Human Rights System' (2008) 17 (2) Lesotho Law Journal, 1.

¹⁵² Nsongurua Udombana, 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' (2003) 28 Brook Journal of International Law, 830.

¹⁵³ Vincent Nmehielle, *The African Human Rights System: Its Laws, Practice and Institutions* (n 23 above) pg 393.

decisions and adjudication processes.¹⁵⁴ This submission does not wholly reflect contemporary position. Although delay in the African Commission process is still apparent, the Rules of Procedure of the African Commission 2010¹⁵⁵ enshrine a follow-up procedure for the African Commission in cases where a state party fails to voluntarily comply with decisions.¹⁵⁶

In further clamour for reforms, other scholars carried out an analysis of the structure and effectiveness of the Commission, sometimes in comparison with the role of a supposed regional court. This is done because implementation of the Charter norms was regarded as the most pressing problem at the grassroots.¹⁵⁷ Agreeing that implementation is a significant challenge facing the African Charter, Nmehielle opined that the African Charter drafters and the OAU purposely created a weak regional human rights mechanism to evade accountability and enforcement.¹⁵⁸ However, regarding the role of the African Commission in the enforcement of the African Charter, it has been submitted that many of its earliest decisions highlighted the incapacity to give binding decisions against state parties by making declaratory judgments.¹⁵⁹ At present, while the African Commission has evolved past making declaratory judgments, the issues of composition, structure and state party compliance with findings remain constant.¹⁶⁰

¹⁵⁴ Makau Mutua, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 (2) *Human Rights Quarterly*, 342. See also, George Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (n 1 above) pg 36.

¹⁵⁵ Rule 112 of the Rules of Procedure of the African Commission 2010.

¹⁵⁶ Extensive discussion of this follow-up procedure is conducted in chapter 4 and 5.

¹⁵⁷ George Mugwanya, 'Realising International Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (2000) 10 *Indiana International and Comparative Law Review*, 35.

¹⁵⁸ See, for example, Vincent Nmehielle, 'Towards an African Court of Human rights: Structuring and the Court' (2000) 6 *Annual Survey of International and Comparative Law*, 96.

¹⁵⁹ Jennifer Anazor, 'Enforcement of Human Rights in Africa: A Case Study on the African Commission on Human Rights and Peoples' Rights' (2018), available at > <file:///H:/SSRN-id3407770.pdf>< accessed 23 October 2019; Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American System' (1984) 2 *Human Rights Quarterly*, 141; George Mugwanya, 'Realising International Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (n 157 above).

¹⁶⁰ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (n 71 above).

Despite the broad mandate of the African Commission, the quest for a regional court remained a top priority. For instance, Mutua,¹⁶¹ Ndombana,¹⁶² and Baderin¹⁶³ all admitted that a Court would fill the void left by the Commission and enhance African Charter enforcement. Accordingly, Viljoen asserted that a regional court would generate more exposure and create a better human rights identity for the African region.¹⁶⁴ At present, the fundamental reform clamoured for by these scholars being the establishment of a regional human rights court was met in 1998 when the Court Protocol was adopted. However, the establishment of the African Court has not downplayed the role of the African Commission because the African Commission enjoys unhindered direct individual and NGOs access when compared to the African Court. This observation is made in light of the number of state parties that have made a declaration under article 34 (6) of the Court Protocol.¹⁶⁵ Ironically, inadequate access to the African Court shifts the bulk of the discussion on human rights protection within the continent back to the Commission. Viljoen, in his analysis of the African Court, compared it with other regional human rights systems and concluded that direct access was vital but not enough to guarantee enhanced and effective enforcement.¹⁶⁶

Accepting that the establishment of the African Court epitomises advancement in the area of human rights protection, Daly and Wiebusch¹⁶⁷ concluded that the Court is susceptible to some patterns of resistance in how it operates, monitors and enforces its judgements, and access. Their analysis went further to state the key actors who hamper the African Court development as the

¹⁶¹ Makau Mutua, 'The African Human Rights Court: A Two-Legged Stool?' (n 154 above).

¹⁶² Nsonguru Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late than Never' (n 78 above).

¹⁶³ Mashood Baderin, 'Recent Development in the African Regional Human Rights System' (2005) 5 Human Rights Law Review, 117.

¹⁶⁴ Frans Viljoen, 'A Human Rights Court for Africa and Africans' (2004) 30 Brook Journal of International Law, 1.

¹⁶⁵ At present, only 9 countries have made declaration under article 34 (6) of the Court Protocol and they are- Benin, Tanzania, Mali, Ghana, Burkina Faso, Malawi, Tunisia, Gambia, and Cote d'Ivoire.

¹⁶⁶ Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 International and Comparative Law Quarterly, 63.

¹⁶⁷ Tom Daly and Micha Wiebusch, 'The African Court on Human and Peoples' Court: Mapping Resistance against the young Court' (n 100 above).

national government, national courts, and the NGOs.¹⁶⁸ For instance, it was stressed that some state parties impede the African Court's progress by their wilful refusal to ratify the Court Protocol and make the declaration under Article 34 (6).¹⁶⁹ Daly and Wiebusch opined that the national courts play the most significant role beyond national governments by making decisions that absolve state party obligation under international treaties or ignore the judgements of international courts.¹⁷⁰ Despite this observation, there is little evidence of the use of regional jurisprudence at the national courts and no established regional mandate on a national court to implement or recognise the African Court's decision.

From the foregoing, it is demonstrated that most scholars agree on one thing- a need for reform of the African human rights system. What is not commonly highlighted is the method of reform. However, rather than calling for an amendment or adopting a new Charter to meet the set standard recognised in various UN instruments, the AU and African Charter state parties should focus on the innovative implementation of the existing rights and freedoms.¹⁷¹ Agreeing that poor implementation is a significant setback to the African Charter enjoyment, Kioko agrees that although the normative provisions of the Charter are mostly inadequate, the AU regional politics remain another obstacle to adequate implementation within the region.¹⁷² To this end, this thesis would provide insights to improve African Charter enforcement.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Chairman Okoloise, 'Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 African Human Rights Law Journal, 27; Chidi Odinkalu, 'The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System', (2001) 1 (2) African Human Rights Journal, 226.

¹⁷² Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention' (n 18 above). See also, Moussa Samb, 'Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union' (2009) 15 (5) Annual Survey of International and Comparative Law, 1.

1.8 Research methodology

Given the anticipated contribution of this thesis to the body of knowledge, it is important that the methods used for data collection and analysis be explicit.¹⁷³ Chynoweth asserts that no purpose would be served by inputting a methodology section within a doctrinal research publication because the process is one of analysis rather than data collection.¹⁷⁴ While this assertion may be true for published research journals, it may not apply wholly to a PhD thesis. This is because if the process considered in the analysis of the data or the assumption that inform the analysis is not known, it is difficult to evaluate this thesis and synthesise it with other related studies. Thus, clarity around the process is vital.

1.8.1 Overview of methodology and methods

Having a clear idea of the research methodology and methods of this thesis makes the literature analysis more straightforward because it precisely targets literature related to this thesis and it critiques the whole approach to similar studies. The literature analysis seeks to understand what is available in the research area. Research methodology refers to the practical structure within which the research is conducted and this includes understanding, explaining, describing, analysing and criticising data to arrive at meaningful information that answers specific questions.¹⁷⁵ On the other hand, research methods refer to the systematic and orderly approach taken towards the collection and analysis of data so that information can be obtained from such data.¹⁷⁶ Moreover, research methods can be either qualitative or quantitative depending on research focus and the type of data relevant to the research. Simply put, whereas a research methodology is a justification for using a particular research method, a research method is simply a research tool that is used in performing research.¹⁷⁷ However, for the purpose

¹⁷³ Jan Jonker and Bartjan Pennick, *The Essence of Research Methodology: A Concise Guide for Master and PhD Students in Management Science* (Springer-Verlag, 2010).

¹⁷⁴ Paul Chynoweth, 'Legal Research in the Built Environment: A Methodological Framework' (International Conference on Building Education and Research (BEAR), Building Resilience, 11-15 February 2008) 37.

¹⁷⁵ Jan Jonker and Bartjan Pennick, *The Essence of Research Methodology: A Concise Guide for Master and PhD Students in Management Science* (n 173 above) 17.

¹⁷⁶ Nicholas William, *Research Methods: The Basics* (Routledge, 2011) 1.

¹⁷⁷ Ranji Kothari, *Research Methodology and Techniques* (2nd edn, New Age Publishers, 2004) 26.

of this research, this thesis will be conducted using a legal method in order to achieve the research aim and advance on existing literature in this subject area.

1.8.2 Legal research methods

Legal research is essentially conducted in the following forms- doctrinal legal research method and non-doctrinal legal research method.¹⁷⁸

1.8.2.1 Non-doctrinal legal research

Non-doctrinal legal research is commonly referred to as interdisciplinary or socio-legal research and commences when the epistemological nature of legal research changes from an internal enquiry into the meaning of law, to external enquiry and into the nature of law.¹⁷⁹ It generally refers to external factors while seeking answers that are consistent with the existing body of rules.¹⁸⁰ This legal research helps in the understanding of how law works in practice and it is used to understand, examine and evaluate the impact of legal rules on people and society. Simply put, non-doctrinal helps in understanding how other disciplines influence law and legal institutions.¹⁸¹ Consequently, non-doctrinal legal research does not investigate the law but researches about the law and how it affects or relates with the society and other institutions.¹⁸² Nonetheless, research questions structured in such manner would have some element of doctrinal research which allows the investigation of the law.¹⁸³

1.8.2.2 Doctrinal legal research

Doctrinal legal research provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas

¹⁷⁸ Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2012).

¹⁷⁹ *Ibid.*, 6.

¹⁸⁰ Geoffrey Wilson, 'Comparative Legal Scholarship' in Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2012) 164.

¹⁸¹ Susan McVie, 'Challenges in Socio-Legal Empirical Research', available at > <https://www.create.ac.uk/methods/methodological-challenges/socio-legal-empirical-research/?print=pdf> accessed 21 September 2019.

¹⁸² For instance, non-doctrinal legal research evaluates the effectiveness of a legislation or treaty in achieving a particular social goal.

¹⁸³ This is because a researcher would first determine the existing law, which can only be done doctrinally.

of difficulty and perhaps predicts future development.¹⁸⁴ Doctrinal research focuses on legal principles generated by the courts and the legislature. Thus, it is usually a two-part process because it involves first locating the source of law and then interpreting and analysing the text.¹⁸⁵ Of course, before analysing the law, a researcher is expected to locate it, and this may require some analysis of historical and current questions relating to the law. This prepares the researcher to review and make arguments based on the norms and standards.

Doctrinal legal research is concerned with the analysis of legal doctrines and examines how legal doctrines have been developed and applied. It is characterised by the study of a body of cases and is often conducted theoretically through a historical perspective.¹⁸⁶ However, both case law and statute requires the contribution of other disciplines to achieve a clear understanding and application of the law. Put simply, doctrinal legal research analyses black letter law strictly and reviews research in law.¹⁸⁷ Doctrinal research seeks to collect and analyse a body of case law and statutes, is qualitative in nature and does not necessarily involve statistical analysis of data.¹⁸⁸ In this vein, this thesis applies a qualitative research methodology¹⁸⁹ that consists of a library-based text analysis method in identifying, locating and analysing relevant information. The qualitative characteristics connote that this research is not a field or laboratory research that will involve any primary collection procedure such as telephone survey, mass observation or a small group study of behaviour. Hence, qualitative research simply entails non-numerical research.¹⁹⁰

¹⁸⁴ Terry Hutchinson and Nigel Duncan, 'Defining and Describing what we do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review*, 83.

¹⁸⁵ *Ibid.*

¹⁸⁶ Geoffrey Wilson, 'Comparative Legal Scholarship' in Mike McConville and Wing Hong Chui, *Research Methods for Law* (n 180 above) 164.

¹⁸⁷ Mike McConville and Wing Hong Chui, *Research Methods for Law* (n 178 above) 4.

¹⁸⁸ Paul Chynoweth, 'Legal Research in the Built Environment: A Methodological Framework' (n 174 above) 1.

¹⁸⁹ According to Paul Chynoweth, doctrinal research is concerned with the formulation of legal doctrines through analysis and application of legal rules to any given situation under consideration. This research method clarifies ambiguity within the rules, is characterised by the study of legal texts, and for this reason, is described as 'black letter law'. Further, doctrinal research is concerned with the discovery and development of the legal doctrines. For further analysis, see, Paul Chynoweth, *ibid.*, 29.

¹⁹⁰ Mike McConville and Wing Hong Chui, *Research Methods for Law* (n 178 above) 201.

This research methodology allows the analysis of relevant primary and secondary materials.¹⁹¹ Analysis of primary and secondary materials has the advantage of not having to generate data, which in this research is beneficial since access to conducting a continental-based interview with all relevant stakeholders is difficult. On the other hand, the qualitative method adopted for data collection instead of conducting interviews is preferred because all relevant data is found in the diverse literature on the internet. In this regard, a review of documents that seem relevant to the research is advisable, and it is immaterial if such a document is private or public. It is a truism that documents have the potential to inform and structure decisions; besides, they constitute readings of events.¹⁹² Apart from this, the approach allows the researcher to email and request documents from relevant bodies and individuals without having to travel to such locations.¹⁹³

Indeed, this research will rely on primary and secondary data such as case law, AU documents, African Commission Resolutions, state parties' constitutions, academic journals and articles, the opinion of jurists, and relevant regional and international human rights instruments. The reason for this is to ensure that the study focuses on the relevant statements of the law and other related materials that discuss, explain, interpret, and analyse what the law is and how the law has been enforced or otherwise. This focus leads to an analysis of African Charter case law jurisprudence to underscore the direction provided in these decisions and the successes or otherwise of the African Charter institutions in realising effective enforcement.

It is worthy of mention that this methodology makes it possible to gather the information highlighted in the appendix.¹⁹⁴ For instance, the information

¹⁹¹ Kristina Simion, 'Practical Guide: Qualitative and Quantitative Approaches to Rule of Law Research' (2016) International Network to Promote the Rule of Law, available at >https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817565< accessed 26 July 2018.

¹⁹² Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 10.

¹⁹³ Further, this approach best fits this research as against other approaches such as participatory observation, interviews, and use of questionnaires because of some of the reasons highlighted in the limitation of the study.

¹⁹⁴ It is essential to mention that the content of the tables in appendix are correct as of the date of thesis submission, 01 July 2019.

illustrated in the compliance table under the appendix was collected applying a qualitative method such as analysis of the media, email to both the African Commission and the African Court secretariats, email to relevant NGOs', analysis of the Activity reports and concluding observations and recommendations, scholarly text and articles, and international human rights organisations. Furthermore, this thesis does not involve a comparative dimension between the African Charter and other international human rights instruments. The comparative trend is not necessary because the analysis of the African Charter and the case laws would reveal the enforcement challenges confronting effective realisation of African Charter civil and political rights. Whereas there is no basis for comparison, best practices and strengths of related human rights instruments will be highlighted and analysed.¹⁹⁵

1.9 Overview of chapters

The examination of the issues in this thesis is structured into seven chapters. This introductory chapter outlines the aim, objectives, relevance and background of the thesis. It further provides a brief account of the problems facing the enforcement of the African Charter's civil and political rights. Also, the research questions, methodology, and analysis of the thesis's inspiring literature of reference are outlined.

It is against the chapter one background that this study sets out in chapter 2 to analyse the theoretical basis, background context and nature of human rights and in particular, civil and political rights. This chapter examines the UN efforts in safeguarding civil and political rights up to the evolution into the regional protection of human rights. By setting the scene for underlining the relevance of

¹⁹⁵ Suffice to add that a thematic analysis will be applied as the suitable research approach for the thesis. Thematic analysis is a widely used qualitative data analysis method used in identifying, analysing, and reporting patterns (themes) within data, and it minimally organises and describes your data set in (wealthy) details. However, having examined the research aim, questions and objectives illustrate that the thesis is qualitative in nature, which makes a thematic analysis useful for its conduct. See, Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology*, 77.

regional human rights systems, this chapter lays the foundation for the examination of the African Charter civil and political rights protection.

The African Charter normative features, civil and political rights provisions and case law jurisprudence are discussed in chapter 3. The African Charter is discussed in detail to determine the extent to which it meets the UN standards in the UDHR and the ICCPR. In addition, the case law jurisprudence permits an analysis of the interpretations of the African Charter civil and political rights provisions and the extent to which such interpretation has influenced the realisation of civil and political rights. In all, this chapter lays a foundation for subsequent recommendations for African Charter norms.

Chapter 4 analyses the political and institutional framework for the protection of African Charter civil and political rights. The principal analysis in this chapter includes the structure and mandate of the African Court and the African Commission and the role of the African Union in human rights protection.

Chapter 5 examines state party obligations under the African Charter by analysing their constitutional and other measures for the protection of civil and political rights. Using a few selected countries as case study, this chapter examines whether state parties to the African Charter have met their obligations to guarantee civil and political rights protection and enforcement.

In chapter 6, this thesis assesses the African Charter civil and political rights, with a view to impart future reform to regional protection, particularly in the context of realising effective enforcement. This chapter analyses potential shortcomings of relevant African Charter institutions, the African Charter norms, as well as state party obligations in realising effective enforcement of civil and political rights.

Finally, chapter 7 concludes this thesis and outlines the recommendations aimed at realising the effective enforcement of civil and political rights provisions of the African Charter. This chapter suggests grey areas for reforms to the regional human rights system and concludes that if the suggested recommendations are

applied, the African Charter civil and political rights would be effectively realised within the continent.

CHAPTER TWO: THE BACKGROUND, CONTEXT AND NATURE OF CIVIL AND POLITICAL RIGHTS: IN PURSUIT OF EFFECTIVE INTERNATIONAL CIVIL AND POLITICAL RIGHTS PROTECTION

2.0. Introduction

This chapter seeks to examine both the philosophical and normative foundations underlying the protection of civil and political rights. It examines the historical development, context and nature of relevant international human rights instruments and analyses them as a contemporary approach towards realising civil and political rights. The discussion in this chapter reflects on the underpinnings of the enforcement of civil and political rights under the African Charter Human and Peoples Rights (African Charter) in two ways. Firstly, it demonstrates the link between contemporary human rights expressed after World War II and the earlier guaranteed generations of individual rights following the French and American revolutions. Secondly, it acts as a template for the evaluation of the normative provisions and limitations of the African Charter. Therefore, through the analysis of the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and other regional human rights instruments, this chapter fits into a more extensive research geared towards improved understanding of the origin, development and pursuit of international human rights concept with particular reference to civil and political rights.

2.1 The meaning of civil and political rights

This section will explore the meaning of civil and political rights. It will demonstrate that there is no definition of civil and political rights in international human rights treaties; rather, it will emphasise the nature and scope of civil and political rights as useful guidance for the understanding of civil and political rights.

A definition of the key term of this thesis is crucial because it exposes the context on which its analysis would be made. In this thesis, civil and political rights exclusively imply one of the generations, categories or classifications of human rights. The origin of civil rights is traced to the practices of governments or

institutions viewed as being oppressive and led to the request for the legal protection of individuals and groups from forms of oppression that have gained widespread acceptance across the world.¹ Political rights, on the other hand, guarantee the liberty to contribute to the process of governing the affairs of society through political participation of all eligible citizens. Political rights involve the ability to interact with one's government and include the right of free speech, the right to vote and be voted for and to criticise the government.²

According to Keith, civil and political rights have the potential to check the powers of the government in respect of actions affecting the individual, and they confer upon the people an entitlement to participate in government and contribute to the determination of laws.³ They protect an individual or group of individuals from infringement of their civil and political liberty by the government, government institutions and influential individuals.⁴ Fundamental rights in this category include prohibition of discrimination based on race, religion, ethnicity, and gender; the right to life; the right to a fair trial; freedom from torture or cruel, inhuman treatment or punishment; the right to property; the right to liberty; the right to asylum; the right to personal security; the right to freedom of thought, religion, and conscience; and many others.⁵

¹ David Kairys, 'Civil Rights' (2015) *International Encyclopaedia of the Social and Behavioural Sciences*, 686; Leland Ware, 'Civil Rights and the 1960s: A Decade of Unparalleled Progress' (2013) 72 (4) *Maryland Law Review*, 1087; Cass Sunstein, 'What the Civil Rights Movement Was and Wasn't' (1995) *University of Illinois Law Review*, 191.

² Dinal Shelton, 'Challenges to the Future of Civil and Political Rights' (1998) 55 *Washington and Lee Law Review*, 669; Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 (4) *Yale Journal of International Law*, 539.

³ Linda Keith, 'The United Nations International Covenant for Civil and Political Rights: Does it make a Difference on Human Behaviour?' (1999) 36 *Journal of Peace Research*, 95. See also, Egon Schwelb, 'Civil and Political Rights: The International Measures for Implementation' (1968) 62 (4) *American Journal of International Law*, 827.

⁴ Zoran Milovanovich, 'Civil and Political Rights' available at > <http://www.lincoln.edu/criminaljustice/hr/Civilandpolitical.htm> accessed 25 March 2019.

⁵ The ICCPR contains a more comprehensive list of rights than all other existing international human rights instruments. The provisions of the ICCPR will form the basis to evaluate the African Charter civil and political rights provisions in the next chapter.

In addition, civil and political rights guarantee freedom from government interference and are conceived as negative rights.⁶ However, not all rights that make up civil and political rights are attributed as negative rights; for example, the right to participate in free and fair elections and the right to fair trials can be categorised as positive rights because they require some duties by the state.⁷ However, recognition of individual civil and political rights, as inherent to the human family, predates the contemporary human rights protection under the UN and regional arrangements.⁸

2.2 Philosophical foundation of human rights

The philosophical foundation of human rights provides useful guidance on the understanding and application of the human rights concept while examining its development. Therefore, in order to ascertain contemporary human rights discourse, this section examines relevant philosophical theories relating to the origin of human rights and civil and political rights protection. The theories are naturalism and positivist theories of law.⁹ However, the details of these theories will be analysed only to the extent that the defined scope of this thesis permits.

According to Shestack, understanding the philosophical foundation of human rights is necessary for the universal recognition of human rights

⁶ Berta Hernandez-Truyol, 'Civil and Political Rights- An Introduction' (1997) University of Miami Inter-American Law Review, 223. According to Hernandez-Truyol, a negative right permits government inaction and often associated with civil and political rights while positive rights is subjected to an action of another or the government- permits action for the right to be enjoyed.

⁷ *Ibid.* For instance, where the government fail to call for elections, the right to vote and be voted for will not be exercised or realised.

⁸ Some of the contemporary civil and political rights were first contained in the 1689 English Bill of Rights, 1791 Bill of Rights of the United States and 1789 French Declaration of the Rights of Man.

⁹ Indeed, there are other theories of law such as the Marxist theory. However, this study will not analyse Marxist theory, given the understanding that its theoretical approach is rooted in the causal role of things such as relations and forces of production. According to Karl Marx (a German philosopher), there is nothing natural or inalienable about human rights especially in a capitalist monopolised society. To him, human rights is a middle-class illusion while concepts such as law and freedom are determined by the material conditions and social circumstances of a people. In addition, the Marxist theory does not support a universal system of human rights because it does not recognise international norms and thus, it is associated with more human rights violations. See generally, Darrell Moellendorf, 'Marxism and the Law' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (Juta, 2006) 138; Jerome Shestack, 'The Philosophic Foundation of Human Rights' (1998) 20 (2) Human Rights Quarterly, 201.

principles.¹⁰ This section, therefore, is relevant to this thesis because philosophy plays an instrumental role in the understanding and clarity of truth to avoid an obscure understanding of universal recognition of human rights development.¹¹ Generally, the discussion in this section is linked to the African Charter because it demonstrates the historical development of human rights from its perception as the essential characteristics of the human person through the codification process which government are obliged to respect and recognise.

2.2.1. Natural law/right theory

At the outset, early philosophers developed the theory of natural law (rights) in their search for the philosophical foundations and meaning of the law.¹² Natural law theory is a legal theory that recognises law and morality as deeply connected; thus this theory believes that human laws are defined by morality, and not by an authority figure.¹³ Thomas Aquinas, one of the philosophers of the medieval period, professed natural right as part of God's law that allows for certain inherent rights of individuals.¹⁴ For instance, God's commandments to the children of Israel that protected certain inherent rights of the individual, such as the right to life and property.¹⁵ It is clear from the proponents of natural law theory that human rights were originally understood as natural rights inherent to being human and this was determined by philosophers' perception of nature and the characteristics of the human being.¹⁶ In particular, rights and freedoms believed to be natural by being

¹⁰ Jerome Shestack, 'The Philosophic Foundation of Human Rights' (n 9 above).

¹¹ *Ibid.*

¹² Some of these early philosophers include Aristotle, Sophocle, Plato, St. Augustine, John Locke, Thomas Hobbes and St. Thomas Aquinas. Darrel Moellendorf, 'Marxism and the Law' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (n 9 above), pg. 25-61.

¹³ Mark Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 4-5.

¹⁴ Wessel Roux, 'Natural Law Theories' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (Juta, 2006) 25.

¹⁵ See, Exodus 20: 1-17; Deuteronomy 5: 4-21. Admittedly, these rights come under the contemporary civil and political rights category.

¹⁶ Wessel Roux, 'Natural Law Theories' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (n 14 above) 25.

human were identified, considering the condition of human beings in a stateless society.¹⁷

Indeed, following the rise of modern secular and rationalistic philosophies of natural law, religion was detached from natural law. The significance of this evolution is that the natural law theory led to the natural rights theory, which is closely associated with contemporary human rights discourse.¹⁸ For instance, Grotius, while defining natural law as a 'dictate of right reason' asserted that to live together in peace and harmony is a natural characteristic of human beings.¹⁹ Grotius agrees that the state of nature guarantees absolute freedom and equality because whatever conforms to the nature of men and women were deemed right and just and whatever disturbs the social and peaceful harmony were unjust and wrong.²⁰ Consequently, the natural rights theory led by John Locke imagined the existence of human beings in the state of nature, enjoying their freedom and actions without being subject to the will or authority of another.²¹ For example, it is agreed that this state of nature suffered certain limitations due to the absence of regulation by a superior power over the rise of the conflicting interests of individuals; thus, propelling individuals to enter into a social contract to set up a political authority to protect their natural rights by forming civil society.²²

The natural law/right theory demonstrates the evolution of rights from a stateless society to political authority. Locke proceeded to note that under the natural law theory, human beings, not governments came first in the order of things. Accordingly, Locke argued that in setting up civil society and political authority, the failure of this authority to secure rights is a failure that justifies the

¹⁷ Centre for Human Rights, *From Human Wrongs to Human Rights* (Centre for Human Rights, Pretoria, 1995) 50.

¹⁸ Josiah Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 (3) Human Rights Quarterly, 309.

¹⁹ See generally, Hugo Grotius, *The Rights of War and Peace*, (1625) edited by Richard Tuck (Liberty Fund, Indianapolis, 2005 Edition), available at > <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-2005-ed-vol-1-book-i> accessed 10 October 2018.

²⁰ *Ibid.*

²¹ John Finnis, *Natural Law and Natural Rights* (2nd edn, Clarendon Law Series, 2011) 18.

²² Wessel Roux, 'Natural Law Theories' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (n 14 above) 25.

removal of the government.²³ Indeed, the government has the power to protect the natural rights of human beings because human beings, not governments, came first in the order of things.²⁴ Significantly, this theory formed the basis of the principle that law should act as measures to limit the powers of government while at the same time protecting the inherent rights such as the right to life, liberty and property.²⁵

Meanwhile, natural rights philosophy was a significant influence in late eighteenth century revolutions against absolutism and the birth of individual rights in Europe and America.²⁶ In Smith's opinion, the idea of natural rights is visible in contemporary statutory protection of human rights and some historic bills of rights such as the English Bill of Rights (1689), the 1776 United States' Declaration of Independence, the French Declaration of the Rights of Man and Citizen (1789), and the 1791 Bill of Rights in the United States Constitution.²⁷ Furthermore, the Magna Carta (1215)²⁸ promoted measures targeted at curbing the monarch's excessive authoritarian executive and absolute power prior to the late eighteenth century revolutions.²⁹ According to Vincent, the demand for good governance on the principle of equality, justice, and fairness formed the basis for which the Magna Carta was promulgated.³⁰ On the other hand, the Magna Carta was a practical solution to the political crisis at that time, and it established the principle that everybody, including the king, was made subject to the law.³¹ The Magna Carta

²³ Osita Eze, *Human Rights in Africa* (Nigeria Law Publication Limited, 1998) 85.

²⁴ *Ibid.*

²⁵ Philip Alston, *Promoting Human Rights through Bills of Rights: Comparative Perspective* (Oxford University Press, 1999) 13.

²⁶ Ziyad Motola, 'Human Rights in Africa: A Cultural, Ideological and Legal Examination' (1989) *Hastings International and Comparative Law Review*, 374. Suffice to add that notable early philosophical sources of natural rights theory include Hugo Grotius (1548-1617), John Locke (1632-1704) and Immanuel Kant (1724-1804).

²⁷ Rhona Smith, *International Human Rights* (5th edn, Oxford University Press, 2012) 6; the French Declaration begins by stating that 'men are born free and remain free and equal in rights' and this has continued to remain the cornerstone of the French Constitution.

²⁸ *Magna Carta*, meaning, the Great Charter was issued by King John of England (1199-1216) as a practical solution he faced during a political crisis in 1215 and established the principle that everyone, including the king, is subject to the law.

²⁹ Shami Chakrabarti, 'Magna Charta and Human Rights' (2015), available at > <https://www.bl.uk/magna-carda/articles/magna-carda-and-human-rights>< accessed on 18 March 2019.

³⁰ Nicholas Vincent, *Magna Carta: A Very Short Introduction* (Oxford University Press, 2012) 95; Nicholas Vincent, *Magna Carta: The Foundation of freedom 1215-2015* (Third Millennium Publishers, 2014) 36.

³¹ Lucinda Maer and Oonagh Gay, 'The Bill of Rights 1689' (2009) House of Common Library, SN/PC/0293.

was repealed not long after it was enacted; however, some of its principles formed the bedrock and inspiration for the United States Bill of Rights 1791, UDHR 1948, as well as the European Convention of Human Rights 1950.³²

The essence of the 18th-century declarations, as well as the Magna Carta, is to protect the rights of individuals. An instance is the French Declaration of the Rights of Man 1789, which attributed ignorance, neglect, and contempt of the inalienable, natural and sacred rights of men as causes of public calamities. This legal document recognised state sovereignty and political association and participation for the preservation of the natural and imprescriptible rights of men, among other rights.³³ In particular, the 1689 English Bill of Rights identified freedom from cruel and unusual punishment, freedom from being fined without trial,³⁴ and free elections as inalienable rights.³⁵ This position implies that the Western and American political systems had, before contemporary human rights discourse under the UN, produced normative and institutional arrangements for the protection of the individuals' natural rights from infringement by the government.³⁶

The position of natural law/rights theory failed to highlight the rights that should be considered as inalienable natural rights. While this theory falls outside the concept of contemporary human rights approach, Swanson observed that under Locke's view of natural rights, all that was needed by human beings in the state of nature for them to be self-dependent were life, property, and liberty.³⁷ In particular, Shestack noted that the natural rights theory was criticised and termed

³² Claire Breay and Julian Harrison, 'Magna Carta: An Introduction' (2014) available at ><https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction>< accessed 12 October 2017.

³³ See generally, preamble and Articles 1, 2, 3 and 4 of Declaration of the Rights of Man 1789, available at >http://avalon.law.yale.edu/18th_century/rightsof.asp< accessed 11 October 2017. Other rights recognised by the Rights of Man 1789 are equality (article 1), political association and participation (article 6), personal liberty (article 4), fair hearing attributes of presumption of innocence and no punishment without a law (article 7, 8, and 9) freedom of religion (article 10) freedom to hold ideas and opinion (article 11), and right to property (article 17).

³⁴ Article 10 of the 1689 Bill of Rights.

³⁵ Article 8 of the 1689 Bill of Rights.

³⁶ Julia Swanson, 'The Emergence of New Rights in the African Charter' (1991) 12 New York Law School Journal of International and Comparative Law, 307.

³⁷ *Ibid.*

a 'fallacy' by theorists such as Jeremy Bentham because of its potential for flexibility arising from the absence of what forms part of natural legal rights and other difficulties.³⁸ The implication is that what amounts to natural law/rights may vary from one proponent to another, depending on the understanding of the theorist on the concept of nature.³⁹ Besides, natural law theory was criticised on the argument that it opposes legal reform while insisting on the status quo.⁴⁰ What is implied is that natural law/right does not support reforms and new recognition of rights apart from rights qualified as natural rights.

Furthermore, natural rights theory was criticised by some philosophers who supported an idea of rights that are definite and practicably enforceable.⁴¹ The proponents of this idea believe that rights will be better enjoyed when instruments outline what these rights are, as well as the limits of their enjoyment.⁴² This is because there is a need for governments to put in place limits on the enjoyment of rights and on the power of their agents because some mistreatment is genuinely intolerable, irrespective of possible excuses.⁴³

2.2.2. Positive rights (law) theory

The positive rights/law theory is another theory relevant to the foundation of contemporary human rights. The legal positivism theory is mostly founded on the rejection of metaphysics and experimentation by Auguste Comte, who argued that science ought to concern itself with experimental facts from which general rules or laws of nature can be abstracted through induction.⁴⁴ This theory emphasises that law is socially constructed and was founded on human beings having control

³⁸ Jerome Shestack, 'The Philosophic Foundation of Human Rights' (n 9 above) 201.

³⁹ *Ibid.*

⁴⁰ See, for instance, David Johnson, Steve Pete, and Max Du Plessis, *Jurisprudence: A South African Perspective* (Butterworths, 2001) 64.

⁴¹ A crucial proponent of this idea of rights include Auguste Comte, John Austin (1797-1859) and Jeremy Bentham.

⁴² Some of the proponents include Hans Kelsen, Herbert Hart and Joseph Raz.

⁴³ Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001) 06; Jerome Shestack, 'The Philosophic Foundation of Human Rights' (n 9 above) 201.

⁴⁴ See, Irma Kroeze, 'Legal Positivism' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (Juta, 2006) 63.

over nature and not otherwise.⁴⁵ Law, according to positivism, is a matter of what has been posited.⁴⁶ The arguments put forward by legal positivism advocates is that law is synonymous with positive laws, that is, laws made by a law-making institution and not based on divine or natural commandments or rights.⁴⁷

Legal positivism theory does not oppose the idea that morality influences the law; rather, it opposes the idea that morality determines the validity of a law.⁴⁸ This theory has over time undergone several changes due to the diverse understanding of preposition by different proponents of the same school of thought.⁴⁹ For instance, the classical positivist proponent rejects any definition of law other than that emanating from the existing legal system, given its position that all authority belongs to the state. Classical positivism believes that rights/laws only emanate from legal enactments with sanctions therein attached and are never based on the understanding of the natural entitlement of human beings.⁵⁰ This means that classical positivism does not support 'law as it ought to be' but 'law as it is' and without regard to its goodness or badness.⁵¹

It has, therefore, been opined in line with the preceding argument that natural law/rights theory lacks the capacity to determine what law/right is. Kroeze has argued that not only does it equal a mistake to look at natural law/right in a bid to establish what law/right is, natural law should also not be used to establish what law/right ought to be.⁵² Other advocates of positive law theory have adamantly insisted on the separation of law and morals, which forms part of the

⁴⁵ *Ibid.*

⁴⁶ Kenneth Himma, 'Legal Positivism', available at > <https://www.iep.utm.edu/legalpos/>< accessed 01 January 2019.

⁴⁷ *Ibid.*

⁴⁸ Irma Kroeze, 'Legal Positivism' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (n 44 above) 63.

⁴⁹ *Ibid.*, 63.

⁵⁰ Jerome Shestack, 'The Philosophic Foundation of Human Rights' (n 9 above) 201.

⁵¹ John Austin, 'The Province of Jurisprudence Determined' (1894) as cited in Irma Kroeze, 'Legal Positivism' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (n 44 above) 63. Therefore, it is agreed that natural law cannot deduce what law is because they suggest what law ought to be and not what law is.

⁵² Irma Kroeze, 'Legal Positivism' in Darrell Moellendorf and Chris Roederer (eds), *Jurisprudence* (n 44 above) 63.

bedrock of natural law/right theory.⁵³ For instance, Jeremy Bentham dismissed the natural law theory as 'nonsense on stilts' because he opined that anything that cannot be verified empirically does not exist.⁵⁴ However, the positive right/law theory is also not without criticism.

The positive right/law theory was criticised for its stance in undermining the international idea of human rights following its emphasis on the supremacy of national laws and sovereignty.⁵⁵ Shestack discredited this theory because legal positivism regards international law as rules of positive morality imposed by opinion.⁵⁶ This criticism is based on his understanding that every society needs to apply some basic rules with an intersection between the natural and positive law theories. For him, the idea of the supremacy of national law and sovereignty will pose a challenge to the effective enforcement of international human rights law.⁵⁷ This is because the theory suggests that all laws must be obeyed irrespective of their impact on society and people or its extent of moral validity. The implication is that every law must be obeyed because it is law regardless of how immoral such law may be.⁵⁸

The above discussion on the philosophical foundations of rights/law, which focused on natural and positivist theory partly explains the dichotomy of the historical and philosophical history of human rights. This discussion, however, is not to suggest that only the European or American can lay claim to the origin of human rights practices because of 18th-century revolutions and Magna Carta. Indeed, such arrogation can be successfully sustained if the codification of international human rights is unduly relied upon. Nonetheless, it has been observed that numerous societies had cultural practices that could be interpreted

⁵³ Take, for instance, Adrienne Blerk, *Jurisprudence: An Introduction* (Lexis Nexus, 2011) 29.

⁵⁴ Jeremy Bentham, 'Anarchical Fallacies' in Jeremy Waldron *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge, 1987) 53.

⁵⁵ Jerome Shestack, 'The Philosophic Foundation of Human Rights' (n 9 above) 201.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* On this note, Shestack cited the apartheid practice in South Africa and the anti-Semitic edicts of the Nazis which convincingly were bad norms but were obeyed as positive law.

as having human rights characteristics.⁵⁹ For example, the socialist and communalistic attribute of pre-colonial African societies ensured that individual rights and privileges were respected and regarded as the rights and privileges of the society and community.⁶⁰ This is because African societies did not emphasise individual rights in the same way and manner that European societies did.

2.3 Foundation and context of contemporary international human rights: The international pursuit of effectiveness in civil and political rights protection

This section will examine human rights discourse from the 20th century. The underlying foundation for this section is article 60 of the African Charter provision which permits the African Commission to draw inspiration from UDHR and other international law provisions. This section demonstrates that contemporary human rights arrangement adopts a right codification concept in line with positive law/rights theory while also protecting rights which are deemed intrinsic to every human being, which appears to be a relic of the natural law theory. Indeed, the discussion of the foundation and context of contemporary international human rights is closely related to the preceding section because the normative foundations of contemporary human rights are rooted in the French and American revolutions, and then found expression internationally after World War II and later found their way to Africa following decolonisation. This discussion is relevant to this study because the African Charter's system can be traced to general international human rights law; although with a slight difference in norms.

The concept of contemporary international human rights is traced to the historical antecedents of World War II⁶¹ atrocities and the quest by some Western

⁵⁹ Okey Ejidike, 'Human Rights in the Cultural Traditions and Social Practice of Igbo of the South –Eastern Nigeria' (1999) (43) *Journal of African Law*, 71; Nana Busia 'The Status of Human Rights in Pre-Colonial Africa: Implications for Contemporary Practices' in Eileen McCarthy-Arnolds, David Penna, and Debra Joy Cruz Sobrepena (eds), *Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World*, (Greenwood press, 1994) 226; Osita Eze, *Human Rights in Africa: Some Selected Problems* (n 23 above) 10.

⁶⁰ Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law*, 339.

⁶¹ The World War II lasted from 1939 to 1945.

countries to forestall a future occurrence.⁶² It follows that the history of contemporary human rights protection begins with the creation of the United Nations Organisation (UN) in 1945 by the Charter of the United Nations.⁶³ Primarily, the UN was established to save succeeding generations from the scourge of war, to reaffirm faith in fundamental rights, amongst other objectives.⁶⁴ From the language of the first four paragraphs of the preamble to the Charter of the UN, the international community used the opportunity to emphasise the previous destruction and death because of the World Wars and the failure of the League of Nations.⁶⁵ The entire preamble to the UN Charter passionately suggests the need for nations and individuals to learn lessons from the past to address contemporary and future problems.

The UN emergence was a commitment to multilateralism and robust intergovernmental organisation.⁶⁶ A distinctive contribution of the UN is its character as a standard norm-setter and its universal membership.⁶⁷ Without a doubt, the reference to human rights in the UN Charter is a golden feature of the post World War II order and a substantial contribution of the international community to individuals and nations. However, one would have thought that

⁶² Zeid Al-Hassan, 'The United Nations at 70' (2015) 6 *European Human Rights Law Review*, 555; George Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Transnational Publishers, 2003) 16; paragraph 6 of the preamble to UDHR; Kristina Ash, 'U.S. Reservation to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence' (2005) 3 (1) *Northwestern Journal of International Human Rights*, 1; Dejo Oloru, *An Integrative Rights-based Approach to Human Rights Development in Africa* (Pretoria University Law Press, 2009) 22; Miia Halme-Tuomisaari and Pamela Slotte, 'Revisiting the Origins of Human Rights: Introduction' in Pamela Slotte and Miia Halme-Tuomisaari (eds), *Revisiting the Origins of Human Rights* (Cambridge University Press, 2015) 6; For a more detailed discussion of the UN and promotion of human rights, see, Myres McDougal and Gerhard Bebr, 'Human Rights in the United Nations' (1964) *American Journal of International Law*, 603; William Wagner, 'The Emergency of International Human Rights Law, Universal Human Rights, The United Nations, and the Telos of Human Dignity' (2005) 3 *Ave Maria Law Review*, 197; George Edwards, 'Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of highly successful Human Rights NGOs' (2010) 18 *Michigan State Journal of International Law* 167.

⁶³ The Charter of the United Nations was signed on 26 June 1945, in San Francisco, United States, and came into force on 24 October 1945.

⁶⁴ Preamble 1 and 2 of the Charter of the United Nations.

⁶⁵ The League of Nations was an intergovernmental organisation founded on 10 January 1920 as a result of the Paris Peace Conference that ended the First World War. It was created as a forum for resolving international disputes following the World War I of 1914-1918.

⁶⁶ Thomas Weiss, 'The United Nations: Before, During and After 1945' (2015) 91 (6) *International Affairs*, 1221.

⁶⁷ *Ibid.* The UDHR demonstrates an instance of UN standard setting characteristic.

since the Charter of the UN recognises the devastating effects of the World Wars, it would have been better to have enlisted a stringent human rights concept at the international level.

The aftermath of World War II brought about a radical change in international law in line with article 1 (3) of the UN Charter.⁶⁸ Being the provision of the 'purpose and principles' of the UN, the background of this article gave rise to the idea embodied in the 1948 UDHR, which supported a universal approach to international order.⁶⁹ Likewise, a universal human rights approach was further suggested in the second paragraph of the preamble to the UN Charter.⁷⁰ However, in demanding a universal approach to the international human rights system, the UN Charter did not insist that the UDHR must be binding on all member states irrespective of their year of membership. This could be taken to signify an international understanding of global diversity in civilisation.

However, prior to the emergence of the UN Charter and adoption of the UDHR, the notion of traditional law in practice gave states primacy over their subjects irrespective of any agreed international treaty.⁷¹ During the period, several human rights violations were overlooked because states were not allowed to interfere in the internal conflicts and affairs of others.⁷² This is because the relationship between states and its citizens did not fall under the purview of international law neither were human rights recognised in international law as individual rights vested against a sovereign nation.⁷³ At present, however, human

⁶⁸ Article 1 (3) states as follows: 'to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language and religion'.

⁶⁹ See Article 28 of UDHR; Zeid Al-Hassan, 'The United Nations at 70' (n 62 above) 555; Louise Fawcett, 'The History and Concept of Regionalism' (2012) 4 (2) *European Society of International Law (Conference Paper Series)* 1.

⁷⁰ The provision of this preamble enshrines that 'We the people of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and nations large and small'.

⁷¹ John Humphrey, 'The International Law of Human Rights in the Middle Twentieth Century' in Maarten Bos (eds.) *The Present State of International Law and Other Essays* (Springer Science Business Media, 1973) 75. However, this principle was originally enshrined in Article 15 of the Covenant of the League of Nations and further resonated in Article 2 (7) of the 1945 United Nations Charter.

⁷² Rehman Javaid, *International Human Rights Law* (2nd Edition, Pearson Education, 2010) 3.

⁷³ Paul Seighart, *The International Law of Human Rights* (Clarendon Press, 1983) 12.

rights discourse reflects an interpretation of the traditional concept of international law, which limits the exercise of absolute power by governments.⁷⁴ Accordingly, international human rights have acted as a responsive tool for emerging conflicts, fears, values, and social problems.⁷⁵ This concept of rights did not only bring a change in state party obligation under international law, but it also introduced the idea of fundamental rights that individuals must enjoy the world over.⁷⁶

2.3.1 Universal Declaration of Human Rights

At the outset, the UN Charter preamble reaffirmed faith in fundamental human rights without expressly listing what these rights are. However, human rights expression found in the UDHR provides the framework for international recognition of rights undefined by the UN Charter.⁷⁷ The UDHR has been praised as one of the UN's greatest achievements.⁷⁸ For example, the UDHR has inspired a rich body of legally binding human rights instruments and acts as an inspiration in addressing injustice, repression, conflicts, and in achieving universal enjoyment of human rights.⁷⁹ In this regard, Annan opined that what the UN through UDHR offered is a vision of human rights that is foreign to no one and native to all.⁸⁰

In particular, the UDHR comprises thirty articles traversing various categories of rights. For example, articles 1 to 21 contain rights that were later

⁷⁴ Rhona Smith, *International Human Rights* (n 27 above) 5. This is made possible because a new kind of legal order (the international law) has overtaken the old traditional international law, which had governed only the relations of states.

⁷⁵ Dinah Shelton, 'Challenges to the Future of Civil and Political Rights' (n 2 above).

⁷⁶ Ved Nanda, 'Implementation of Human Rights by the United Nations and Regional Organisations' (1972) 21 (3) *De Paul Law Review*, 307.

⁷⁷ John Humphrey, 'The International Bill of Rights: Scope and Implementation' (1976) 17 (3) *William and Mary Law Review*, 527. The UDHR enshrines a new scope of human rights ideology, which has influenced other regional and national human rights instruments. Some of the notable instruments influenced by the UDHR include the European Convention on Human Rights and the American Convention on Human Rights.

⁷⁸ Rosalyn Higgins, 'The United Nations at 70 years: The Impact upon International Law' (2016) 65 (1) *International and Comparative Law Quarterly*, 1.

⁷⁹ United Nations, 'The Foundation of International Human Rights Law', available at > <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> < accessed 18 March 2019. Indeed, the UDHR has inspired numerous regional treaties, conventions and declarations, national human rights laws and constitutional provisions.

⁸⁰ Kofi Annan, 'Ignorance, not Knowledge, ... Makes Enemies of Man' (speech to the Communication Conference at ASPEN Institute 1997), available at > <https://www.un.org/press/en/1997/19971020.SGSM6366.html> < accessed on 18 March 2019.

enshrined as civil and political rights under the ICCPR 1966 such as the right to life, non-discrimination, equality, fair trial, prohibition of torture, slavery, arbitrary arrest and detention, and inhuman treatment, amongst others. In the same vein, articles 22 to 27 comprise rights later recognised under the International Covenant for Economic, Social and Cultural Rights (ICESCR) 1966 such as the right to social security, the right to work, equal pay, remuneration, the right to a standard of living adequate for health, and the right to education. Unlike the UDHR provisions, the 1966 covenants provided more expansive rights and further recognised the right to self-determination as civil and political rights as well as social-economic rights.

The UDHR is a non-self-executing document and was not intended to be binding on UN member states as part of positive international law.⁸¹ Instead, the UDHR is a human rights aspirational standard for UN member states, with the expectation that member states recognise these rights in their constitutions and/or domestic laws.⁸² Nonetheless, the UN Commission on Human Rights⁸³ was generally concerned with the implementation aspects of the UN recognised human rights until the middle of the 1950s.⁸⁴ In 1956, the Economic and Social Council acting under article 64 of the UN Charter asked all UN member states to report every three years on progress made towards the actualisation of the UDHR.⁸⁵ Nonetheless, the Office of the UN High Commissioner for Human Rights (OHCHR)

⁸¹ UNGA Ordinary Resolution 934, UN Doc. A/177 (1948).

⁸² The UN is the world largest intergovernmental organisation with 193 sovereign states are members.

⁸³ The Commission on Human Rights was made up of 18 members from various political, cultural and religious backgrounds and the Commission met for the first time in 1947.

⁸⁴ The period between 1947 and 1954 saw the UN Commission on Human Rights being the primary body drawing up human rights duties and provisions of the UN Charter. Other UN established institutions with human rights mandate include Economic and Social Council (ECOSOC) which was established following the ECOSOC Resolution 1235 of 1967 and ECOSOC Resolution 1503 of 1970. See also, See, George Mugwanya, *Human Rights in African: Enhancing Human Rights Through the African Regional Human Rights System* (n 62 above) 17.

⁸⁵ John Humphrey, 'The International Bill of Rights: Scope and Implementation' (n 77 above) 527. However, this system has changed to a biannual report circle on any particular topic. Article 64 of the UN Charter empowers the Economic and Social Council to obtain reports from the specialised agencies on the steps taken to give effect to the recommendations on matters made by the General Assembly.

retained lead responsibility in the UN system for the promotion and protection of human rights until its replacement in 2006 by the Human Rights Council.⁸⁶

Whilst it is essential to mention that the UDHR was not accompanied with an implementation mechanism, suffice to add that the General Assembly at the time of UDHR adoption requested the Commission on Human Rights to prioritise the drafting of measures of implementation.⁸⁷ Considering the non-self-executing nature of the UDHR, Koh likens it to a mere political instrument with less significant legal impact on states.⁸⁸ This is because the common standard of human rights put forward in the UDHR would not make any difference if ignored by state parties. On the other hand, the UDHR failed to mention the protection of minorities, and its treatment of issues relating to political asylum is unsatisfactory.⁸⁹ Whether the omission of rights in the first official human rights standard can be overlooked depends on the relevance of the omitted rights. For instance, the right relating to the protection of minorities was typical of World War II violations which witnessed atrocities against minorities.

Considering the state of affairs in many countries prior and after the World Wars, and the relevance of human rights to human dignity, one would have expected the UDHR to have a decisive, uniform and stringent enforcement arrangement. This is because the adopted approach for enforcement of the UDHR leaves it mainly at the mercy of member states; thus, leaving the UN with the task of using its moral and political authority to canvass for the universal spread of human rights standards. Although this moral authority seems to be challenged in the contemporary world due to divergent political and economic interests,

⁸⁶ The Human Rights Council replaced the 60-year-old UN Commission on Human Rights and became the key independent UN body responsible for human rights. At present, the UDHR is promoted and protected by Human Rights Council through its secretariat – Office of the UN High Commission for Human Rights (OHCHR). Its headquarters is situated in Geneva, Switzerland.

⁸⁷ General Assembly Resolution 217 B and E, UN Doc A/177 (1948). Several draft reports were submitted especially between 1954 and 1963, which were helpful in the drafting of the European Convention on Human Rights and other UN human rights instruments such as the 1969 Racial Discrimination Convention. See generally, Ved Nanda, 'Implementation of Human Rights by the United Nations and Regional Organisations' (n 76 above) 307.

⁸⁸ Harold Koh, 'How is International Human Rights Law Enforced?' (1999) 74 (3) *Indiana Law Journal* 1397. Koh further argued that the UDHR could be legally binding if recognised as international customary law.

⁸⁹ John Humphrey, 'The International Bill of Rights: Scope and Implementation' (n 77 above) 527.

debate on United Nations Security Council, and use of the veto, the UN has progressively strived for its human rights mandate.⁹⁰ It is thought that such a universal boost of human rights is supported by the UDHR preamble, which declared the UDHR a common human rights standard for all in 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'.⁹¹ The consequence is that the UDHR has become a universally accepted interpretation, and the definition of human rights left undefined by the UN Charter.⁹² Despite massive contemporary recognition accorded to the UDHR across the globe in international human rights discourse, the UN did not abandon its quest for binding human rights instruments.

2.3.2 International Covenant for Civil and Political Rights⁹³

The UN quest to provide a binding human rights system was achieved in 1966 when the United Nations General Assembly (UNGA) adopted two significant multilateral treaties with the capacity to expose states to international scrutiny.⁹⁴ The treaties are the ICCPR⁹⁵ together with its Optional Protocols, and International Covenant for Economic, Social and Cultural Rights (ICESCR).⁹⁶ With the adoption of the ICESCR and the ICCPR and its Optional Protocols, the UN attained a

⁹⁰ Zdzislaw Kedzia, 'United Nations Mechanisms to Promote and Protect Human Rights' in Janusz Symonides (eds), *Human Rights: International Protection, Monitoring and Enforcement* (Routledge, 2003) 34.

⁹¹ Paragraph 1 of the preamble to the UDHR.

⁹² Rosalyn Higgins, 'The United Nations at 70 years: The Impact upon International Law' (n 78 above) 1; John Humphrey, 'The International Bill of Rights: Scope and Implementation' (n 77 above) 527. Furthermore, at the time the UN was founded in 1945 it had 51-member states but as today it has 193-member states out of the 195 countries in the world- the Holy See and the State of Palestine.

⁹³ As at 11 February 2019, ICCPR has 172 state parties and 19 no-action states. For more detail visit 'Status of Ratification Interaction Dashboard', available at > <http://indicators.ohchr.org/>< accessed 11 February 2019. All African states have ratified the ICCPR except South Sudan. It is imperative to mention that unlike the UDHR, the ICCPR applies only to the state parties that ratify it. See, John Humphrey, 'The International Bill of Rights: Scope and Implementation' (n 77 above) 527.

⁹⁴ Zdzislaw Kedzia, 'United Nations Mechanism to Promote and Protect Human Rights' in Janusz Symonides (eds), *Human Rights: International Protection, Monitoring and Enforcement* (n 90 above) 15.

⁹⁵ The ICCPR was adopted by the UN General Assembly Resolution 2200A (XXI), 21 U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. The next section would broadly discuss this category of international human rights.

⁹⁶ The ICESCR was adopted by the UN General Assembly Resolution 2200A (XXI) on 16 December 1966 and entered into force January 3, 1976.

significant step forward towards providing concrete, enforceable rights.⁹⁷ These three UN instruments, the UDHR, the two covenants and the protocols, became known as the 'international bill of rights'.⁹⁸ The UN effort in enacting enforceable civil and political rights is relevant to this thesis because the ICCPR acts as a UN standard in the protection of this category of human rights. Conversely, the ICCPR, as well as the UDHR, have a direct influence on the African human rights norm setting, interpretation and human rights protection under the African Charter.

In view of the preceding discussion, it is essential to mention that all African states are state parties to the ICCPR except South Sudan.⁹⁹ Whereas this indicates African region acceptance of human rights concept, it also signifies accountability to ICCPR mechanisms. For instance, article 2 enshrines that 'each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory ...the rights recognised in the present Covenant, without distinction of any kind...'.¹⁰⁰ As a binding instrument, this provision is remarkable given that every human being lacks the absolute power to determine into what race, nationality or ethnicity, gender or societal class one is born. Accordingly, it has been opined that article 2(1) creates an independent state obligation outside the outlined substantive rights of the ICCPR.¹⁰¹

2.3.2.1 Normative framework of the ICCPR

The ICCPR provides the legal framework to protect and preserve the most basic civil and political rights such as the right to life, equality, and the prohibition from torture. In simple terms, the ICCPR confers rights on individuals and obligations

⁹⁷ Ved Nanda, 'Implementation of Human Rights by the United Nations and Regional Organisations' (n 76 above) 307.

⁹⁸ United Nations, *Human Rights: A Compilation of International Instruments of the United Nations*. Vol. 1, Pt 2, UN.Doc. ST/HR/1/Rev.6 (2002), available at > <https://www.ohchr.org/documents/publications/compilation2en.pdf>< accessed 13 February 2019. This section would concentrate on the ICCPR because of its core bearing with the thesis, being the UN standards of civil and political rights.

⁹⁹ For more details visit 'Status of Ratification Interaction Dashboard', available at > <http://indicators.ohchr.org/>< accessed 11 February 2019.

¹⁰⁰ Article 2 (1) of ICCPR.

¹⁰¹ Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies before Domestic Courts' (2018) *International and Comparative Law Quarterly*, 201; Torkel Opsahl, 'International Obligation and National Implementation' (1979) 23 *Scandinavian Studies in Law*, 149.

on state parties.¹⁰² Unlike the UDHR, the ICCPR has fifty-three articles, divided into a preamble and six parts,¹⁰³ and recognises 'all peoples' right to self-determination'.¹⁰⁴ Part 1 of the ICCPR recognises the right to self-determination and the right of the people not to be deprived of its means of subsistence. Part 2 obliges state parties to give effect to the covenant rights through legislation, where necessary, and to provide remedy for violation for the covenant rights. It requires state parties to recognise these rights without discrimination of any kind. Part 3 lists the rights themselves while Part 4 establishes the Human Rights Committee. Part 5 adumbrates on interpretation whereas Part 6 governs ratification, entry into force and amendment of the ICCPR. However, the civil and political rights catalogued in the ICCPR are substantially the same as those contained in the UDHR, although there are significant differences.

The specific civil and political rights enumerated in the ICCPR comprise the equal rights of men and women,¹⁰⁵ the right to life,¹⁰⁶ freedom from torture, degrading treatment,¹⁰⁷ freedom from slavery and the slave trade,¹⁰⁸ the right to liberty and security,¹⁰⁹ the right of detained persons,¹¹⁰ freedom from imprisonment for debt,¹¹¹ freedom of movement and choice of residence,¹¹² freedom of aliens from arbitrary expulsion,¹¹³ the right to fair trial,¹¹⁴ prohibition

¹⁰² Sarah Joseph, 'A Rights Analysis of the Covenant on Civil and Political Rights' (1999) 5 *Journal of International Legal Studies*, 57.

¹⁰³ At on 11th February 2019, there are 172 state parties to the ICCPR; 116 State Parties to the First Optional Protocol to the ICCPR; and 86 State Parties to the Second Optional Protocol to the ICCPR. See generally, 'Status of Ratification Interaction Dashboard', available at > <http://indicators.ohchr.org/>< accessed 11 February 2019.

¹⁰⁴ Article 1 of the ICCPR. This right is recognised under the ICESCR and Article 20 of the African Charter. However, under the ECHR, this right is not recognised. Except the African Charter, no other regional human rights treaty recognises peoples' rights.

¹⁰⁵ Article 3 of the ICCPR.

¹⁰⁶ Article 6 of the ICCPR.

¹⁰⁷ Article 7 of the ICCPR.

¹⁰⁸ Article 8 of the ICCPR.

¹⁰⁹ Article 9 of the ICCPR.

¹¹⁰ Article 10 of the ICCPR.

¹¹¹ Article 11 of the ICCPR.

¹¹² Article 12 of the ICCPR.

¹¹³ Article 13 of the ICCPR.

¹¹⁴ Article 14 of the ICCPR.

against retroactivity of criminal law,¹¹⁵ the right to be recognised everywhere as a person before the law,¹¹⁶ the right to privacy,¹¹⁷ the right to freedom of thought, conscience and religion,¹¹⁸ the right of opinion and expression,¹¹⁹ prohibition of propaganda for war and incitement to national, racial or religious hatred,¹²⁰ the right to peaceful assembly,¹²¹ freedom of association,¹²² the right to marry and found a family,¹²³ the right of a child,¹²⁴ political rights,¹²⁵ equality before the law,¹²⁶ the right of a person belonging to minorities,¹²⁷ and the right to self-determination.¹²⁸ However, the Second Optional Protocol to the ICCPR further protects the right to life by abolishing the death penalty.¹²⁹

It is thought that the expanded substantive civil and political rights under the ICCPR would be all-inclusive and comprehensive; however, unlike article 17 UDHR, the ICCPR does not cover the right to property and the right to asylum and nationality. Further, while it recognises the right to belong to an organisation, the ICCPR fails to recognise the right not to belong to an organisation.¹³⁰ These omissions do not literally imply that ICCPR rights are not comprehensive, especially when compared to the UDHR and other regional treaties. It cannot be relied upon to discredit the UN efforts in providing a comprehensive binding civil and political rights instrument. Indeed, the substantive rights of the ICCPR are so

¹¹⁵ Article 15 of the ICCPR.

¹¹⁶ Article 16 of the ICCPR.

¹¹⁷ Article 17 of the ICCPR. Under article 17, the ICCPR protects the right to sexual privacy and freedom from surveillance.

¹¹⁸ Article 18 of the ICCPR.

¹¹⁹ Article 19 of the ICCPR.

¹²⁰ Article 20 of the ICCPR.

¹²¹ Article 21 of the ICCPR.

¹²² Article 22 of the ICCPR.

¹²³ Article 23 of the ICCPR.

¹²⁴ Article 24 of the ICCPR.

¹²⁵ Article 25 of the ICCPR.

¹²⁶ Article 26 of the ICCPR.

¹²⁷ Article 27 of the ICCPR.

¹²⁸ Article 1 of the ICCPR.

¹²⁹ Adopted and proclaimed by the UN General Assembly Resolution 44/128 of 15 December 1989 and entered into force 11 July 1991. It commits State Parties to the ICCPR to the abolition of the death penalty.

¹³⁰ The right not be compelled to belong to an association is recognised under article 10 (2) of the African Charter.

comprehensive that virtually no state party can claim to either be in full compliance with its normative provisions or their article 2 obligation.¹³¹

An additional instance of the normative advance in the ICCPR is that it gives state parties the right to take measures derogating from their obligations under it in time of public emergency.¹³² Although it is unclear what extent of public emergency should allow the derogation under article 4 of ICCPR, it is interesting to note that there is no derogation from articles 6, 7, 8 (1) and (2), 11, 15, 16 and 18.¹³³ In particular, the exempted articles are very crucial to the inherent dignity of the human person and freedom from fear and want. In contrast with the European system, however, the European Court on Human Rights (ECtHR) in *Lawless v Ireland*¹³⁴ provided valuable clarification of its similar derogation provision under article 15. In this case, the court held that 'emergency refers to an exceptional situation or crisis which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed'.¹³⁵ In this case, the ECtHR reaffirmed that article 15 (3) only requires a state party to communicate the facts of the situation and notice of derogation to the Council of Europe Secretary-General.¹³⁶

The derogation requirement is different under the ICCPR. Article 4 (3) requires a state party to inform other state parties through the Secretary-General of the UN, of the provisions from which it has derogated and the reasons for such derogation. Despite this, the International Court of Justice in the Nuclear Weapon advisory opinion maintains that the human rights protection offered by the ICCPR does not cease in case of armed conflict, except through the provisions of article

¹³¹ David Kaye, 'State Execution of International Covenant on Civil and Political Rights' (2013) 3 (9) UC Irvine Law Review, 95; Anja Seibert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para 2' (2001) 5 Max Planck Yearbook of the United Nations, 399.

¹³² Article 4 of ICCPR. Of course, there is no derogation provision under the UDHR. However, a similar provision is seen in article 15 of ECHR. Under the European system, the European Court on Human Rights has the power to decide whether the conditions for this right has been fulfilled. See, *Lawless v Ireland* case, (1961) European Court of Human Rights 2, (1961) 1 European Court of Human Rights 15, APP No. 332/57.

¹³³ Article 4 (2) of ICCPR.

¹³⁴ *Lawless v Ireland*, App No. 332/57 (A/5), (1961).

¹³⁵ App No. 332/57 (A/8), (1961).

¹³⁶ *Ibid.*

4 of ICCPR.¹³⁷ However, no country has sought to exercise its power of derogation under article 4 about a military operation in time of armed conflict outside its territory when such armed operation has UN mandate.¹³⁸ This is because it is difficult and unclear how states carrying out military operations in another country can invoke the application of the ICCPR under article 4.¹³⁹ What, then, is unknown is whether member states of a coalition or international body taking part in an armed conflict in another country can suspend the ICCPR under article 4 (3) on behalf of another state. Rather, the frequent notification under article 4 ICCPR concerns the suspension of state party domestic laws during periods of public emergencies such as armed conflict.¹⁴⁰ Therefore, where a state fails to give other state parties proper notification of intention to derogate, any derogation then declared is illegal and a forfeiture of the right to derogate.¹⁴¹

Another important normative feature of ICCPR is its approach to permissible limitations on the enjoyment of the Covenant rights. Unlike the UDHR which deals with limitations only in article 29 (2),¹⁴² the ICCPR limitations are more extensive. Six rights are limited by restrictions under the ICCPR and they include the right to movement under article 12, equality before the courts and tribunal under article 14, freedom of thought, conscience and religion under article 18, the right to hold opinion under article 19, the right to peaceful assembly under article 21 and freedom of association under article 22. The grounds for these limitations are similar to UDHR with a slight difference, and include national security,¹⁴³ rights

¹³⁷ *Nuclear Weapon Advisory Opinion* by the international Court of Justice, 25 para 34. The International Court of Justice in *DRC v Uganda* maintained this position.

¹³⁸ See generally, Ineke Boerefijn, 'UN Covenant on Civil and Political Rights: CCPR Commentary' (2008) 6 *European Journal of International Law*, 714.

¹³⁹ Without a doubt, article 4 applies to state parties and not international organizations such as the UN though individual states participating in the armed operation may be member states of the ICCPR.

¹⁴⁰ See, Notifications under Article 4 (3) of the Covenant (Derogations), available at > https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND< accessed 20 February 2019. As of February 20, 2019, 34 states had submitted notifications under article 4 (3) of the ICCPR.

¹⁴¹ *Israeli Wall Advisory Opinion* by the international Court of Justice, para 127, 136 and 140.

¹⁴² Article 29 (2) of UDHR permits limitations solely for the purpose of securing due recognition and respect for the rights of others and of meeting a just requirement of morality, public order and general welfare in a democratic society.

¹⁴³ Articles 12, 14, 19, 21, 22 of ICCPR.

and freedom of others,¹⁴⁴ public safety,¹⁴⁵ public health,¹⁴⁶ public order,¹⁴⁷ and public morals necessary in a democratic society.¹⁴⁸ Consequently, the ICCPR limitations present greater possibilities of abuse and difficulty in interpretation.¹⁴⁹ For example, the use of 'public order' in article 12 (3) has no precise legal meaning in common law jurisdiction, which means the absence of disorder.¹⁵⁰ One would agree that an attempt to allow states to interpret their understanding of public order will lead to uncertainty and endanger the efficient implementation of the ICCPR.

2.3.2.2 Structure and procedure for implementation of the ICCPR

The ICCPR, unlike the UDHR, establishes an implementation and monitoring procedure that depends mainly on state party reporting.¹⁵¹ On the other hand, unlike the ICESCR,¹⁵² the ICCPR goes beyond the reporting system by making provision for conciliation of disputes on an optional basis.¹⁵³ However, the General Assembly established a Human Rights Committee (HRC)¹⁵⁴ as a self-monitoring and enforcement body for the ICCPR. Therefore, this section will determine whether the monitoring and enforcement arrangements of the ICCPR are adequate to realise effective enforcement of a universal civil and political rights concept.

2.3.2.2.1 The mandate and functions of the HRC

The HRC comprises 18 experts elected by the UN member states, who serve in their personal capacity.¹⁵⁵ Primarily, the HRC is authorised to deal with the

¹⁴⁴ Articles 12, 18, 21, 22 of ICCPR.

¹⁴⁵ Articles 18, 21, 22 of ICCPR.

¹⁴⁶ Articles 12, 18, 19, 21, 22 of ICCPR.

¹⁴⁷ Articles 12, 14, 18, 19, 21, 22 of ICCPR.

¹⁴⁸ Articles 12, 14, 18, 19, 21, 22 of ICCPR.

¹⁴⁹ John Humphrey, 'The International Bill of Rights: Scope and Implementation' (n 77 above) 527.

¹⁵⁰ *Ibid.*

¹⁵¹ Article 40 of ICCPR. Article 40 requires state parties to submit reports through the UN Secretary-General of the UN on the measure they have adopted which give effect to the rights recognised in the ICCPR and the progress made in the enjoyment of those rights.

¹⁵² The ICESCR depends exclusively on reporting for its implementation. See article 16 of ICESCR.

¹⁵³ Article 44 of ICCPR.

¹⁵⁴ Article 28 of ICCPR.

¹⁵⁵ Article 28 of ICCPR. The HRC meets three times annually and members are elected by secret ballot and serve four-year terms.

individual complaint,¹⁵⁶ act on state parties' reports, deal with interstate complaints under article 41, and finally, submit annual reports to the General Assembly under article 45. The HRC's mandate to act on state parties' reports requires it to transmit comments to both state parties and the Economic and Social Council.¹⁵⁷ Likewise, the HRC has to produce General Comments and Concluding Observations after acting on state reports. What this demonstrates is a broad responsibility for the implementation body, despite the socio-cultural and political diversity and difference of ICCPR state parties. It is therefore argued that the mandate of the HRC is very demanding when compared to its composition and the number of state parties.

At the outset, the ICCPR itself did not empower the HRC to deal with individual complaints. Such competence was established following the enactment of the Optional Protocol to the ICCPR, which enables the HRC to receive and consider complaints from individuals.¹⁵⁸ Consequently, state parties that ratify the Optional Protocol agree to allow individuals to file complaints against them at the HRC.¹⁵⁹ It follows that the right of individuals to file complaints at the HRC is not automatically binding on state parties to the ICCPR. As a prerequisite, however, the state party to this Protocol must make a declaration that it recognises the competence of the HRC to receive and consider such complaints.¹⁶⁰ Likewise, the HRC's jurisdiction extends to the Second Optional Protocol to the ICCPR on the abolition of the death penalty with regard to states that have ratified the

¹⁵⁶ Article 1 of the Optional Protocol to the ICCPR. Adopted and opened for signature, ratification and accession by General assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with article 9. Available at > <https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx>< accessed 14 February 2019.

¹⁵⁷ Article 40 (4) of ICCPR.

¹⁵⁸ The Optional Protocol establishes an individual complaints procedure for bringing alleged violation of the ICCPR before the Human Rights Committee. At present, whereas Benin is a state party to this Protocol, Nigeria and Tanzania have taken no action on this Protocol.

¹⁵⁹ While to date, 116 state parties have signed up to this Protocol, this individual complaint procedure has resulted in numerous filings giving rise to a vast development of case law jurisprudence. For instance, the HRC has 1745 finalised cases as at July 2017 from its 116 sessions of communications; see also, Report of the Human Rights Committee to the General Assembly, Supplement No. 40 (A/72/40) for 117th, 118th and 119th session, 2017.

¹⁶⁰ Article 1 of the Optional Protocol.

Protocol.¹⁶¹ As a result, the abolition of the death penalty in some African countries such as Benin, South Africa, Angola, Burundi, Gabon and Cote d'Ivoire have their foundation in this Second Optional Protocol.

The above notwithstanding, the provisions of the ICCPR, its Protocols and the jurisdiction of the HRC cannot be enforced against a non-state party and a state party that has not made a declaration under article 41.¹⁶² This is because the option of an inter-state complaints system under article 41 requires a voluntary declaration by a state recognising the competence of the HRC to receive and consider complaints from another member state alleging that it is not fulfilling its obligation under the ICCPR.¹⁶³ This optional measure for state versus state complaint can only be instituted when both countries involved have already made the declaration under article 41. However, it is essential to mention that a similar inter-state complaint procedure is adopted in some international treaties.¹⁶⁴ The concern, therefore, is the effect of such an approach to the enhancement of international human rights law, and particularly, civil and political rights implementation.¹⁶⁵ It is therefore argued that the success of inter-state complaint system depends on the human rights commitment of the member states. This is against the backdrop that state parties' inability to freely use interstate complaint procedure against non-compliant member states may affect international progress on the enforcement of the ICCPR. Therefore, one significant probable effect is the

¹⁶¹ The Second Optional Protocol aims at the abolition of the death penalty and was adopted and proclaimed by the General Assembly resolution 44/123 of 15 December 1989.

¹⁶² As at October 2017, 50 state parties had made the declaration provided for under article 41 (1) of the ICCPR.

¹⁶³ Only 50 state parties have filed a declaration under article 41. See, Report of the Human Rights Committee to the General Assembly, Supplement No. 40 (A/72/40) for 117th, 118th and 119th session, 2017.

¹⁶⁴ For example, see article 21 of Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment; article 32 of Convention for the Protection of All Persons from Enforced Disappearance; and, article 10 of the Optional Protocol to ICESCR. See generally, UN Human Rights: Office of the High Commissioner 'Inter-state Complaints' available at >
<http://www.ohchr.org/EN/HRBodies/Petitions/Pages/InterStateComplaints.aspx>< accessed 15 February 2018.

¹⁶⁵ The procedure is that before such complaint is made to the HRC, the complaining state must first make a written communication to the state which is allegedly not fulfilling its obligations. Therefore, complaints can be made to the HRC if the matter is not satisfactorily settled after this attempt. See, article 41 (1) (a) and (b) of ICCPR.

lack of opportunity for state parties to put pressure on themselves or act as a watchdog for the HRC.

2.3.2.2.2 The reporting procedure of ICCPR

The reporting system is the primary mechanism for monitoring implementation of the ICCPR in member states. Under article 40, state parties to the ICCPR undertake to submit periodic reports to the Secretary-General of the UN, who will transmit them to the HRC. Unlike the ICESCR where the Economic and Social Council is expected to report to the General Assembly with 'recommendations of a general nature',¹⁶⁶ the HRC transmits its reports and General Comments as it may consider appropriate to the state parties after studying their reports.¹⁶⁷ However, while the HRC may transmit these General Comments to the Economic and Social Council, it is expected to include a summary of its activities in its annual report submitted to the General Assembly.¹⁶⁸ One could, however, question whether the HRC General Comments and Concluding Observations have the force of law in concerned states.

It is clear from the analysis of the HRC that Concluding Observations have more influence on the state parties, unlike General Comments.¹⁶⁹ In particular, the HRC adopts a Concluding Observation after considering state reports which are monitored by a Special Rapporteur for Follow Up on Concluding Observation to ensure state party implementation. On the other hand, the HRC General Comments on ICCPR provisions act as guidance to be taken into account when making State Reports under article 40. However, the content and sincerity of these reports have been questioned. In this vein, Olowu,¹⁷⁰ Donnelly,¹⁷¹ and

¹⁶⁶ Article 21 of ICESCR.

¹⁶⁷ Article 40 (4) of ICCPR.

¹⁶⁸ Article 45 of ICCPR; article 6 of the Optional Protocol.

¹⁶⁹ Yogesh Tyagi, 'Influence of the ICCPR in Asia', in Daniel Moeckli, Helen Keller, and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present and Future* (Oxford University Press, 2018) 204.

¹⁷⁰ Dejo Olowu, 'The United Nations Human Rights Treaty System and the Challenges of Commitment and Compliance in the South Pacific' (2006) 7 *Melbourne Journal of Internal Law*, 1.

¹⁷¹ Jack Donnelly, 'International Human Rights: A Regime Analysis' (1986) 40 (3) *International Organisation*, 599.

Robertson,¹⁷² have argued that since state parties through their officials compile these reports, such state reports may lack an objective account of state commitment to the covenant. These scholars are concerned whether state reports will reflect the actual position of state measures in respecting and ensuring the enjoyment of ICCPR rights because states may not want to indict themselves by stating the reality.

In the light of the preceding concern, the HRC introduced in 2009 a simplified reporting procedure which focuses on a state party replying to a list of issues from the HRC.¹⁷³ As a result, this approach allows the HRC to seek input from civil society organisations and National Human Rights Institutions (NHRIs) in operation in the concerned state party before listing the issues to be addressed in its focused state report. This methodology is practical and will ensure objectivity in state reports because state parties are expected to respond accurately to the HRC listed issues. This is because this method is target driven and result-oriented with potential to extract an actual human rights position from state parties. However, what is unclear is whether this approach will tackle state parties' late filing of reports to the HRC under the article 40 provision.

It is observed that delay in submitting state reports contributes to HRC's inability to monitor state parties' implementation of ICCPR provisions.¹⁷⁴ Although non-submission of reports is a violation of article 40 (1) of ICCPR, many Asian states have been reluctant to submit their state reports to the HRC.¹⁷⁵ Consequently, the HRC has, over time, adopted several measures to encourage state parties' compliance with article 40 (1) and such includes the admonition of states, recognition of serious defaulter States, and notice to States warning them

¹⁷² Arthur Robertson, 'The Implementation System: International Measures' in Louis Henkin (eds), *The International Bill of Rights: The Covenant of Civil and Political Rights* (Columbia University Press, 1981) 332.

¹⁷³ Human Rights Committee, Focused Reports Based on Replies to list of Issues prior to Reporting (LOIPR): Implementation of the new Optional Reporting Procedure (LOIPR Procedure), Ninety-nine session, 12-30 July 2010, UN document CCPR/C/99/4 available at > <https://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-99-4.pdf> accessed 14 February 2019.

¹⁷⁴ Yogesh Tyagi, 'Influence of the ICCPR in Asia, in Daniel Moeckli, Helen Keller, and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present and Future* (n 169 above) 204.

¹⁷⁵ *Ibid.*

about the HRC's intent to consider state party measures adopted to give effect to the provisions even in the absence of a submitted state report.¹⁷⁶ One would have thought that since the examination of state reports is the primary means of monitoring ICCPR implementation, it would have been better to have clarified this scope from the outset rather than leaving the issues to be resolved after many years of poor compliance by state parties.

2.3.2.3 Underlying domestic implementation of the ICCPR

It is clear from the provisions of the ICCPR that enforcement depends on the effectiveness of the HRC and state legislative and enforcement institutions.¹⁷⁷ For instance, under article 2 (1) ICCPR, state parties undertake 'to respect and ensure for all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'. Furthermore, article 2 (2) of the ICCPR provides:

'where not already provided for by existing legislative and other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provision of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present covenant'.

On the other hand, article 2 (3) of the ICCPR states that each state party to the present Covenant undertakes:

- (a) 'to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy.....'.
- (b) 'to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy'.

¹⁷⁶ *Ibid.*

¹⁷⁷ Linda Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it make a Difference in Human Rights Behaviour?' (n 3 above).

What is clear from the above provisions is that enjoyment of the ICCPR largely depends on the legislative and implementation measures taken by state parties. It follows that while domestic enforcement plays a primary role in ICCPR implementation, international enforcement acts as a control system and a secondary means of enforcement.¹⁷⁸ As a result, both national and international institutions have a crucial role to play in ensuring civil and political rights enforcement to every individual across the globe.

Firstly, article 2 (1) ICCPR establishes an obligation of result on state parties to ensure the implementation of civil and political rights in an effective manner.¹⁷⁹ Such obligation of result envisages article 2 (2) mandate to adopt legislative and other measures to give effect to the ICCPR. What is implied from the wording of this provision is that the ICCPR provides leeway for state parties to use another medium because it did not make legislative adoption the only method of implementation. Indeed, Nowak in his analysis observed that part of the article 2 (2) wording, speaking of 'the necessary steps in accordance with the constitutional processes' can give state parties leeway in the implementation of the covenant.¹⁸⁰ It follows that different constitutional processes of state parties will determine the manner of ICCPR implementation, thereby eliminating the idea of a harmonised implementation medium which ignores the vast difference between diverse legal systems.

It is the prerogative of state parties to the ICCPR to choose its style of legislative implementation as long as it gives effect to the ICCPR.¹⁸¹ On this note, Opsahl asserts that state parties have a double duty of implementation. According to him, state parties have a responsibility 'to respect and to ensure individuals

¹⁷⁸ Anja Seibert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para 2' (n 131 above) 399.

¹⁷⁹ Oscar Schachter, 'The Obligation to Implement the Covenant in Domestic Law' in Louis Henkin (ed.) *The International Bill of Rights* (Columbia University Press, 1981) 311.

¹⁸⁰ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel publishers, 1993) 54.

¹⁸¹ Michael O'Flaherty, 'The Reporting Obligation under Article 40 of the International Covenant on Civil and Political Rights: Lessons to be learned from consideration by the Human Rights Committee of Ireland's First Report' (1994) 16 *Human Rights Quarterly*, 515.

enjoy these rights without distinction of any kind, and to take necessary steps to provide legislative or other measures to give effect to the ICCPR'.¹⁸² Whilst this observation appears to be correct, one can argue that the wording of article 2 suggests immediate state parties' compliance with ICCPR obligations, unlike the ICESCR. For instance, while article 2(1) of ICESCR requires State Parties to ICESCR 'to take steps, individually or through international assistance and cooperation.... with a view to achieving progressively the full realisation of the rights', whereas article 2(3) further demands 'developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights'.¹⁸³ The difference in phrases 'to take steps' when compared to 'undertake to respect and ensure' used in both covenants suggests that while the ICCPR creates an immediate and unconditional obligation, the ICESCR implies a progressive implementation.¹⁸⁴ As a result, one can argue that the ICESCR normative approach may have contributed to the idea of adopting some socio-economic rights as fundamental objectives and directive principles of state policy in many African state constitutions, thus non-justiciable rights.¹⁸⁵

The mandatory obligation of state parties in the implementation of the ICCPR is further emphasised in article 2 (3) ICCPR. This provision instructs state parties to provide an effective remedy and fair hearing or determination by a competent judicial, administrative or legislative authority, or by any other competent authority provided for by the state party legal system. Furthermore, state parties are mandated to ensure that competent authorities enforce such

¹⁸² Torkel Opsahl, 'International Obligations and National Implementation' (n 101 above) 149.

¹⁸³ See generally, article 2 of ICESCR.

¹⁸⁴ Anja Seibert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para 2' (n 131 above) 399; Thomas Buergenthal, 'To Respect and to Ensure State Obligations and Permissible Derogations' in Louis Henkin (eds), *The International Bill of Rights: The Covenant of Civil and Political Rights* (Columbia University Press, 1981) 72.

¹⁸⁵ From the analysis of both covenants, whereas ICCPR state parties have a mandatory duty to implement without recourse to available resources and other contingencies, the situation under the ICESCR suggests a mere promotional obligation which is determinant on the availability of resources. For example, rights recognised as fundamental objectives and directive principles of state policy in 1999 Constitution of Nigeria are not enforceable; rather they aid the government in directing its policies and programme. See chapter 2 of 1999 Constitution of Nigeria.

remedies when granted.¹⁸⁶ This implies that state institutions have the power to choose which remedies or punishment to award. For instance, whereas arbitrary killing¹⁸⁷ and kidnapping¹⁸⁸ constitute both human rights violations¹⁸⁹ and crimes punishable under the Nigeria Criminal Code Act, female genital mutilation constitutes inhuman and degrading with prison term under Benin Act No. 2003-03.¹⁹⁰ What is implied is that acts that breach civil and political rights may attract different remedies depending on the punishment and protection under the national legislation of concerned state parties.

It is particularly evident that ICCPR provisions are protected under national and international laws.¹⁹¹ However, the individual complaint system provided by the Optional Protocol requires domestic remedies to be exhausted before an individual may submit a communication to the HRC.¹⁹² This is because domestic mechanisms play a prominent role which makes them useful even in its international implementation procedure.¹⁹³ Take, for instance, article 2 (3) (c) which mandates state parties to ensure competent authorities enforce remedies when granted. It follows that the non-recognition of national institutions in the implementation of ICCPR would make the treaty meaningless because of the non-binding structure of the HRC.

2.3.2.4 Overriding limitations to the implementation of the ICCPR

A significant issue for contemporary international human rights law is to guarantee both the protection and the enjoyment of these rights by ensuring that human

¹⁸⁶ Article 2 (3) (c) of ICCPR.

¹⁸⁷ Chapter 27 of the Criminal Code Act 1990 of Nigeria deals with various offences which violate the constitutional right to life.

¹⁸⁸ Chapter 31 of the Criminal Code Act 1990 of Nigeria deals with various offences which violate the constitutional rights to personal liberty of a person.

¹⁸⁹ For instance, the right to life and right to personal liberty.

¹⁹⁰ Article 4 of Act No. 2003-03 of Benin prescribes a 6-month to 3 years term in prison and a fine for violation of this provision.

¹⁹¹ Todd Landman, 'The Scope of Human Rights: From Background Concepts to Indicators' (2005) Paper prepared for the AHRI-COST Action meeting, Oslo, available at ><http://www.corteidh.or.cr/tablas/R22302.pdf>< accessed 18 March 2019.

¹⁹² Articles 2 and 5 (2) of Optional Protocol to the ICCPR. See also, Report of the Human Rights Committee, UNGA 44th Session, Supplementary No. 40(A/44/40) 1989 at 44.

¹⁹³ John Quigley. 'The International Covenant on Civil and Political Rights and the Supremacy Clause' (1993) 42 (4) DePaul Law Review, 1287.

rights do not end as a mere promise. Consequently, implementation has remained the weakest component of the international human rights system due to institutional weaknesses and voluntary state party compliance method.¹⁹⁴ Therefore, to ascertain the challenges to ICCPR enforcement, this section examines the potential limitations of the ICCPR provisions as a foundation for studying the prospects for reforms.

2.3.2.4.1 Reservations, Understandings and Declarations clause

The Reservations, Understandings and the Declarations clause (RUDs) is a portion of a treaty that does not apply to the 'reserving' party. RUDs allow a state to become a member state to an international treaty in a qualified and contingent manner, exempting itself from complying with certain obligations under the treaty.¹⁹⁵ RUDs limit the domestic effects of treaties and confine provisions of international treaties to meanings ascribed to them by state party practice.¹⁹⁶ This practice is often seen in the United States of America's (USA) ratification of international human rights convention such as the ICCPR.¹⁹⁷ However, it is clear that the ICCPR permits reservations apart from those relating to reporting.¹⁹⁸ In particular, this practice has been contentious and was objected to by some state parties when the United States sought it in the implementation of the ICCPR.¹⁹⁹

¹⁹⁴ Ryan Welch, 'National Human Rights Institutions: Domestic Implementation of International Human Rights Law' (2017) 16 *Journal of Human Rights*, 96; Douglas Donoho, 'Human Rights Enforcement in the 21st Century' (2006) *Bepress Legal Services*, 1282. According to Donoho, international human rights system's approach to implementation of human rights has proven unrealistic due to reason such as oppression, armed conflicts and poverty.

¹⁹⁵ Eric Neumayer, 'Qualifies Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36 (2) *Journal of Legal Studies*, 397.

¹⁹⁶ Eric Chung, 'The Judicial Enforceability and Legal Effects of Treaty Reservation, Understandings and Declarations' (2016) 126 *Yale Law Journal*, 1.

¹⁹⁷ *Ibid*; Louis Henkin, 'US Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89 *American Journal of International Law*, 341.

¹⁹⁸ Article 41 of the ICCPR. For details on RUDs, see *International Convention on Civil and Political Rights, Declarations and Reservations*, available at > https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND< accessed 20 February 2019. See also, Madeline Morris, 'Few Reservations about Reservations' (2000) 2 *Chicago Journal of International Law*, 341; John Humphrey, 'The International Bill of Rights: Scope and Implementation' (n 77 above) 527. Under the ICCPR, states must report within one year of ratification, and every four years. However, the HRC may request more frequent reports if they have specific concerns.

¹⁹⁹ The opposing countries include Denmark, Belgium, Finland, France, Italy, Netherlands, Spain, Norway, Sweden, Portugal and Germany objected to the United States of America RUDs for being against the object and

According to the United States, the ICCPR is not self-executing, thereby it cannot by itself create rights enforceable in the United States.²⁰⁰ In contrast, opposing countries relied on the argument that RUDs contradict the provisions and objectives of the ICCPR and are in violation of articles 4 and 50 provisions. What is clear, however, is that although the ICCPR permits RUDs, invoking it can be argued to limit state party obligations under the ICCPR while also violating state party commitment not to invoke domestic law to justify non-compliance.²⁰¹

It is clear from the foregoing that the option for a reservation to the ICCPR has a direct effect on the enjoyment of civil and political rights. For instance, the USA reservation relating to the right to sentence persons under the age of 18 to death contravenes the article 4 (2) provision on non-derogation from the implementation of the right to life.²⁰² It is important to note that such an approach has the potential to create uncertainties if copied by other state parties, and in particular, will undermine the efficiency of the HRC. The analysis put forward concerning RUDs shows that they will deprive individuals of the international protection provided under the ICCPR because it limits state party obligations under the ICCPR, thereby denying individuals a cause of action under domestic law.

2.3.2.4.2 Lack of judicial or quasi-judicial enforcement institution

The ICCPR, just like the UDHR, fails to create an effective enforcement system given the absence of either a judicial institution for the determination of disputes. According to Mutua, the absence of a binding enforcement mechanism is a

purpose of the covenant. See also, Kristina Ash, 'U.S. Reservation to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence' (n 62 above) 1.

²⁰⁰ David Stewart, 'US Ratification of the Covenant of Civil and Political Rights: The Significance of Reservations, Understandings and Declarations' (1993) 42 (4) DePaul Law Review, 1183.

²⁰¹ Anja Seibert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Para 2' (n 131 above) 399.

²⁰² International Convention on Civil and Political Rights, *Declarations and Reservations*, available at > https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND< accessed 20 February 2019. However, the USA has maintained that its RUDs do not breach its international law obligation under the covenant given that it is entitled to its domestic implementation of these rights. In this regard, Stewart further observed that HRC is more interested in state parties taking appropriate steps to incorporate the covenants rights into domestic law for national courts to have jurisdiction. See, David Stewart, 'US Ratification of the Covenant of Civil and Political Rights: The Significance of Reservations, Understandings and Declarations' (n 200 above) 1183.

significant weakness that impacts on state party implementation of ICCPR.²⁰³ From a less cynical perspective, the lack of a judicial enforcement mechanism for ICCPR leaves its enjoyment at the mercy of the state parties' judicial system. In such circumstances, ratification of the ICCPR is not enough to guarantee international implementation. Therefore, where a state party fails to internalise the ICCPR, the entire reports, comments, and observations of the HRC may be of no effect or ignored, and individuals will have no domestic redress available to exhaust before the HRC assumes jurisdiction.²⁰⁴

The absence of a judicial institution for ICCPR enforcement makes the ICCPR somewhat a persuasive instrument.²⁰⁵ Despite establishing the HRC to oversee the implementation of the ICCPR, article 45 requires an annual HRC report to be submitted to the UNGA as evidence of its implementation activities.²⁰⁶ While the article 45 requirement may give rise to effective enforcement or persuasion through the UNGA, it still cannot translate to a judicial enforcement system, which internationally enjoys the binding force of law. Indeed, such a situation has the potential of weakening international implementation measures because it leaves a considerable implementation responsibility on state party mechanisms. Accordingly, Mutua, in his analysis of the HRC, maintains that this ICCPR implementation body has remained mostly ineffective because state parties have consistently ignored their ICCPR obligations.²⁰⁷ This has sometimes led to the conclusion that the HRC is weak, timid and ineffectual to deliver international community promises on human rights protection.²⁰⁸ On the other hand, it has

²⁰³ Makau Mutua, 'Looking past the Human Rights Committee: An Argument for De-marginalising Enforcement' (1998) 4 Buffalo Human Rights Law Review, 211. For instance, during the 119 session, the Special Rapporteur for follow-up on Views indicated that there has been a violation of the 1029 of 1221 Views adopted since 1979. See generally the Report of the Human Rights Committee to the General Assembly, Supplement No. 40 (A/72/40) for 117th, 118th and 119th session, 2017.

²⁰⁴ *Ibid.*

²⁰⁵ John Humphrey, 'The International Bill of Rights: Scope and Implementation' (n 77 above) 527.

²⁰⁶ Article 45 of ICCPR.

²⁰⁷ Makau Mutua, 'Looking past the Human Rights Committee: An Argument for De-marginalising Enforcement' (n 203 above) 211.

²⁰⁸ *Ibid.*

been observed that neither states nor international bodies, which depend on the voluntary approach of implementation, can adequately protect human rights.²⁰⁹

2.3.2.4.3 Lack of sanctions for non-compliance

Another significant limitation of the ICCPR is the lack of penalties or sanctions against non-complying state parties. The non-recognition of the use of sanctions against erring state parties to the ICCPR exposes its persuasive or voluntary implementation status. The most notable impact of this absence is that full individual enjoyment of the ICCPR cannot be guaranteed at the state level because a state party can ratify international treaties to comply with international obligations even when necessary institutions for effective implementation are lacking. For instance, some state parties to the ICCPR have witnessed large-scale violations of the Covenant rights and freedoms without officially applying for a derogation under article 4.²¹⁰

However, it is argued that state parties and perhaps people understand that rules will be readily obeyed if backed with penalties for non-compliance even when they felt no moral obligation to follow such rules.²¹¹ What is expected in the absence of sanction is a situation where the interest of government conflicts with state obligations under international treaties. The impact that may be created by such lack of sanctions will be more distressing given the ICCPR approach to the interstate complaint system and the absence of peer pressure from other state parties.²¹² One would have thought that since the violation of civil and political

²⁰⁹ Siobham McInerney-Lankford, 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective' (2009) *Journal of Human Rights Practice*, 51; Carol Tucker, 'Regional Human Rights Models in Europe and Africa: A Comparison' (1983) 10 *Syracuse Journal of International Law and Commerce*, 135.

²¹⁰ For example, Burundi and Cameroon are state parties to the ICCPR and have not, even during their political crisis, applied for derogation despite the widespread violation of civil and political rights in these countries. Another important example is the Yahya Jammeh of Gambia scenario leading to his acceptance to ultimately step down after losing in a general election to Adama Barrow. It is understood that Yahya Jammeh eventually vacated the office of the President because the West African regional body- Economic Community of West African States (ECOWAS) had resolved to use their regional armed forces- Economic Community of West African States Monitoring Group (ECOMOG) to depose him and install the newly elected democratic election government.

²¹¹ Harold Koh, 'How is International Human Rights Enforced?' (n 88 above).

²¹² To ascertain whether the approach of voluntary compliance has increased state obedience will require a state to a state analysis of the extent of the rights covered, the available state mechanisms for its enforcement and an in-depth analysis of HRC findings and their enforcement by state parties. However, this will not be covered by

rights affects the intrinsic nature of human beings and the widespread violations in many states, it would have been better to have its implementation backed with sanctions.

2.3.2.4.4 Regionalism

Regionalism occurs where a group of independent states form a subgroup within the UN.²¹³ Regionalism, as a group strategy, is an approach adopted by countries to pursue common agendas, protect individual members or further national policies of different states.²¹⁴ As an aspect of international human rights law, regionalism is a useful concept to understand voting amongst the groups of countries that share seats in the HRC.²¹⁵ According to Abebe, such subgroups within the UN are necessary because human rights are often twisted towards Western practices leaving non-Western states with the option of using subgroups to represent their standpoint.²¹⁶

It is clear from the outset that the UN's human rights system was not open to the idea of regional implementation until the rise of regional bodies and their participation in regional peace, security, and political affairs.²¹⁷ In other words, the European human rights system having not undermined the universal scope of the UDHR, led to the UN General Assembly Resolution 32/127 encouraging states to consider the establishment of regional human rights machinery.²¹⁸ With more involvement and pressure coming from such subgroups, the UN subsequently

this study because of the enormity of the task. Take, for example, the report by the Special Rapporteur for follow-up on Views during the 119 Session that there has been a non-enforcement of 1029 of 1221 Views adopted since 1979. See generally, the Report of the Human Rights Committee to the General Assembly, Supplement No. 40 (A/72/40) for 117th, 118th and 119th session, 2017.

²¹³ Karl Kaiser, 'The Interaction of Regional Subsystems: Some Preliminary Notes on Recurrent Patterns and the Role of Superpowers' (1968) 21(1) *World Politics*, 84.

²¹⁴ Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge, 2013) 197.

²¹⁵ Damian Etone, 'African States: Themes Emerging from the Human Rights Council's Universal Periodic Review' (2018) 62 (2) *Journal of African Law*, 210.

²¹⁶ Allehone Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the Human Rights Council' (2009) 9 *Human Rights Law Review*, 1.

²¹⁷ For example, regional bodies such as the Council of Europe emerged were involved in affairs, including human rights enforcement, within its region. Rhona Smith, *International Human Rights* (n 27 above) 86.

²¹⁸ United Nations General Assembly Resolution 32/127, available at > <http://www.un.org/documents/ga/res/32/ares32r127.pdf> accessed on 18 March 2019.

recognised regionalism though within the institutional and legal hierarchy that promote the internationalisation of human rights.²¹⁹ At present, both UN and regional human rights systems are complementary in ensuring that the UN universal human rights ambition is actualised.²²⁰ This arrangement scuttles the early notion that the UN remains the sole player in securing human rights. Concerning compliance with international treaties, regional mechanisms are more attractive to states because they deal more with cultural sensitivities²²¹ and are homogenous insofar as their countries have similar political and cultural histories.²²² It follows that countries within a region are more aware of the challenges in the region and maybe in a better position to make recommendations and promote cooperation.²²³

As time progressed, regionalism started having a negative influence by dividing and undermining UN human rights work. In particular, this manifests in situations where state parties adopt or decline recommendations because of the recommending country. For example, Kenya, during a Universal Periodic Review, accepted recommendations from Angola and Rwanda to continue its efforts towards the abolition of the death penalty while rejecting a similar recommendation from France and Poland.²²⁴ Several African states have shown that they are more inclined to accept recommendations from fellow African nations

²¹⁹ See generally Chapter VIII of the UN Charter. Further, article 53 of the UN Charter specifies that the Security Council can utilise regional agencies for enforcement under its authority. The protection of human rights devolved to the continental level with the adoption of ECHR 1950 by the Council of Europe and other regional human rights instruments such as the Inter-American Convention on Human Rights 1969 by the Organisation of American States, and the African Charter on Human and Peoples' Rights 1981 by the OAU.

²²⁰ Brooke Ackerly, *Universal Human Rights in a World of Difference* (Cambridge University Press, 2008); Kathryn McNeilly, 'Reclaiming the Radical in Universal Human Rights' (2015) 4 *International Human Rights Law Review*, 256; Alfred Hennesly and John Langan, (eds), *Human Rights in Americas: The Struggle for Consensus* (Georgetown University Press, 1982) 1.

²²¹ Ruth Houghton, Publication Review of Rosa Freedman *Failing to protect: The UN and the Politicisation of Human Rights* (2015) 28 *Leiden Journal of International Law*, 171.

²²² Rhona Smith, *International Human Rights* (n 27 above) 87.

²²³ Damian Etone, 'African States: Themes Emerging from the Human Rights Council's Universal Periodic Review' (n 215 above) 210.

²²⁴ HRC, 'Report of the Working Group on the Universal Periodic Review: Kenya', UN Doc A/HRC/15/8 of 17 June 2010.

than from non-African countries.²²⁵ Therefore, regionalism breeds solidarity, which negatively impacts on the implementation of ICCPR.

Regionalism is used by state parties to shield allied states. Regional alliance can be traced to the local politics, culture, and history of the particular region, which may cause member states to shield some allies from critical and potential threat and review.²²⁶ For instance, South Africa's positive remarks on human rights situations in some African countries where human rights violations were rife.²²⁷ As a result, regionalism can negatively influence and undermine UN international human rights/law goals. Another relevant factor is that regionalism offers a protective mechanism with authority broader than a sovereign state which functions at an intermediate level for effective international human rights enforcement.²²⁸ From the above analysis, it is submitted that regionalism can achieve both negative and positive outcomes. However, what is essential is how state parties utilise it to achieve international goals, such as effective human rights enforcement.

2.3.2.4.5 Cultural relativism

States that advocate cultural relativism in international human rights implementation argue that human rights depend on the context and culture in which they are applied.²²⁹ Cultural relativism is supported due to different cultural,

²²⁵ See for instance, Nigeria adoption of a recommendation on the death penalty from Benin while rejecting similar recommendations from the UK and Sweden. HRC, 'Report of the Working Group on the Universal Periodic Review: Nigeria', UN Doc A/HRC/11/26 of 5 October 2009.

²²⁶ Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights* (Hurst and Company, London, 2014) 152, 160-161.

²²⁷ HRC, 'Report of the Working Group on the Universal Periodic Review: Zimbabwe', UN Doc A/HRC/19/14 of 19 December 2011. In this recommendation on Zimbabwe, South African intentionally ignored government repression and gross human rights violations and commented only on the effect of economic sanctions as the impeding factor to the human rights efforts of the Zimbabwean government.

²²⁸ Carol Tucker, 'Regional Human Rights Models in Europe and Africa: A Comparison' (n 209 above) 135.

²²⁹ Roger Blackburn, 'Cultural Relativism in the Universal Review of the Human Rights Council' (2011) ICIP Working Papers, available at > https://www.upr-info.org/sites/default/files/general-document/pdf/-blackburn_upr_cultural_relativism.09.2011.pdf< accessed 20 February 2019. The cultural relativism argument implies a respect for cultural difference and sensitivity to cultures; it is conceived as the opposite from absolutism which universalism proffers. See generally, Joseph Asomah, 'Cultural Rights Versus Human Rights: A Critical Analysis of the Trokosi Practice in Ghana and the role of Civil Society' (2015) 15 African Human Rights Law Journal 129; Elvin Hatch, *Culture and Morality: The Relativity of Values in Anthropology* (Columbia University Press, New York, 1983) 8.

social, ideological, economic and religious backgrounds.²³⁰ Likewise, some cultural relativism advocates base their arguments on the need to respect strong, diverse cultural values amongst various countries and societies. An example is seen in a statement made by the Nigerian delegate on behalf of the African Group at the HRC, who reiterated that same-sex relations stand against African values and will not be accepted or integrated as domestic human rights.²³¹ The position of some of these African countries has shown that it is legally, socially, culturally and practically impossible to consider all individual rights acknowledged by Western countries as human rights. For instance, lesbian, gay, bisexual, and transgender (LGBT) rights in many Western countries have continued to face stiff opposition in many African countries due to cultural, religious and societal values.²³² Some states like Kenya, Zimbabwe and Nigeria have refused to accept the existence of gay rights; thereby considering it an attempt by Western countries to prescribe new rights.²³³ To some cultural relativism advocates, human rights is a weapon of cultural hegemony.²³⁴

Many countries, especially from the African continent, have exhibited these cultural relativism aspects in some human rights issues.²³⁵ According to Etone,

²³⁰ Joseph Asomah, 'Cultural Rights Versus Human Rights: A Critical Analysis of the Trokosi Practice in Ghana and the role of Civil Society' (*ibid*); Abdullahi An-Na'im, *Human Rights in Cross Cultural Perspectives: A quest for Consensus* (University of Pennsylvania Press, 1992) 23; Makau Mutua, 'The Complexity of Universalism in Human Rights', in Andras Sajó (eds), *Human Rights with Modesty: The Problem of Universalism* (Kaninklijke Brill, 2004) 51; Surya Subedi, 'Are the Principles of Human Rights "Western" Ideas? An Analysis of the claim of the "Asian" Concept of the Human Rights from the Perspectives of Hinduism' (1999) 30(1) *California Western International Law Journal*, 45.

²³¹ Damian Etone, 'African States: Themes Emerging from the Human Rights Council's Universal Periodic Review' (n 215 above) 210.

²³² This led to some countries like Nigeria, Kenya, Zambia, Russia and some States in the United States to prohibit such rights through domestic legislation. See the following, 'Erasing 76 Crimes', available at > <https://76crimes.com/76-countries-where-homosexuality-is-illegal/>< accessed on 18 March 2019; CNN News, 'The 13 states that still ban same sex-marriage', available at > <https://edition.cnn.com/2015/02/13/us/states-same-sex-marriage-ban/index.html>< accessed on 18 March, 2019.

²³³ HRC, 'Report of the Working Group on the Universal Periodic Review: Kenya', UN Doc A/HRC/15/8 of 17 June 2010; Harriet Alexander, 'Robert Mugabe at UN General Assembly says: We are not Gays' (29 September, 2015) *The Telegraph*, available at > <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/11898748/Robert-Mugabe-at-UN-General-Assembly-says-We-are-not-gays.html>< accessed 20 February 2019.

²³⁴ Darren O'Byrne, *Human Rights: An Introduction* (Pearson Education Press, 2003) 42.

²³⁵ Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', (n 60 above) 339; Makau Mutua, 'The Ideology of Human Rights' (1996) 36, *Virginia Journal of International Law*, 592.

African states have received the highest number of recommendations on sexual orientation at the HRC; yet, there seems to be an increase in the number of African countries criminalising same-sex marriages and related practices.²³⁶ In other words, these countries refuse to accept recommendations on the strength of entrenched socio, cultural and religious sentiments. Indeed, the impact of state party refusal to recognise recommendations is that no legislative effort would be made to recognise the infringed right. However, the argument put forward against cultural relativism is that it has the potential to leave human rights under the control of leaders who use culture as a shield for abuse.²³⁷ The analysis above demonstrates that cultural relativism remains an essential factor in the engagement of states, particularly African countries, in any international human rights discourse.²³⁸

2.4 Regional protection of civil and political rights

Soon after the adoption of the nonbinding UDHR, human rights evolution moved in the direction of regional arrangements. Regional human rights systems are independent sub-regimes nested within the international framework for human rights protection and promotion.²³⁹ Following the enactment of the ECHR in 1950 and other subsequent regional instruments,²⁴⁰ regional human rights systems continued to help in localising international human rights norms and standards while reflecting the particular human rights concerns of the region.²⁴¹ The discussion in this section will be limited mainly to the ECHR and the American Convention on Human Rights because both regional instruments pre-date the

²³⁶ Damian Etone, 'African States: Themes Emerging from the Human Rights Council's Universal Periodic Review' (n 215 above) 210.

²³⁷ Micheal Freeman, 'Human Rights' in Peter Burnell and Vicky Randall (eds), *Politics in the Developing World* (Oxford University Press, 2008) 120.

²³⁸ Damian Etone, 'African States: Themes Emerging from the Human Rights Council's Universal Periodic Review' (n 215 above).

²³⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edition, Cornell University Press, 1989) 138.

²⁴⁰ The American Convention on Human Rights 1969 and the African Charter on Human and Peoples' Rights 1981.

²⁴¹ United Nations Office of the High Commissioner on Human Rights. 'An Overview of Regional Human Rights System', available at > <https://bangkok.ohchr.org/programme/regional-systems.aspx>< accessed 08 April 2019.

African Charter.²⁴² Therefore, this section will assess whether these regional systems have any significant influence in the normative and institutional arrangements of the African Charter, thereby positioning as a yardstick to measure the extent of protection afforded by the African Charter.

2.4.1 The European Convention on Human Rights

The ECHR, as the first regional human rights instrument, emerged shortly after the adoption of the UDHR, from a war-ravaged Europe. Following the atrocities of World War II, countries in the European continent created an intergovernmental organisation, the Council of Europe on May 5 1949, to protect human rights amongst other objectives.²⁴³ In fulfilment of its primary task, governments of this organisation at Rome on 4 November 1950 signed the ECHR, and it entered into force on 3 September 1953.²⁴⁴ The ECHR is arguably the most effective regional system for human rights protection available today.²⁴⁵ This argument is based on the level of compliance it gets from state parties.²⁴⁶

2.4.1.1 Analysis of normative protection

The ECHR creates a regional system for the collective judicial enforcement of rights drawn from the UDHR on every individual within their jurisdiction. It is clear from the language of the ECHR preamble that the ECHR provides a system for the protection of universal rights.²⁴⁷ The rights guaranteed in the ECHR include the right to life; prohibition of torture; prohibition of slavery and forced labour; the right to liberty and security; the right to a fair trial; no punishment without law;

²⁴² It is worthy to mention that these regional instruments provide vast protection of civil and political rights.

²⁴³ The Council of Europe was created to protect human rights, the rule of law and to promote democracy. The Council of Europe has 47-member state under which the ECHR applies, and has its headquarters at Strasbourg.

²⁴⁴ Sandy Gandhi, 'The International Bill of Rights and the European Convention on Human Rights' (2006) 6 (4) *Legal Information Management*, 282.

²⁴⁵ *Ibid.* See also, Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28 (3) *European Journal of Human Rights*, 763.

²⁴⁶ Kevin Boyle, 'The European Experience: The European Convention on Human Rights' (2009) 40 *Victoria University of Wellington Law Review*, 167. However, compliance with the judgments of the ECtHR has been adjudged as one of its major challenge. See, Veronica Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29 (4) *European Journal of International Law*, 1091.

²⁴⁷ The preamble states as follows: 'being resolved, as the governments of European countries which are like minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first step for the collective enforcement of certain of the rights stated in the Universal Declaration'.

the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association; the right to marry and the prohibition of discrimination. While these rights are similar to the UDHR, its enforcement is different.

Human rights protection under the ECHR has been progressive. The protection of the ECHR extends to its Protocols. These Protocols protect rights not covered in the ECHR. For example, the right to property, the right to education, and the right to free election are covered by the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952. Similarly, Protocol No. 4 of 1963 protects prohibition of imprisonment for debt; freedom of movement; prohibition of the expulsion of nationals, and prohibition of collective expulsion of aliens, while Protocol No. 6 of 1983 abolishes the death penalty.²⁴⁸ Protocol No. 7 of 1984 provides procedural safeguards relating to expulsion of aliens; compensation for wrongful conviction; the right not to be tried or punished twice; the right of appeal in criminal matters; and, the right to equality between spouses. Likewise, while Protocol No. 12 of 2000 protects the general prohibition of discrimination, Protocol No. 13 of 2002 protection covers the abolition of the death penalty; prohibition of derogations; and prohibition of reservations. As a result of the preceding progression, the ECHR has been able to cover the majority of human rights omitted at the time of enactment.

However, some rights under the European system may be limited according to the laws of a contracting state. What this implies is that not all rights under the ECHR are absolute. For instance, while state parties may limit the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; and, freedom of assembly and association, the reason for limitation must be necessary in a democratic society, for the protection of the rights and freedom of others, or in the interest of national security or public safety.²⁴⁹ Therefore, in the absence of any or all of these grounds for limitation,

²⁴⁸ What is interesting about this Protocol is that it prohibits derogation and reservations. Therefore, this right is an absolute right.

²⁴⁹ See articles 8 (2), 9 (2), 10 (2) and 11 (2) of ECHR.

the state would be seen as violating the ECHR. On the other hand, state parties can derogate in time of public emergency or war threatening the life of the nation.²⁵⁰ Although this is similar to the ICCPR, some rights are absolute and cannot be derogated from even in time of public emergency.²⁵¹ As a result, state parties are expected to uphold them irrespective of what emergencies the state may be undergoing.

The ECHR provides for both individual and inter-state complaint procedures. Although the original thinking was that the inter-state complaint procedure would act as the guardian of the public order of Europe, the individual complaint procedures have been mostly responsible for the vast case law jurisprudence of the ECHR.²⁵² Suffice it to add that article 34 emphasises the power of the ECtHR to receive individual application from a victim, who may not be a national of the state involved.²⁵³ This idea of protection may be traced to article 1 provision which obliges contracting state parties to ECHR to secure these rights and freedoms to everyone within its jurisdiction. However, individual complaints before the ECtHR need to meet the admissibility requirement enshrined in article 35. This provision permits the court to reject applications where complainants fail to meet one or all of the enshrined criteria. For example, the most common ground of challenge to the court jurisdiction is the failure to exhaust domestic remedies. The legal requirement to exhaust domestic remedies is a fundamental element of the international complaint procedure which ensures that state parties to an international treaty are not denied the first opportunity to provide redress before being dragged before an international body.²⁵⁴ What is implied here is that regional courts assume subsidiary or complementary roles in the protection of human rights.

²⁵⁰ Article 15 of ECHR.

²⁵¹ Article 15 prohibits derogation on the right to life, prohibition of torture, prohibition of forced labour and slavery.

²⁵² Kevin Boyle, 'The European Experience: The European Convention on Human Rights' (n 246 above).

²⁵³ See, *Soering v United Kingdom*, Application No. 14038/88 (1989). In this case, the Court held that extradition of a German national from Britain to the United States where he would face a death penalty violates the United Kingdom's obligation of prohibition against torture, inhuman and degrading treatment under the ECHR.

²⁵⁴ Kevin Boyle, 'The European Experience: The European Convention on Human Rights' (n 246 above).

Generally, the ECHR establishes state party obligations toward individuals. It acts as mandatory domestic standards for state parties and alludes, through its subsidiarity principle, that state parties have a duty to ensure that human rights are respected at the national level.²⁵⁵ Given the idea that human rights can only be enjoyed when state parties meet their duties under an international treaty, the ECHR establishes a system different from the UN approach in the collective protection of human rights through petitions by both states and individuals.²⁵⁶

2.4.1.2 Enforcement mechanism of the ECHR

From its origin, the ECHR established a Commission of Human Rights and a Court. While the Commission of Human Rights, a quasi-judicial body with the mandate to examine the admissibility of applications was abolished by Protocol No. 11 of 1998, this reform made way for the former part-time Court to become a full-time Court. In particular, the composition of the abolished Commission comprises the same number of state parties, and the Commissioners acted in their individual capacities and independently of their various governments. The Commission gave opinions on complaints, but the final decision on violation of the ECHR rested with the Court.²⁵⁷ This evolution in the European human rights system entails that all complaints arising from the violation of the ECHR are adjudicated exclusively by the ECtHR.

On the other hand, the ECtHR applies and protects the rights set out in the ECHR and its Protocols.²⁵⁸ It protects ECHR rights and freedoms through its judicial procedures, and states are bound to implement its judgments.²⁵⁹ As with the abolished Commission, the ECtHR consists of a number of judges equal to that of the contracting parties,²⁶⁰ elected by the state party Parliamentary Assembly by a

²⁵⁵ The subsidiarity principle operates under the rule on the exhaustion of local remedies.

²⁵⁶ That notwithstanding, the ECHR has challenges such as vast pending caseload despite sitting in five chambers. In *Allen v UK*, European Court of Human Rights 678, (2013) – IV, para 92, the Court stated that the ECHR is an instrument for the protection of human rights.

²⁵⁷ Kevin Boyle, ‘The European Experience: The European Convention on Human Rights’ (n 246 above).

²⁵⁸ For ECHR provisions on the European Court of Human Rights, see Section 2, articles 19-51.

²⁵⁹ Article 46 (1) of ECHR.

²⁶⁰ Article 20 ECHR.

majority of votes cast from a list of three candidates nominated by the state.²⁶¹ The ECtHR is organised into five administrative sections sitting and resolving cases simultaneously. At present, the Court works in four different judicial formations; namely, the single judge, committee, chamber, and grand chamber.²⁶² Such administrative pattern ensures speedy adjudication of cases, even though there are several backlogs of pending cases before the ECtHR. Furthermore, the ECtHR has jurisdiction to decide applications submitted by individuals, NGOs and state parties concerning the violation of ECHR and its Protocols.²⁶³ The consequence of the ECtHR jurisdiction is that cases and complaints may overburden it.

Concerning jurisdiction, the ECtHR has undisputed power to decide whether cases submitted to it meet the admissibility criteria under article 35 ECHR. To carry out this mandate, a single judge, committee or chamber share jurisdiction to decide cases relating to individual application concerning the exhaustion of local remedies, six-month application deadline after the exhaustion of local remedies, if a case is against a state party to the ECHR, and if the applicant has shown that he/she suffered a significant disadvantage. From the text of article 35, which is similar to article 56 of the African Charter, a claim would be declared inadmissible by the single judge, committee or chamber if it fails to meet one or all of these criteria.²⁶⁴ However, where any of the ECtHR judicial formations found a violation of ECHR, it has the power to award just satisfaction or fair compensation in the form of financial compensation, to individual applicants or victims of ECHR violation.²⁶⁵ It follows that the award of just satisfaction or fair compensation to victims of ECHR violations may come with a state party obligation to review its

²⁶¹ Article 22 ECHR.

²⁶² Article 26 ECHR. While the single judge only rules on the admissibility of applications, the committee, consisting of three judges rule on the admissibility of case as well as the merits when the case concerns as issued on a well-developed case law. Chamber consists of seven judges and the rule on admissibility as well as merits for a case that have not been ruled on repeatedly by the Court. Grand chamber comprises seventeen judges and they hear selected cases referred to it, sometimes on appeal from the chamber decision, importantly on a case that involve a novel question of law.

²⁶³ Article 32 ECHR. Further, article 46 gives the Court an advisory function.

²⁶⁴ Janneke Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 (4) *International Journal of Constitutional Law*, 619.

²⁶⁵ Article 41 ECHR. The ECtHR may order state parties to amend their laws where they are incompatible with the ECHR.

national laws. Indeed, as the world's first human rights court, the ECtHR has influenced the domestic laws of many member states through decisions and case laws that create fundamental standards for domestic legislation.²⁶⁶ Enforcement has been one of the positive impacts of the European human rights system. However, in order to enhance enforcement, state parties voluntarily undertake to abide by the decision of the ECtHR, which the ECtHR transmits to the Committee of Ministers for the supervision of its execution.²⁶⁷

2.4.2 American Convention on Human Rights

The American Convention on Human Rights (American Convention), also known as the 'Pact of San Jose' was adopted by the Organisation of American States on 22 November 1969 and came into force on 18 July 1978.²⁶⁸ Its evolution is linked with the political, legal and normative developments in the region.²⁶⁹ The purpose of the American Convention is to 'consolidate in this hemisphere, within the framework of domestic institutions, a system of personal liberty and social justice based on the respect for the essentials of man'.²⁷⁰ The state parties to this Convention accept the obligation to respect, protect and fulfil the basic human rights enshrined therein and agree to be bound by the outcome of the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.²⁷¹ Suffice it to add that the civil and political rights form the bulk of the protected rights under the American Convention just like the European Convention. Regardless, article 26 of the American Convention merely commits

²⁶⁶ Alina Cherviatsova, 'The European Court on Human Rights: Bringing together Legal Systems' (2012) 5 *Baltic Journal of Law*, 99.

²⁶⁷ Article 46 ECHR.

²⁶⁸ At present, 25 state parties have ratified this Convention and some of them include Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Haiti, Jamaica, Mexico, Panama, Paraguay, Peru, and Venezuela.

²⁶⁹ Par Engstorm and Courtney Hillebrecht, 'Institutional Change and the Inter-American Human Rights System' (2018) 22 (9) *International Human Rights Journal*, 1111.

²⁷⁰ Paragraph 1 to the preamble of the American Convention.

²⁷¹ See articles 67 and 69 of the American Convention on Human Rights.

states to the progressive realisation of social-economic rights, which are not explicitly listed in this Convention.²⁷²

2.4.2.1 Overview of normative protection under the American Convention

The rights contained in the American Convention consist primarily of civil and political rights.²⁷³ It is clear that some rights enshrined in the American Convention are unique and a departure from the UDHR and the ECHR. For instance, while article 4 protects the right to life from the moment of conception, the right to humane treatment and the right to a name are omitted in ECHR and UDHR. In addition, unlike the ECHR, the American Convention distinctly expanded some fair hearing rights, thereby protecting more international human rights principles. Such expanded rights include the freedom from ex post facto laws, the right to compensation, the right of reply, and the right to judicial protection.

However, not all rights protected in this American Convention are absolute. Similar to the ECHR, some rights can be limited by the rights of others, by the security of all, and by the just demands of general welfare in a democratic society.²⁷⁴ In another similar pattern to the ECHR, state parties are permitted during the time of war, public danger or other emergencies to suspend certain rights. Despite these similarities, article 27 (2) forbids suspension of the following rights- the right to judicial personality, the right to life, the right to humane treatment, freedom from slavery, freedom from ex post facto laws, freedom of conscience and religion, the right to family, the right to a name, the right of a child, the right to nationality, and the right to participate in government. Interestingly, whilst this list outnumbers the rights protected from derogation in

²⁷² Article 26 commits state parties to adopt measures, especially those on economic nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States. However, the socio-economic rights had been expanded in the Protocol of San Salvador of 1988.

²⁷³ Articles 4-25 consist of the following rights- the right to life, the right to humane treatment, the freedom from slavery, the right to personal liberty, the right to fair trial, the freedom from ex post facto laws, the right to compensation, the right to privacy, the right to freedom of conscience and religion, the right to freedom of thought and expression, the right to reply, the right to assembly, the right to freedom of association, the right to nationality, the right to property, the right to freedom of movement and residence, the right to participate in government, the right to equal protection.

²⁷⁴ Article 32 of American Convention.

article 15 (2) ECHR and article 4 of ICCPR, it would indeed make a difference in the number of rights that individuals must enjoy at all times.

Considering the normative protection of human rights, the American Convention contains some normative features that are lacking in the ECHR. For instance, states are permitted to submit reservations under article 75. Allowing state parties to enter reservation implies that state parties can opt out of specific provisions of the American Convention at the point of ratification. Such an approach and tactic may have a devastating effect on civil and political rights enforcement in the American region, even with its expanded norms and approach to derogation. Indeed, it gives state parties a right to choose what right to protect domestically.²⁷⁵ On the other hand, the American Convention is the first regional instrument to enshrine a relationship between duties and rights.²⁷⁶ Although this was later applied in the African Charter, individual duties created under the American Convention include 'responsibility to his family, his community, and mankind'.²⁷⁷

2.4.2.2 Analysis of the American Convention enforcement institutions

To address the hemisphere human rights problems, the Organisation of American States established the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court on Human Rights (Inter-American Court) as monitoring and compliance bodies for the American Convention. Such dual monitoring and compliance institutions demonstrate another similarity between the American system and the ECHR system.²⁷⁸ The

²⁷⁵ Ineta Ziemele and Lasma Liede, 'Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24 (4) *European Journal of International Law*, 1135; Andres Montalvo, 'Reservations to the American Convention on Human Rights: A New Approach' (2001) 16 (2) *American University of International Law Review*, 269; American Convention on Human Rights, Declarations/Reservations/Denunciations/Withdraws Treaty References: B-32, available at > https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm< accessed 12 April 2019.

²⁷⁶ Chapter V, article 32 of American Convention.

²⁷⁷ This approach similarly appeared in the African Charter.

²⁷⁸ Thomas Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences' (1989) 30 *American University Law Review*, 155.

Inter-American Commission and the Inter-American Court play complementary but distinct roles.

The Inter-American Commission consists of seven members with competence in the field of human rights elected by the Organisation of American States General Assembly.²⁷⁹ The number of its members is different from the precedent set in the ECHR, which allows a composition that equals the member states. Despite its composition, the Inter-American Commission has a broad mandate. Even in the face of its broad mandate, the sitting pattern of the American Commission, like the American Court, is part-time. For instance, while the American Commission observes two regular sessions per year, they may sit in special session when necessary, and the American Court convenes four times per year.²⁸⁰ In particular, both the Inter-American Commission and the Inter-American Court are supported by a full-time secretariat.²⁸¹ Without a doubt, having a full-time secretariat helps organise and support the Court and the Commission to carry out their mandate.

The primary function of the Inter-American Commission is 'to promote respect for and defence of human rights amongst other functions and powers listed in article 41. The Inter-American Commission assists the Inter-American Court in identifying and handling complaints by considering the admissibility requirement for the Inter-American Court's contentious cases. The Inter-American Commission carries out its promotional responsibilities by monitoring situations in member states, publishing reports, proposing amendments and additional Protocols to the American Convention. The Inter-American Commission receives and processes complaints on specific abuses and can seek to reach a friendly settlement between the parties under article 45 of the Convention. However, for the Inter-American Commission to consider petitions from individuals and NGOs in the above circumstances, such individuals or NGOs are required to have exhausted local

²⁷⁹ Articles 34 and 35 of American Convention.

²⁸⁰ Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?' (2010) 9 (4) Washington University Global Studies Law Review, 639.

²⁸¹ Articles 40 and 56 of the American Convention.

remedies and other admissibility requirements under article 46, before approaching the Commission.²⁸²

The Inter-American Commission is a quasi-judicial body, and its decisions are not binding. Based on this, the Inter-American Commission can only declare that a violation has taken place and make recommendations for correction.²⁸³ Further, the Inter-American Commission can refer a case to the Inter-American Court for a binding decision if the affected state has accepted the Court's jurisdiction.²⁸⁴ However, the Inter-American Commission has a duty to appear in all cases before the Court.²⁸⁵

The American Convention created the Inter-American Court to adjudicate the obligations enshrined in the Convention.²⁸⁶ The composition of the Inter-American Court is similar to the Inter-American Commission, which comprises seven members proposed by member states and voted on by the General Assembly, including those states that have not recognised the jurisdiction of the court.²⁸⁷ While the Inter-American Court has both contentious and advisory powers,²⁸⁸ its contentious power permits it to order provisional measures, where it is necessary to prevent irreparable loss.²⁸⁹ Despite this, the jurisdiction of the Court relates to the interpretation and application of the American Convention, other human rights treaties of the Organisation of American States, or international human rights treaties ratified by the particular state, which may aid the interpretation of the Convention.²⁹⁰ For instance, the jurisdiction of the Inter-American Court applies only to state parties which recognise its jurisdiction.

²⁸² Generally, the admissibility requirement is similar to the ECHR and includes, exhaustion of local remedies, lodging of application within six months from the date of final judgment, and complaint must not be pending before another international proceeding for settlement.

²⁸³ Eugenio Matibag, 'Inter-American Commission on Human Rights' (2012) Iowa State University Digital Repository, 478. The Inter-American Convention enjoys only political power, lacks teeth to bite, and has no power to enforce its recommendations.

²⁸⁴ Articles 50 and 51 of the American Convention.

²⁸⁵ Article 57 of the American Convention.

²⁸⁶ Articles 52-69 of the American Convention.

²⁸⁷ Article 53 of the American Convention.

²⁸⁸ Chapter VIII, Section 1 of the American Convention on Human Rights.

²⁸⁹ Article 63 (2) of the American Convention.

²⁹⁰ Article 29 of the American Convention.

Notwithstanding, a state that has not done this may grant the Court a temporary jurisdiction to consider a particular case.²⁹¹

The American Convention and the Charter of the Organisation of American States are superficial on how the judgments of the Inter-American Court can be enforced. Unlike the European system that imposes on the Committee of Ministers the duty to ensure and monitor state party compliance of the ECtHR decisions, the American Convention lacks such provision. Instead, article 41 (g) requests both the Inter-American Court and Commission to submit reports to the General Assembly of the Organisation of American States. In particular, the General Assembly of the Organisation of American States performs enforcement oversight for both the Inter-American Court and Commission.²⁹² For instance, it has discretionary power to sanction state parties that fail to comply with the decisions of both the Inter-American Court and Commission.²⁹³

2.5 Conclusion

The philosophical foundation of human rights has shown that human rights protection has always been part of humanity. Although the codification of rights started with the early revolutions, the 20th-century events laid the foundation for contemporary international codification for human rights and its development as a branch of law. It is agreed that the international and regional arrangements for human rights protection are laudable. In particular, the regional arrangements have taken a more progressive leap towards realising effective protection through their adoption of judicial means of enforcement. What is remaining is for these regional and UN institutions to ensure state parties' adherence to treaty obligations. This is because the strength of each regional system lies in the varying commitment from member states, the concerned intergovernmental body and

²⁹¹ Article 62 of the American Convention. Likewise, article 78 allows a state party to renounce its recognition of the court jurisdiction.

²⁹² The General Assembly is not inclined to adopt this enforcement power against state parties. Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?' (n 279 above).

²⁹³ For instance, in 1990, the General Assembly issued sanction against Haiti because of military junta takeover. See, *Report of the Human Rights Situation in Haiti 1995*, available at > <http://www.ijdh.org/wp-content/uploads/1995/02/1995-ICHR-Report-Haiti.pdf>< accessed 09 April 2019.

monitoring enforcement institutions. However, it is not out of place to consider reforms to the UN human rights system, especially the ICCPR, given the identified contextual shortcomings in the area of enforcement. Based on these gaps which somewhat leave enforcement partly at the mercy of state parties, a more innovative measure such as ensuring enforcement using the UN Security Council or collaboration with the International Court of Justice or International Criminal Court may be considered. In brief, the UN and its member states should employ more use of pressure, the name and shame approach, and Security Council resolutions to improve its enforcement of the ICCPR.²⁹⁴ Finally, the analysis of this chapter provides the needed foundation for assessment of the African Charter normative and enforcement institutions as well as the domestic enforcement of civil and political rights.

²⁹⁴ The ICCPR may be amended under article 51 with the consent of two-thirds of its state parties.

CHAPTER THREE: NORMATIVE FRAMEWORK FOR CIVIL AND POLITICAL RIGHTS PROTECTION UNDER THE AFRICAN CHARTER

3.0 Introduction.

The previous chapter has laid the foundation for regional human rights arrangement through the analysis of the evolution of human rights; in particular, the progressive approach in guaranteeing effective enforcement of civil and political rights. This chapter analyses the protection of civil and political rights under the 1981 African Charter on Human and Peoples' Rights (African Charter). It examines the extent of normative protection enshrined in the African Charter while assessing the similarities and differences with relevant international instruments. In particular, this chapter examines the key normative features of the African Charter and analyses their impact on realising effective enforcement of civil and political rights. Furthermore, it analyses the interpretation accorded to civil and political rights by African Charter enforcement institutions¹ as well as the direction provided in these case laws. The intention is to facilitate a better understanding of whether the interpretation accorded these rights have corrected the challenge posed by the underlying provisions or oversights of the African Charter norms.

3.1 Historical overview and emergence of the African Charter

This section will examine the emergence and development of the African Charter. It suggests that the journey towards the realisation of the African Charter was marred by resistance as well as negotiations, thus leaving several questions relating to the normative and institutional protection of human rights unanswered by the African Charter.

The journey towards the enactment of an African Charter started in 1961.² At the outset, the 'African Conference on the Rule of Law' 1961 organised by the

¹ The enforcement institutions of the African Charter are the African Court and the African Commission. These institutions will be broadly analysed in the next chapter.

² The first conference for an African human rights treaty was the African Conference for the Rule of Law 1961 organised by the International Commission of Jurists in Lagos, Nigeria.

International Commission of Jurists (ICJ) and held in Lagos, Nigeria, emphasised the African need to give effect to the Universal Declaration of Human Rights (UDHR) by possibly adopting an African Convention of Human Rights with a human rights court.³ Although the recommendations of this conference did not have any immediate result in Africa, it set the scene for further discussions for the establishment of a regional human rights system. For instance, the quest for a regional human rights system following the 1961 Lagos Conference led to a series of Conferences and Seminars such as the Cairo Seminar of 1969;⁴ the Lusaka, Zambia Seminar of 1970 on the Realisation of Economic, Social and Cultural Rights; the Libreville Gabon Seminar of 1971 on the Participation of Women in Economic Life; the Dar-es-Salaam, Tanzania Seminar of 1973 on the study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa; and, the Dakar, Senegal Seminar of 1978 on Human Rights and Economic Development in Francophone Africa. One would have thought that since many newly independent African countries have recognised the UDHR through their membership of the UN, more priority would have been given to the immediate creation of an indigenous regional human rights system just like the European system, rather than relying on the UDHR which many newly independent African countries did not participate in making. This submission is true given that the colonialists mostly did not implement UDHR provisions during colonisation/apartheid.

The output from the above conferences and seminars resulted in one recommendation or other that partly formed the basis of the African Charter in 1981. For instance, at the 1978 Dakar Seminar, a draft resolution prepared by Keba M'baye, a delegate from President Senghor of Senegal, proposed the establishment of an African Human Rights Commission.⁵ In addition, at the 1979

³ Lone Lindholt, *Questioning the universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique: Law, Social Change and Development* (Aldershot, England, 1997) 73; Laurence Lombard, 'African Conference on the Rule of Law Held at Lagos, Nigeria, in January' (1961) 46 (6) *American Bar Association Journal*, 563.

⁴ This conference pressed for the establishment of an African Commission.

⁵ Gino Naldi, *The Organisation of African Unity: An Analysis of its Role* (Mansell Publishing, 1989) 110.

Organisation of African Unity (OAU) Summit in Monrovia organised by the OAU Secretariat, the OAU agreed to the establishment of a Pan-African Commission on Human Rights. In 1979, a UN Seminar on the Establishment of Regional Commission on Human Rights in Monrovia resulted in the setting up of a Working Group to draft proposals for the establishment of the African Commission on Human Rights. Afterwards, the 1979 Ministerial Conference in Dakar had these draft proposals reviewed.⁶ Considering the strides made through these drafts, a selected group of jurists produced the first draft of the African Charter in 1979 while the second and final draft was prepared in Banjul, The Gambia, in June 1980 and January 1981. Consequent upon the preparation of the January 1981 draft, the 18th Assembly of Heads of State and Government (AHSO) on 26th of June 1981 in Nairobi Kenya adopted the African Charter. Thereupon, Africa joined its European and American counterparts in establishing a regional human rights system for the promotion and protection of basic universal rights.⁷

The African Charter has been applauded for its positive contribution to international human rights discourse.⁸ In contrast to other regional human rights instruments, the drafters of the African Charter adopted a unique normative approach. Whereas it can be argued that some of its normative approaches were due to the historical past of the continent, it is also submitted that the reality in many African states at the time of drafting may have been considered. For instance, by protecting various categories of human rights, the drafters of the African Charter may have considered the totalitarian nature of governance in many countries and the consequences of not including various human rights

⁶ Fatash Ouguerous, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers, 2002) 32.

⁷ Oji Umzurike, 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 902; Rose D'Sa 'African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action' (1983) 10 *Australian YearBook of International Law*, 101. The universal objective of human rights is embedded in the United Nations' Universal Declaration on Human Rights (UDHR) 1948 and subsequently re-enacted so as to have binding force in UN backed International Covenant on Civil and Political Rights (ICCPR) 1976 and International Covenant of Social, Economic and Cultural Rights (ICESCR) 1976.

⁸ Josiah Cobbah, 'African Values and the African Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 309; Frans Viljoen, 'Africa's Contribution to the Development of International Human Rights and Humanitarian Law' (2001) 1 *African Human Rights Law Journal*, 18; Evelyn Ankumah, *The African Commission on Human and People's Rights: Practice and Procedure* (Martinus Nijhoff, 1996) 11.

categories. While this is an enormous advantage and innovation in international human rights law development, the absence of a derogation clause in the African Charter can potentially be invoked to enhance enforcement in conflict and peacetime.

Indeed, the significance of the African Charter adoption offers OAU member states an indigenous human rights measure for the promotion and protection of individuals and groups rights.⁹ However, OAU adoption of the African Charter does not imply the automatic coming into force and operation in member states. In this instance, article 63 (3) the African Charter requires a simple majority ratification by member states of the OAU before the African Charter could come into force. It follows that African leaders at this time in history who were mostly totalitarian could choose not to ratify the newly adopted human rights instrument. However, in 1986, five years after the adoption, the simple majority requirement was met, and the African Charter eventually came into force. The five years cannot be wholly criticised when compared to the ten years it took the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Social, Economic and Cultural Rights (ICESCR), and the nine years it took the American Convention to come into force. However, uncertainties marred the slow pace of African Charter ratification, and this ignited great fear and doubt among human rights crusaders.¹⁰

However, this is not to say that human rights were unknown to African countries before the adoption and coming into force of the African Charter. Suffice it to mention that some new independent African countries were signatories to international human rights instruments such as the UDHR,¹¹ ICCPR,¹² and

⁹ The African Charter came alongside the African Commission, which was inaugurated in 1987 in The Gambia.

¹⁰ Rachel Murray, 'Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms' (1999) 17 *Netherlands Quarterly of Human Rights*, 109; Lone Lindholt, *Questioning the Universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique: Law, Social Change and Development* (n 3 above) 80.

¹¹ Two African countries were part of the adoption of the UDHR: Egypt and Ethiopia, while South Africa abstained on the day of adoption. The majority of African states were still under colonisation at this time of adoption in 1948. However, several African countries joined the UN upon independence as follows: Libya 1955; Morocco, Sudan and Tunisia 1956; Ghana 1957; Guinea 1958; Cameroun, CAR, Chad, Congo, DRC, Dahomey, Gabon, Ivory Coast, Mali, Niger, Nigeria, Senegal, Somalia, Togo, and Upper Volta 1960.

¹² Of 169 and 165 States that have ratified the ICCPR and the ICESCR respectively, all African States except South Sudan and Western Sahara have ratified the ICCPR and, all African States except Botswana, South Sudan,

ICESCR.¹³ By being signatories to some of the highlighted human rights instruments, concerned African countries already had human rights obligations despite the poor human rights respect by some African leaders.¹⁴ That notwithstanding, the emergence of the African Charter, to date, appears not to have largely eliminated widespread human rights violations in many African countries despite the wide ratification it enjoys.¹⁵ Suffice to note that all African Union (AU, former OAU) member states except Morocco have ratified and deposited the African Charter.¹⁶ It is clear that upon ratification of the Charter, state parties automatically come under the jurisdiction of the Commission. This is because the Commission is a creation of the Charter and does not require separate ratification.

Western Sahara, and Mozambique have ratified the ICESCR. For instance, the following countries ratified the ICCPR in the 1970s and 1980s- Cameroun 1984; CAR 1981; Congo 1983; DRC 1976; Egypt 1982; Gabon 1983; Gambia 1978; Togo 1984; Guinea 1978; Kenya 1972; Libya 1970; Madagascar 1971 Mali 1974; Mauritius 1973; Morocco 1979; Niger 1986; Rwanda 1975; Senegal 1978; Sudan 1986; Tunisia 1969; Tanzania 1976, and Zambia 1984.

¹³ Up to 1986, the following African countries ratified the ICESCR: Cameroun 1984; CAR 1981; Congo 1983; DRC 1976; Egypt 1982; Gabon 1983; Gambia 1978; Guinea 1978; Kenya 1972; Libya 1970; Madagascar 1971 Mali 1974; Mauritius 1973; Morocco 1979; Niger 1986; Rwanda 1975; Senegal 1978; Sudan 1986; Tunisia 1969; Tanzania 1976, and Zambia 1984.

¹⁴ Some of these leaders include Idi Amin of Uganda, Jean-Bedel Bokassa of CAR, and Marcias Nguema of Equatorial Guinea.

¹⁵ Morris Mbondenyi, *International Human Rights and their Enforcement in Africa* (Law Africa Publishing, 2011); Fatash Ouguerous, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights Dignity and Sustainable Democracy in Africa* (n 6 above) 32; Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (n 7 above); Oji Umozuruike, 'The Domestic Jurisdiction Clause in the OAU Charter' (1979) 311 *African Affairs* 197; Rachel Murray, 'The African Charter on Human and Peoples' Rights 1987-2000: An Overview of its Prospects and Problems' (2001) 1 *African Human Rights Law Journal*, 1; Vincent Nmehielle, *The African Human Rights System: Its Laws, Practice and Institutions* (Martinus Nijhoff Publishers, 2001). Further, see the following links for contemporary widespread human rights violation in Africa- Human Rights Watch, *2017 World Report: Events of 2016*, available at > https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf< > accessed on 18 March 2019; European parliament Policy Briefing, 'Human rights protection mechanisms in Africa: Strong potential, weak capacity' (2013), available at > [http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491487/EXPO-DROI_SP\(2013\)491487_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491487/EXPO-DROI_SP(2013)491487_EN.pdf)< accessed on 19 March 2019.

¹⁶ South Sudan deposited its document of ratification on 19th May 2016 in line with Article 65 of the African Charter. At the time of writing, all African States except Morocco have ratified the African Charter. South Sudan joined the AU in 2011 and deposited its document of ratification on 19th May 2016 in line with article 65 of the African Charter. Morocco re-joined in January 2017; 33 years after withdrawing from the regional body due to the regional body's recognition of Western Sahara. However, Morocco has commenced the process of ratifying the African Charter.

By its very scope as the primary monitoring and enforcement institution, the Commission undertakes promotional, protection and interpretative functions, which it has used to develop its rich jurisprudence and case law principles.¹⁷ It should be borne in mind that the Commission has used its mandate to clarify some discrepancies in the African Charter norms. For example, the Commission has considered several complaints of extra-judicial killings,¹⁸ unlawful detention, torture, inhuman and degrading treatment by government security agencies,¹⁹ restriction of movement and membership of associations,²⁰ and deprivation of property.²¹ The African Commission case laws have also closed some normative gaps in the interpretation and understanding of the African Charter.

The African Charter norms and institutions, like their counterparts, appear not to be perfect. This position demonstrates why its emergence did not immediately resolve several human rights violations in African countries.²² Although many African states were locked in dictatorial rule amidst prevalent internal armed conflicts at the time of adoption of the Charter, the contemporary situation in many African countries shows extensive human rights violations by state authorities.²³ However, the premise deduced from the widespread human rights violations in the continent during the 1980s became more prominent given

¹⁷ Such celebrated cases include, *Communication 155/96 - Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*; *Communication 218/98 - Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*; *Communication 148/96 Constitutional Rights Project v Nigeria*.

¹⁸ Killing of unarmed students during the 'Ali must go' 1978 demonstration in Ibadan Nigeria by security forces; killing of over 100 demonstrators over the 1993 presidential election annulment by the Nigerian military government. See, Sylvester Odion-Akhaine, 'The Student Movement in Nigeria: Antinomies and Transformation' (2009) 36 (12) *Review of African Political Economy*, 427.

¹⁹ See African Commission Communication 279/09 against Sudan wherein it ruled that Sudan through its security agencies was responsible for torture and other inhuman treatment against the complainants.

²⁰ *Communication 225/98- Huri-Law (on behalf of Civil Liberties Organisation) v Nigeria*.

²¹ *Communication 155/96 - Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*.

²² Oji Umzuruike, 'The African Charter on Human and Peoples' Rights' (n 7 above); Further instances of countries where internal conflicts erupted include the Nigeria civil war of 1967-1970; Algerian Ethio-Somali War of 1977-1978; and South Africa's apartheid regime.

²³ Some of Africa's despotic leaders who violated these rights include Gnassingbe Eyadema of Togo (1967-2005), Hasting Banda of Malawi (1963-1994), Siad Barre of Somalia (1969-1991), Obiang Mbasogo of Equatorial Guinea (1979-Date), Hissene Habre of Chad (1982-1990), Omar Al-Bashir of Sudan (1989 –2019), and Muammar Gaddafi of Libya (1969-2011).

the absence of a judicial arm of enforcement in the regional human rights system.²⁴ Based on these observations and in contrast with the European and American human rights systems, the African human rights system has been adjudged the least developed, least efficient, most distinctive and the most controversial regional human rights instrument.²⁵ Today, this argument cannot be entirely correct given the evolution recorded in the system and the number of complaints that have been successfully adjudicated by the African Court, the African Commission and other regional human rights institutions such as the Committee on the Rights of Women and Committee of Expert on the Rights and Welfare of the Child.

3.2 Significant features of the African Charter: Underlying basis for interpretation

This section examines the unique normative features in the African Charter and their impact in enhancing civil and political rights enforcement in Africa. It argues that the drafters of the African Charter produced a treaty for human rights protection which deviated from the normative styles in existing human rights instruments, thus raising several concerns relating to African Charter interpretation. However, it is interesting to note that the normative structure and content of a legal framework are useful in distinguishing the standard of the norm. A norm is synonymous with a legal principle upon which legal rules should be based- a set of standards of behaviour or judgment assumed to be just standards

²⁴ Christof Heyns, 'The African Human Rights System: In Need of Reform' (2001) 2 African Human Rights Journal, 155; Fatsah Onguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (n 6 above) 791; Hastings Okoth-Ogendo, 'Human and Peoples' Rights: What Point Is Africa Trying to Make?' In R. Cohen Hyden, and W. Nagen, (eds), *Human Rights and Governance in Africa*, (University Press of Florida, 1993) 76; Jean Boukongou, 'The Appeal of the African System for Protecting Human Rights' (2006) 6 African Human Rights Law Journal, 269; Oji Umzuruike, 'The African Charter on Human and Peoples' Rights' (n 7 above); Edward Kannyo, *Human Rights in Africa: Problems and Prospects* (1980) A report prepared for the International League for Human Rights (Human rights working paper) 15; Nsongurua Udombana, 'Can a Leopard can its spots? The African Union Treaty and Human Rights' (2002) 17 Australian University Law Review, 1177; Makau Mutua, 'The African Human Rights System: A Critical Evaluation' (2000) available at > <http://hdr.undp.org/sites/default/files/mutua.pdf>< accessed on 18 March 2019; Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 Virginia Journal of Int. Law, 339.

²⁵ Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals* (3rd edn, Oxford University Press, 2008) 1063.

of behaviour for society or humanity in its entirety.²⁶ Thus, some unique normative style of the African Charter includes the absence of a derogation clause, the inclusion of three categories of human rights, individual duties and an introduction of 'peoples' rights'.²⁷

3.2.1 Inclusion of various human rights categories

This section examines whether the inclusion of different human rights categories in the African Charter is effective in guaranteeing enforcement by state parties to the African Charter, thereby alleviating the challenge of drafting and ratifying numerous treaties. It will be demonstrated that although the African Charter approach is different from other regional instruments and saves the region the burden of multiple ratifications of treaties, it has not satisfactorily influenced the recognition and justiciability of specific categories of rights in some countries.

The African Charter norms comprise different categories of human rights. Unlike the ICCPR and the ECHR, the African Charter rights and freedoms comprise civil and political rights; economic, social and cultural rights; and group and peoples' rights. Whether this normative approach is unconventional or not, the inclusion of these categories of human rights has the potential to influence effective domestic implementation. It saves AU member states the burden of ratifying different human rights instruments for these categories of rights. Besides, there is no guarantee that AU member states will willingly ratify too many human rights instruments for three main reasons. Firstly, the uncertainty that state parties' may not ratify numerous treaties has been exemplified following the poor ratification of some regional human rights instruments such as the Protocol to the African Charter on the Rights of Women,²⁸ Protocol on the Statute of the African Court of Justice and Human Rights,²⁹ and, Protocol to the African Charter

²⁶ Daci Jordan, 'Legal Principles, Legal Values and Legal Norms: Are they the same or different?' (2010) *Academicus International Scientific Journal*, 109.

²⁷ Fatsah Onguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (n 6 above) 57.

²⁸ Adopted 11 July 2003 at Maputo Mozambique and have been ratified by 41-member states as at June 2019.

²⁹ Adopted in Egypt 01 July 2008 and as at June 2019, has been ratified by only 7 countries but needs 15 ratifications to come into force.

on the Establishment of an African Court on Human and Peoples' Rights.³⁰ Secondly, the potential that minority group and tribes may rely upon group rights to seek independence or self-determination, thereby distorting the already recognised state boundaries. Thirdly, the financial burden that comes with domestic implementation of socio-economic rights may deter state parties from ratifying a distinct instrument on socio-economic rights protection.

The recognition of diverse human rights categories enshrined in the African Charter is reflected in the Charter preamble. For instance, paragraph 7 to the African Charter preamble enshrines that the satisfaction of the economic, social and cultural rights is a guarantee of the enjoyment of civil and political rights.³¹ It suggests that no particular category of right is more important or should be prioritised by state parties. Considering the normative recognition of these rights, the African Charter norms can be argued as complying with the Vienna Declaration and Programme of Action idea of human rights protection.³² Thus, this illustrates the reason for the African Commission's ruling in *SERAC v Nigeria*. In this case, the Commission ruled that collective rights, individual rights, environmental rights, and economic and social rights are essential elements of the African Charter and must be made efficient through implementation.³³ Arguably, this approach guarantees the enjoyment of rights, which ordinarily would be hindered by poverty, and the scarce finances of AU member states.³⁴

Under the African Charter, civil and political rights protection comprises freedom from discrimination, equality before the law, the right to life, prohibition of torture, the right to liberty, the right to fair trial, freedom of conscience and religion, the right to receive information, the right to free association, the right to assemble freely, freedom of movement, the right to participate in government,

³⁰ Ratified by 30 AU states since its adoption in 1998.

³¹ Preamble, paragraph 7. This paragraph equally emphasised the right to development.

³² Vienna Declaration and Programme of Action, Part 1, para 5; Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (n 7 above).

³³ Communication 155/96. This communication also opened new ground in environmental and human rights activism in Africa given that the case was one that challenged environmental degradation.

³⁴ Oji Umozuruike, 'The Present State of Human Rights in Africa' (1986) 1 Calabar Law Journal, 62.

and the right to property.³⁵ These rights are direct and essential rights of individuals, and they confer on individuals the opportunity to participate in the political scheme of the government.³⁶ At the same time, the African Commission jurisprudence on individual and NGO complaints indicates a widespread violation of these rights.³⁷ Examples of prevalent civil and political rights violation in the region include arbitrary arrest, detention and unfair or no trial, use of military courts for civilian opponents, forceful disappearance, inhuman and cruel treatment, restriction on freedom of expression, association and assembly by government forces, banned opposition demonstrations, closure of media houses, and, forceful dismissal of peaceful protesters.³⁸ However, it is noteworthy to mention that this category of rights is mainly recognised as fundamental rights in many African Charter state parties' constitutions.

Similar to the above array of rights, economic, social and cultural rights protected under the African Charter include the right to work, the right to physical and mental health, and the right to education.³⁹ The African Charter omitted some individual socio-economic rights guaranteed under the ICSECR such as the right to social security,⁴⁰ trade union rights,⁴¹ the right to an adequate and improved standard of living,⁴² and the right to reasonable limitation of working hours and remuneration for public holidays.⁴³ However, the African Commission has remedied some of these omissions in the 1989 Guidelines for National Periodic

³⁵ Articles 2-14 of the African Charter.

³⁶ See Article 13 of the African Charter; article 23 of American Convention on Human Rights; Article 21 of UDHR.

³⁷ A right-to-right analysis of civil and political rights category will be conducted in the next section.

³⁸ Amnesty International, 'Cameroon 2016/2017' available at > <https://www.amnesty.org/en/countries/africa/cameroon/report-cameroon/>< accessed on 18 March 2019; Human Rights Watch, 'Burundi Human Rights Crisis 2015-2017' available at > https://www.hrw.org/sites/default/files/supporting_resources/burundi_compendium_2016_web_version_4.pdf< accessed on 18 March 2019; Human Rights Watch, 'Democratic Republic of Congo: Events of 2016' available at > <https://www.hrw.org/world-report/2017/country-chapters/democratic-republic-congo>< accessed on 18 June 2019; Human Rights Watch, 'Ethiopia: Year of Brutality and Restrictions' available at > <https://www.hrw.org/news/2017/01/12/ethiopia-year-brutality-restrictions>< accessed on 18 March 2019.

³⁹ Article 15-17 of the African Charter.

⁴⁰ Article 9 (b) ICSECR.

⁴¹ Article 8 ICSECR.

⁴² Article 11 ICSECR.

⁴³ Article 7 (d) ICSECR.

Reports which requires states to provide information on social security rights, trade union rights and the right to limitation of working hours and remuneration for public holidays.⁴⁴ On the other hand, group rights comprise, among other things, the right to self-determination, the right to freely dispose of wealth and natural resources, the right to economic, social, and cultural development, the right to national and international peace and security, and the right to satisfactory environment.⁴⁵ Unlike civil and political rights, many socio-economic rights and group rights are recognised as Fundamental Objectives and Directive Principles of State Policy. Thus, they are not enforceable rights in many African countries.⁴⁶

3.2.2 Claw-back clauses

Another significant feature in the African Charter is the use of claw-back clauses. The term 'claw-back clause' was first used by Rosalyn Higgins to refer to a limitation clause that permits a non-observation of an obligation for public reason.⁴⁷ Such clauses are qualifications or limitations to the full enjoyment of human rights.⁴⁸ Under the African Charter, some relevant claw-back clauses are introduced through the use of phrases such as 'within the law', 'subject to law and order', 'laid down by the law' and 'provided that the individual abides by the law'.⁴⁹ This section will illustrate that it is not clear whether claw-back clauses have enhanced civil and political rights enforcement, thereby reducing the challenge of state party ousting of regional human rights protection. It will be demonstrated that although the African Charter institutions have given an impressive

⁴⁴ Guidelines for National Periodic Reports 1989', available at > http://www.achpr.org/files/instruments/guidelines_national_periodic_reports/achpr_guide_periodic_reporting_1989_eng.pdf< accessed on 18 March 2019.

⁴⁵ Article 20-24 of the African Charter.

⁴⁶ More discussion and understanding of fundamental objectives and directive principles of state policy will be done in details in chapter five.

⁴⁷ See generally, Rosalyn Higgins, 'Derogations under Human Rights Treaties' (1977) 48 *British Yearbook of International Law*, 281. The author further distinguished a claw-back clause from a derogation clause to the extent that a derogation clause allows a suspension or breach of obligation only in circumstances of war or public emergency.

⁴⁸ Sandhiya Singh, 'The Impact of Clawback Clauses on Human and Peoples' Rights' (2009) 18 (4) *African Security Studies*, 95; Makau Mutua, 'The African Human Rights System: A Critical Evaluation' (n 24 above).

⁴⁹ See the provisions of Article 6, 9, 10, 11, 12, 13, 14 of the African Charter.

interpretation of claw-back clauses, there is more need for reforms to reduce these clauses from the African Charter norms.

The inclusion of claw-back clauses in the African Charter has attracted several criticisms. Mutua,⁵⁰ Anthony⁵¹, and Buergenthal⁵² argue that claw-back clauses put the African Charter rights under the discretion of domestic jurisdiction, while Murray opines that they could promote despotism.⁵³ State parties have severally relied upon these clauses to avoid implementation of the African Charter.⁵⁴ In such instances, state parties' interpretation of these clauses gives credence to the provisions of national law.⁵⁵ However, the controversy generated by claw-back clauses in the African Charter has attracted an interpretation by the African Commission. In *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*,⁵⁶ wherein the complainant challenged the ouster clause in the Legal Practitioners' Decree promulgated by the Nigerian Military Government which prevents the observation of articles 6, 7, and 10 of the African Charter, the African Commission ruled that the term 'law' in these clauses should, in fact, be understood as a reference to international law. This decision interprets a claw-back clause to mean referral to other international human rights instruments. This decision did not change the pattern of African Charter state parties to rely on claw-back clauses to oust the African Charter rights and freedoms.

⁵⁰ Makau Mutua, 'The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation' (1993) 5 *Legal Affairs*, 7.

⁵¹ Arthur Anthony, 'Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa' (1997) 32 *Texas International Law Journal*, 518.

⁵² Thomas Buergenthal, 'et al', *International Human Rights in a Nutshell* (4th edn, West publishing Company, 2009) 234.

⁵³ Rachel Murray, 'The African Charter on Human and Peoples' Rights 1987-2000: An Overview of its Prospects and Problems' (n 15 above) 1.

⁵⁴ Dojo Olowu, 'The African Charter on Human and Peoples' Rights, its Regional System and the Role of Civil Society in the First Three Decades: Calibrating the Paper Tiger' (2013) 31 *Obiter* 29; the following cases involved state reliance on the claw-back clause to oust the African Charter: See the following Communications where domestic laws or decrees contain an ouster clause in line with the claw-back understanding of states: Communication 60/91- *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*; Communication 87/93- *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*; Communication 101/93- *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*; and Communication 129/94- *Civil Liberties Organisation v Nigeria*.

⁵⁵ Claude Welch, 'The African Commission on Human and Peoples' Rights: A Five-year Report and Assessment' (1992) 14 *Human Rights Quarterly*, 43.

⁵⁶ Communication 101/93.

The decision in the aforementioned communication did not change state party attitude on claw-back clauses. For instance, in *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*,⁵⁷ Nigeria again relied on claw-back clauses to give powers to special tribunals and military courts while ousting the jurisdiction of ordinary courts and denying appellate courts the right to entertain appeals.⁵⁸ In this case, the African Commission gave a similar ruling as above by emphasising that state parties cannot oust the jurisdiction of ordinary courts. Despite these rulings on claw-back clauses, state parties will still rely on claw-back clauses to achieve local circumstance factors to demonstrate a specific domain of sovereign competence over its affairs.⁵⁹ It illustrates the reason some state parties' limit rights such as freedom of the press, the right to association and assembly through domestic legislation.

Indeed, the African Commission has set limits to state party legislation that renders the African Charter rights inoperative. The significance of such limits to state party reliance on claw-back clauses makes it legally difficult for state parties to oust the Charter rights through domestic laws. For example, in *Media Rights Agenda, Constitutional Rights Project v Nigeria*, the African Commission ruled that a claw-back clause makes recourse to violating domestic law remedies non-existent and ineffective.⁶⁰ In this case, the Commission set a limit that claw-back clauses should not serve the purpose of a general restriction of African Charter rights. However, a claw-back clause will be allowed if the limitation meets the legitimate interest and are necessary in a democratic society.⁶¹ On the other hand, the Court has not developed much jurisprudence in this aspect.

⁵⁷ Communication 60/91. See also, Communication 87/93- *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*.

⁵⁸ *Ibid.*

⁵⁹ Amos Anabulele, 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human Rights have the final say?' (2016) 16 African Human Rights Law Journal, 1.

⁶⁰ Communication 105/93-124/94-130/94-152/96.

⁶¹ *Scanlen and Holderness v Zimbabwe*, Communication 297/05.

3.2.3 Individual and state duties

From the viewpoint of the African Charter, the enjoyment of rights and freedoms also implies the performance of corresponding duties on the part of everyone.⁶² Under the African Charter, the duties imposed on individuals are towards the family, his/her fellow beings, society, state, other legally recognised communities and the international community, to strengthen African cultural values, preserve national security, and to promote African unity.⁶³ State duties, on the other hand, are towards ensuring the respect of the rights and freedoms of the African Charter, the independence of the courts and institutions for the promotion and protection of African Charter rights.⁶⁴ This section will argue that while state duties have a potential to enhance the effective realisation of civil and political rights, it is not clear whether individual duties make any meaningful contribution to effective enforcement of the African Charter rights. This is against the backdrop that some individual duties are somewhat unclear in terms of implementation.

The African Charter was drafted after the ECHR and the UN covenants became operative, while none of these instruments made explicit reference to individual duties, the American Convention recognised it in article 32 titled 'relations between duties and rights'. This article recognises individual duties only to one's family, community and mankind.⁶⁵ However, unlike these human rights instruments, the African Charter contains a chapter on duties and creates a direct legal obligation between parties, which makes it more regionally oriented.⁶⁶ According to Mutua, the African Charter state duties are based on inspiration from the regional history of colonisation and respect for post-colonisation institutions for human rights protection.⁶⁷ For instance, state parties have a mandatory obligation at all times to allow the establishment and improvement of appropriate

⁶² African Charter Preamble, paragraph 7.

⁶³ Article 27-29 of the African Charter.

⁶⁴ Article 21 (5), 22 (2), 25 and 26 of the African Charter.

⁶⁵ Article 32 of American Convention; See also Article 29 UDHR.

⁶⁶ Ralph Beddard, 'Duties of Individuals under International Human Rights Instruments' (1999) 3 (4) International Journal of Human Rights, 30.

⁶⁷ Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (n 24 above).

institutions such as the courts. Hence, the decision in *Amnesty International, Comite Looseli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*⁶⁸ where the Commission held that the state duty to guarantee the independence of the court remains sacrosanct. In this case, Decree 2 of 1989, which ousted the ordinary courts in Sudan was declared a violation of Sudan's duty to guarantee the independence of the judiciary under articles 7 and 26. In this case, the Commission further held that the Sudan government had bound itself under article 1 to respect the Charter rights and freedoms. From this decision, one can agree that state duties are essential in the realisation of effective civil and political rights enforcement.

On the other hand, while the provision for individual duties requires the rights and freedom of each individual to be exercised with due regard to the rights of others,⁶⁹ it places a duty to respect and consider his fellow beings without discrimination.⁷⁰ Therefore, the civil and political rights of an individual may be restricted in the interests of the rights of others and the need to respect some moral and social order adopted by the state and duty to the community. Arguably, this duty raises the question as to whether individuals enjoy unfettered rights under the African Charter. This question is raised because the scope of the individual duty to fellow human beings, the community and the need to respect moral and social order seem unclear and open-ended. However, it is clear that for the individual to enjoy the African Charter civil and political rights, he must abide by the duties therein recognised. For example, for an individual to enjoy an unfettered right to expression under the African Charter, he has a responsibility not to breach another's intellectual property rights or be defamatory or seditious.

⁶⁸ Communication 48/90-52/91-89/93; See also, *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* (Communication 294/04).

⁶⁹ Article 27 (2) of the African Charter.

⁷⁰ Article 28 of the African Charter.

3.2.4 Absence of derogation clause

This section examines whether the absence of a derogation clause in the Africa Charter is an effective method to ensure effective enforcement of African Charter rights and freedoms by state parties. It will be demonstrated in this section that although the African Charter is alone in this method when compared with other regional instruments, the drafters of the Charter may not have been completely wrong because of the numerous human rights violations in many African countries at the time of drafting.

A derogation clause is a limitation on a state's power during an emergency where human rights are in a precarious situation.⁷¹ It allows a temporary suspension of human rights instruments during state emergencies, such as war and armed conflict.⁷² In other words, a derogation clause confers the right on state parties to temporarily abandon some human rights obligations and resort to adequate measures necessary for the duration of the emergency.⁷³ A core objective of a derogation clause is to limit the enforcement of human rights temporarily within a state for a period of time necessary to allow for the return of normalcy.⁷⁴ On the other hand, the recognition of derogation in international human rights instruments guarantees a 'rational response to domestic political uncertainty' given that it confers on states time to confront a crisis.⁷⁵

From the preceding analysis of the instruments that contain derogation clauses, three circumstances under which derogation can be allowed are⁷⁶ (a) in the event of exceptional public danger that threatens the existence of the state,⁷⁷

⁷¹ Melkamu Tolera, 'Absence of a Derogation Clause under the African Charter and the Position of the African Commission' (2014) 4 Bahir Dar University Law Journal, 229.

⁷² Abdi Ali, 'Derogation from Constitutional Rights and its Implication under the African Charter on Human and Peoples' Rights' (2013) 17 Law, Democracy and Development, 78.

⁷³ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2003) 202.

⁷⁴ Frederic Megret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaram (eds), *International Human Rights Law* (Oxford University Press, 2010) 143.

⁷⁵ Emilie Hafner-Burton, 'et al', 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 International Organisation, 673.

⁷⁶ Laurent Sermet, 'The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion' (2007) 7 African Human Rights Law Journal, 142.

⁷⁷ Article 4 ICCPR.

(b) during a war or other public danger threatening the life of the nation,⁷⁸ and (c) during a war or any other crisis situation that threatens the independence or security of a state.⁷⁹ It is clear that the life of the nation can be threatened from within or outside the country in which circumstances the state's duty to protect communities and institutions arises.⁸⁰ However, one would have thought that a derogation might negatively influence state party obligation to respect human rights. This is because a state can use such an opportunity to abuse the rights of the perceived opponents or the people for many unjustifiable reasons.

However, unlike the ICCPR, ECHR and the American Convention, the African Charter is silent on a derogation clause.⁸¹ Derogation clauses under these instruments enjoy different status. For instance, while the ICCPR adopts a similar approach to the ECHR by explicitly prohibiting derogation from certain articles such as the right to life,⁸² prohibition of torture,⁸³ prohibition of slavery and forced labour,⁸⁴ and no punishment without law,⁸⁵ the ICCPR goes further to prohibit derogation on imprisonment on the ground of inability to fulfil a contractual obligation,⁸⁶ right to recognition everywhere as a person before the law,⁸⁷ and the right to freedom of thought, conscience and religion.⁸⁸ It follows that non-derogable rights in these instruments must remain justiciable and sacrosanct even when a lawful state of emergency has been declared. What is not known is whether the African Charter drafters envisaged the need for countries not to opt out of

⁷⁸ Article 15 of ECHR.

⁷⁹ Article 27 of American Convention.

⁸⁰ Amrei Muller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review, 557.

⁸¹ See Article 15 of the ECHR; article 4 of ICCPR, and Article 27 of the American Convention. See also, Awol Allo, 'Derogation or Limitation? Rethinking the African Human Rights System of Derogation in Light of the European System' (2009) 2 Ethiopian Journal of Legal Education, 50; Laurent Serment, 'The Absence of Derogation Clause from the African Charter on Human and Peoples Rights: A Critical Discussion' (n 76 above); Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, 2000) 126; Christof Heyns, 'The African Regional Human Rights System: In Need of Reform' (n 24 above).

⁸² Article 2 of ECHR and article 6 of ICCPR.

⁸³ Article 3 of the ECHR and article 7 of ICCPR.

⁸⁴ Article 4 of ECHR and article 8 of ICCPR.

⁸⁵ Article 7 of ECHR and article 15 of ICCPR.

⁸⁶ Article 11 of ICCPR.

⁸⁷ Article 16 of ICCPR.

⁸⁸ Article 18 of ICCPR.

their Charter obligation or that derogation is irrelevant because of the inclusion of claw-back clauses.

It cannot be ascertained whether the African Charter drafters took into consideration the fact that the Charter was drafted at a time when many African countries were locked into military regimes or other forms of totalitarian government. Conversely, it is clear that the drafters of the African Charter did not envisage derogation even in emergencies, unusual circumstances,⁸⁹ or civil wars.⁹⁰ This has been demonstrated by the African Commission when it ruled that the impact of the absence of a derogation is that every state party must at all times respect the Charter rights and freedoms.⁹¹ At present, however, the absence of a derogation clause in the African Charter is not replicated in the human rights provisions of many African countries constitutions. In contrast, most African constitutions contain a derogation clause which is frequently ignited to declare a state of emergency,⁹² thereby limiting or suspending the constitutional rights, as well as the enjoyment of other human rights legislation. Arguably, the contrasted fact that African constitutions contain derogation clauses makes the interpretation of the absence of a derogation clause less likely to be enforced by the African states.⁹³

3.2.5 Peoples' rights

The protection of 'peoples' rights in the African Charter is another unique feature that distinguishes it from the other regional instruments earlier discussed. Peoples' rights protected in the African Charter include equality of all peoples' rights,⁹⁴

⁸⁹ See in *Media Rights Agenda, Constitutional Rights Project V Nigeria*.

⁹⁰ See *Commission Nationale des Droits de l'Homme et des Liberties V Chad*, - Communication 70/92.

⁹¹ *Ibid*.

⁹² For instance, see, section 45 (2) of the 1999 constitution of Nigeria; article 44 of the 1995 Constitution of Uganda; article 24 (3) of the 1990 Constitution of Namibia; Article 93 (4) of the 1995 Constitution of Ethiopia; Article 52 of the 1992 Constitution of Angola; Article 137 of the 2003 Constitution of Rwanda; and, Article 31 of the 1984 Constitution of Guinea-Bissau.

⁹³ It is noteworthy that many African states are signatories to the ICCPR and can argue their constitutional recognition of derogation through the interpretations of claw-back clauses, which recognises international laws and article 61 of the African Charter.

⁹⁴ Article 19 of African Charter.

peoples' right to existence and self-determination,⁹⁵ peoples' right to sovereignty over group wealth and natural resources,⁹⁶ peoples' right to development,⁹⁷ peoples' right to national and international peace and security,⁹⁸ and peoples' right to general satisfactory environment favourable to development.⁹⁹ It is clear from the above list of rights that the peoples' rights category is a different and unique category of human rights; the African Charter fails to define this concept. However, while the idea of peoples' rights opens a new development of international human rights jurisprudence, the absence of a definition potentially breeds uncertainty and speculation in understanding this concept of rights.¹⁰⁰ This section will demonstrate the relationship between peoples' rights and civil and political rights, thereby arguing that the realisation of some peoples' rights will enhance effective enforcement of civil and political rights.

The concept of peoples' rights, as a distinct category of rights, is critical to the enjoyment of civil and political rights. For example, article 19 provides that 'all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another'. Likewise, article 20 protects peoples' right to existence and the unquestionable and inalienable right to self-determination and freely determine their political status. From these provisions, peoples' rights are directly significant to the enjoyment and protection of some civil and political rights. This is because while the peoples' rights look at group or collective protection of the right to equality, the right to choose a government and prohibition of discrimination, the rights under article 2, 3 and 13 are accessed on an individual basis. For instance, in *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, the Commission noted that

⁹⁵ Article 20 of African Charter.

⁹⁶ Article 21 of African Charter.

⁹⁷ Article 22 of African Charter.

⁹⁸ Article 23 of African Charter.

⁹⁹ Article 24 of African Charter.

¹⁰⁰ Solomon Dersso, 'The Jurisprudence of the African Commission on Human and Peoples' Rights with respect to Peoples' Rights' (2006) 6 (2) African Human Rights Law Journal, 360.

peoples' right to national and international peace and security under article 23 could be used to protect villages of black Mauritians against attacks, discrimination and enjoyment of property.¹⁰¹ In the light of the above communication, the peoples' right has been employed to remove the obstacle of having many complaints before the Commission and other restraints that may have restricted victims from seeking justice at the African Commission.

3.3 African Charter civil and political rights norms and case law jurisprudence

The rights protected under the African Charter, like the other regional human rights instruments, contain provisions safeguarding civil and political rights. The civil and political rights protected under the African Charter are the protection from discrimination on grounds such as race, gender, ethnicity, age, religion and national origin; the right to equality before the law; the right to life; prohibition of torture and inhuman treatment; the right to liberty; the right to fair trial; freedom of conscience and religion; the right to receive information; the right to freedom of association; the right to freedom of movement; the right to participate freely in government and the right to property.¹⁰² Therefore, to ascertain the extent of normative protection to this category of rights by the African Charter, this section examines the provisions relating to civil and political rights and how relevant African Charter institutions have interpreted them.

Effective enforcement of any right depends on the normative protection, interpretation from the relevant institution and appropriate implementation. Considering that the civil and political rights form part of the three categories of rights contained in the African Charter, this section will demonstrate that other international human rights instruments indeed influenced the African Charter provisions, given some similarity in language and right coverage. Yet, at present, like at the time of drafting the African Charter, many African states make headlines

¹⁰¹ Communication 54/91, 61/91, 98/93, 164/97, 196/97, 210/98.

¹⁰² Article 2-14 of the African Charter.

for extensive human rights abuses in wartime,¹⁰³ political conflicts,¹⁰⁴ coups d'état,¹⁰⁵ flawed elections,¹⁰⁶ and religious intolerance.¹⁰⁷ For example, the 2016/2017 Amnesty International Annual Report attributes causes of Africa's unfortunate human rights situation to authoritarianism and political repression; lack of judicial independence and freedom of the press; discrimination, inequality and marginalisation; civil and political conflicts; and, armed conflicts in several African states.¹⁰⁸ From the preceding observation, the violation of civil and political rights has remained rife in some African countries. Therefore, it will be demonstrated in this section that the normative protection in the African Charter does not appear to be satisfactory and somewhat inadequate when compared to the ICCPR and some regional instruments. However, one can rightly argue that the African Commission and the African Court have reasonably interpreted the scope of these rights; thereby, providing case precedents that close some normative gaps in the African Charter.

3.3.1 Prohibition of discrimination

The prohibition of discrimination is amongst the commonly protected human right.¹⁰⁹ Several international human rights instruments,¹¹⁰ as well as national

¹⁰³ The ongoing-armed conflict in Somalia and South Sudan wherein the following rights are violated: right to life, right to dignity of human person, liberty and to the security of his person, freedom of expression, information, and social economic rights.

¹⁰⁴ In Burundi, Central Africa Republic, Mali, Congo, and Ethiopia where political crisis has led to the killings of many, arbitrary detention without trial, arrest and forceful disappearance of people, and suppression of protest and freedom of expression and information.

¹⁰⁵ Egypt 2013, Guinea-Bissau 2012, and Burkina Faso 2015 truncated the peoples' right to participate in government and representation, and other rights such as guarantee of independence of the court and fair trial of perceived opponents.

¹⁰⁶ Uganda general election 2016, Gabon general election 2016, Sudanese general election 2015, and Equatorial Guinea 2016 all witnessed violence and intimidation of opponents and electorates thereby leading to the violation of the freedom of expression, and the right to participate in government; killing of human rights activists and opposition members.

¹⁰⁷ Central Africa Republic-ongoing, Niger- ongoing, Sudan (1983-2005), Nigeria- ongoing, and Mali, witness violation of right to life, human dignity (rape), cruel and inhuman treatment, freedom of religion, amongst others.

¹⁰⁸ Amnesty International, 'Africa', available at <https://www.amnesty.org/en/countries/africa/report-africa/> accessed 22 June 2017. Consequently, poverty, unemployment, insecurity, illegal migration, and inequality has become prevalent in many African states.

¹⁰⁹ David Kairys, 'Civil Rights' (2015) International Encyclopaedia of the Social and Behavioural Sciences, 686. See, article 2 of the African Charter.

¹¹⁰ For instance, article 2 UDHR, article 2 African Charter, article 2 ICCPR, article 1 (1) Inter-American Convention, article 14 ECHR and Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

constitutions,¹¹¹ prohibit discrimination on several grounds.¹¹² For instance, article 2 UDHR, likewise article 2 of ICCPR prohibit discrimination on the following ten grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Thus, the African Charter adopted the same grounds as ICCPR with the exclusion of 'property'. Under the African Charter, 'fortune' is used to replace 'property'. However, while the Inter-American Convention has an addition of 'economic status', the ECHR recognises 'association with a national minority' in addition to its prohibited grounds of discrimination.

Article 2 of the African Charter protects individual rights and entitlement to the enjoyment of the African Charter rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. The grounds enumerated in this article seem not to be exhaustive given that the term 'other status' could open up more grounds not explicitly mentioned such as disability, economic status, age or sexual orientation. The context of article 2 forbids unjustified exclusion. For instance, article 2 has been violated on the ground of disability,¹¹³ national or social origin,¹¹⁴ birth or other status,¹¹⁵

¹¹¹ Section 17 (2) of Gambian 1997 Constitution; section 42 of 1999 Constitution of Nigeria; Article 29 of the 1989 Constitution of Algeria; article 9 (3) of 1996 Constitution of South Africa; Article 10 (2) of 1990 Constitution of Namibia; Article 2 of 1992 Constitution of Mali; Article 56 (3) of 2013 Zimbabwe Constitution; Article 11 of 1992 Constitution of Togo; Article 11 of 2003 Constitution of Rwanda; Article 27 (4) of 2010 Constitution of Kenya; and, Article 7 of 2001 Constitution of Senegal, and many others.

¹¹² For instance, article 2 UDHR, article 2 African Charter, article 2 ICCPR, article 1 (1) Inter-American Convention, article 14 ECHR and Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹¹³ See the case of *Purohit and Moore v Gambia*, wherein the African Commission held that the Lunatics Detention Act [LDA] violates the rights of disabled persons affected in the Act.

¹¹⁴ Communication 211/98 - *Legal Resources Foundation v Zambia*. In this case, the African Commission ruled that article 34 and 35 of Zambia Constitution (Amendment) Act of 1996 provision that anyone who wants to contest the office of the president has to prove that both parents are/were Zambians by birth or descent, and that nobody who has served two five-year terms as President shall be eligible for re-election to that office, is a violation of article 2 provision of the African Charter.

¹¹⁵ *Ibid.*

nationality,¹¹⁶ gender,¹¹⁷ race and ethnicity,¹¹⁸ political opinion and inclination,¹¹⁹ amongst others.¹²⁰ However, the prohibition of discrimination is not a free-standing right because it must be attached to another substantive right for it to be enjoyed.

The Commission has drawn a connection between non-discrimination and other guaranteed rights such as the right to life, dignity, property, movement, association, information, expression and the extent to which domestic laws comply with the Africa Charter.¹²¹ For instance, in *Legal Resources Foundation v Zambia*,¹²² the complainant alleged that the respondent constitution is discriminatory and violates the rights of 35 percent of the entire population on the grounds of their place of birth, social origin, and other status. The Commission, in this case, held that the constitutional provision restricting citizenship for political offices to Zambian citizens born to Zambia parents after independence in 1964 is particularly a vexing matter and discriminatory.¹²³ The facts in this case alleged that the Zambian government enacted into law through the Constitution (Amendment) Act of 1996 which provides in article 34 'that anyone who wants to contest the office of President has to prove that both parents are/were Zambians by birth or descent', and Article 35 that 'nobody who has served two five-year

¹¹⁶ In communication 249/2002- *African Institute for Human Rights and Development v. Republic of Guinea*, the African Commission held that an inflammatory speech by the President of the country which led to human rights violations suffered by Sierra Leonean refugees is a violation of article 2 for constituting impermissible discrimination on grounds of nationality. See also, Communication 245/2002 - *Zimbabwe Human Rights NGO Forum v. Zimbabwe*; Communication 227/ 99 - Democratic Republic of Congo / Burundi, Rwanda, Uganda.

¹¹⁷ See communication 323/06- *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*. The African Commission held that incidents that took place during a demonstration were in a form of a systematic sexual violence targeted at the women participating or present in the scene and violates the spirit of Article 2.

¹¹⁸ Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98 - *Association Mauritanienne des droits de l'homme v Mauritania*, the African Commission ruled that the killing, torture, incarceration of many black Mauritians because of the colour of their skin violates article 2 intent of non-discrimination.

¹¹⁹ The African Court in *Tanganyika Law Society, Legal and Human Rights Centre v Tanzania* (App. No. 009/2011) that law prohibiting independent candidature is discriminatory to all Tanzanians not belonging to political parties as this law bars them from contesting presidential, legislative and local elections.

¹²⁰ See generally, Human Rights Watch, 'Discrimination, Inequality, and Poverty—A Human Rights Perspective' available at > <https://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective>< accessed 29 June 2017. Reports of social and economic discrimination against minorities, killing of albinos in Malawi, segregation of HIV/AIDS patients, and so on.

¹²¹ See also, Communication 211/98 - *Legal Resources Foundation v Zambia*.

¹²² Communication 211/98.

¹²³ *Ibid*, para 71-72.

terms as President shall be eligible for re-election to that office'. However, the Commission observed that there are 'Zambian citizens born in Zambia but whose parents were not born in what has become known as the Republic of Zambia following independence in 1964'¹²⁴ and ruled that Zambia should take necessary steps to bring its laws and constitution into conformity with the African Charter.¹²⁵

The wording of article 2 of the African Charter implies that there must be no discrimination on any of the listed grounds when applying the other protections in the Charter. It requires that individuals and groups can secure all other rights without discrimination. Hence, all civil and political rights, as well as other rights protected under the African Charter, enjoy legal protection against the grounds of discrimination listed therein. However, the right to non-discrimination is non-derogable and must be respected to allow the enjoyment of all other rights protected under the African Charter.¹²⁶ It protects individuals against discrimination irrespective of whether the state is the direct violator or where states fail to discharge their duties to protect individuals from abuse by non-state parties.¹²⁷ For example, in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*,¹²⁸ the African Commission ruled that violence targeted against women is a form of discrimination which compromises and affects the enjoyment of the Charter rights. In this case, the victims complained that they were sexually and physically assaulted during a demonstration concerning a referendum aimed at amending Article 76 of the Egyptian Constitution on May 25, 2005, because of their gender while their opposite-sex counterparts did not experience the same humiliation and assault.

¹²⁴ Ibid, para 71.

¹²⁵ In compliance with this ruling, Zambia Constitution (Amendment) Act 2016 repealed part of Part IV of the 1996 Constitution and substituted a citizenship requirement in Article 35. Presently, instead of both parents being Zambian citizens, the new constitution requires at least one parent to be a citizen. However, this ruling is commendable because it draws a connection between the prohibition of discrimination and other rights such as the right to equality and the right to participate in the government of one's country.

¹²⁶ *Purohit and Moore v Gambia*, para 49.

¹²⁷ Communication 74/92 - *Commission Nationale des Droits de l'Homme et des Libertés v Chad*; Communication 155/96 - *Social and Economic Rights Action Centre and Another v Nigeria*.

¹²⁸ Communication 323/06.

The complainants, in the foregoing case, further alleged that they were attacked by supporters of President Mubarak and his party in the presence of Riot Police Officers, State Security Intelligence Officers, and high-ranking officers of the Ministry of Interior who did not intervene to save them. Hence, the Commission stated that 'it is clear that the assault which occurred on 25 May 2005 was gender-based violence, perpetrated by both state and non-state actors under the control of state actors. The violations were designed to silence women who were participating in the'¹²⁹ While agreeing that the alleged violations escalated because of the state authority's failure to take action against the perpetrators during and after the acts of assault, the Commission further ruled that Egypt should ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.¹³⁰

Discrimination, according to the International Labour Organisation means 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation'.¹³¹ Accordingly, any of the following terms can be used to describe and establish discrimination- 'distinction,' 'exclusion,' 'restriction,' and 'preference'.¹³² For instance, the African Commission in *Purohit and Moore v Gambia* described discrimination to include any exclusion or preference in the enjoyment of rights contained in the African Charter.¹³³ The African Commission in this case established that state parties should give equal attention to people with mental health disability by helping them achieve their full potential and rights.

¹²⁹ *Ibid*, para 166.

¹³⁰ However, Egypt has not ratified the Women's Protocol in line with this ruling. See, Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 60th Meeting -Commission on the Status of Women, 18 March 2016, available at > <http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf>< accessed 1 July 2017.

¹³¹ Convention No. 111, Convention concerning Discrimination in Respect of Employment and Occupation, 1958, available at ><http://www.supremecourt.ge/files/upload-file/pdf/act75.pdf>< accessed 29 June 2017.

¹³² Li Weiwei, 'Equality and non-discrimination under International Human Rights Law' (2004) Research Notes, The Norwegian Centre for Human Rights, available at > <http://www.mittendrinundaussenvor.de/fileadmin/bilder/0304.pdf>< accessed 05 July 2017.

¹³³ Communication 241/2001, para 61.

It further ruled that the Lunatic Detention Act (LDA) of 1917 which subjects persons designated as 'lunatics' to 'automatic and indefinite institutionalisation' amongst other deprivations be repealed and replaced with new legislation that is compatible with the African Charter and international standards for the protection of mentally ill and disabled persons. In this case, the complainant alleged that certain provisions of the LDA such as lack of provision for legal aid, no remedy to compensation if rights are violated, denial of the right to vote, denial of consent to treatment or subsequent review of treatment on persons designated as 'lunatics' violate article 2 of the Charter.¹³⁴

Discrimination arises under international law if 'equal cases are treated differently; a difference in treatment that lacks objective and reasonable justification; and/or if there is no proportionality between the aims sought and the means employed'.¹³⁵ In *Purohit and Moore v Gambia*, the African Commission agrees that article 2 protects against all forms of discrimination and lays down a principle essential in eradicating all guise of discrimination within the continent.¹³⁶ However, discrimination has remained prevalent in the everyday life of individuals at home, society and the workplace. Some manifestation of discrimination in the African region is seen in the expulsion of non-nationals, selective employment based on gender or nationality, xenophobic attacks against non-nationals,¹³⁷ persecution and killing of people with albinism,¹³⁸ gender-based traditional practices,¹³⁹ and, the social outcast system.¹⁴⁰ Despite this situation, the

¹³⁴ Ibid, para4-8.

¹³⁵ Icelandic Human Rights Centre, 'The Right to Equality and Non-discrimination' available at > <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination>< accessed 29 June 2017.

¹³⁶ Communication 241/2001.

¹³⁷ In May 2008, a series of attacks left 62 people dead in South Africa; another series of attacks in 2015 prompted repatriation of citizens by foreign governments such as Angola and South Africa.

¹³⁸ See 'History of attacks against Persons with Albinism' available at > <http://www.underthesamesun.com/sites/default/files/History%20of%20Attacks%20against%20PWA.pdf>< accessed 1 July 2017.

¹³⁹ Such practices include female genital mutilation, boy preference over girls and its implication for education, social and health consequences, work opportunities; early marriage; cultural support for violence against women; see generally, Fact Sheet No.23, 'Harmful Traditional Practices Affecting the Health of Women and Children' available at > <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>< accessed 1 July 2017.

¹⁴⁰ Sexual and racial harassment, bullying, and discrimination by reason of age and disability. See generally, Darcy Toit, 'The Evolution of the Concept of Unfair Discrimination in South African Labour Law (2006) 27 Industrial

Commission agrees that prohibition of discrimination is the spirit in which the African Charter is laid down because it ensures equality amongst individuals.¹⁴¹

Any differential treatment based on grounds prohibited by article 2 on the enjoyment of any of the African Charter rights and freedom violates the Charter. For instance, while highlighting a UN General Assembly Resolution 47/135 of 18th December 1992,¹⁴² the Commission ruled that killings, torture, and incarceration of people because of the colour of their skin violates the non-discriminatory provision.¹⁴³ Similarly, in *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*,¹⁴⁴ the Commission also held that the expulsion of 517 West Africans from Zambia on February 26 and 27, 1992, by the government based on their nationality is a violation of article 2 provision.¹⁴⁵ However, the Commission failed to elaborate in these cases whether any other situation such as security or economy, can justify the expulsion of non-nationals from one country. In another case before the Commission, the arrest and detention of Burundian refugees by the Rwandan government on the basis of their ethnic origin as members of the Tutsi ethnic group was held to be discriminatory.¹⁴⁶

Law Journal, 1311; Darcy Toit, 'Protection against Unfair Discrimination in the Workplace: Are the Courts getting it Right?' (2007) available at > <http://www.saflii.org/za/journals/LDD/2007/20.pdf>< accessed 1 July 2017.

¹⁴¹ Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98 - *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayantsDroit, Association mauritanienne des droits de l'Homme / Mauritania*.

¹⁴² See Article 1 of Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities.

¹⁴³ *Association mauritanienne des droits de l'Homme v Mauritania*, Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para 130-132.

¹⁴⁴ Communication 71/92.

¹⁴⁵ The Commission agreed that given the manner in which the victims were deported, all from West Africa, constituted a flagrant violation of Article 2 as same appears to target the nationals of West African countries.

¹⁴⁶ Opinion in *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democratés, Commission Internationale des Juristes, Union Interafricaine des Droits de l'Homme (OMCT, AIJD, CIJ, UIDH) v Rwanda*, Communication 27/89-46/91-49/91-99/93.

3.3.2 Right to equality before the law

Equality provisions appear in numerous international human rights instruments and documents of many countries.¹⁴⁷ While article 3 of the African Charter and article 7 of UDHR contain identical language by explicitly guaranteeing equality before the law and equal protection of the law, the wording of article 14 ECHR is almost identical to the ICESCR which requires the enjoyment of the rights and freedoms set forth in the convention without discrimination of any kind. The right to equality has a close nexus with the prohibition of discrimination and both rights constitute a basic and general principle of the protection of human rights.¹⁴⁸

The essence of this right is for the law not to be applied discriminatorily.¹⁴⁹ Article 3 of the African Charter suggests that the law is the same for everybody and must treat everyone fairly and equally. In this regard, the distinctions listed in article 2 of the African Charter must not be applied to favour one individual over another. For example, in *Actions Pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire*,¹⁵⁰ the African Court noted that equality and non-discrimination are a fundamental principle of international human rights law and that everyone, without distinction, should enjoy all the rights guaranteed in the Charter.¹⁵¹ In this case, the complainant alleged that the composition of the Ivorian Electoral Board in Law No. 2014-335 of June 18, 2014, favours the government as well as reflects an imbalance that would affect the independence and impartiality of the board. In its ruling, the African Court found that such imbalance places the government in an advantageous position over other candidates, especially independent candidates, and violates the right to equal protection of the law.¹⁵²

¹⁴⁷ See, article 7 of UDHR, articles 3 and 14 of ICCPR, article 2 of ICESCR, article 3 of the African Charter, and article 24 of American Convention on Human Rights. However, this right is the first individual civil and political right under the African Charter.

¹⁴⁸ See United Nations Human Rights Committee General Comment No. 18 in 'United Nations Compilation of General Comments', HRI/GEN/1/Rev.9 (Vol 1) p. 195.

¹⁴⁹ App. No. 001/2014, *Actions Pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire*.

¹⁵⁰ App. No. 001/2014, judgement delivered 18 November 2016.

¹⁵¹ App. No. 001/2014, para 142.

¹⁵² App. No. 001/2014, para 149-151.

Article 3 bans the discrimination and unfair treatment of individuals, and at the same time, it helps form the rule of law. The protection provided by article 3 of the African Charter combats specific forms of discrimination on any grounds whatsoever. In this regard, the complainant alleging the violation of article 3 must prove how the treatment complained about is different to that meted out to others in the same position.¹⁵³ In *Rev. Christopher R. Mtikila v Tanzania*, the applicant alleged that while the constitutional prohibition of independent candidature affects all Tanzanians, its effects are still discriminatory and against the right to equal protection by the law because it offers differential treatment to all Tanzanians who want to seek election to the Presidency, Parliamentary and local government positions outside sponsored political parties.¹⁵⁴ The African Court, therefore, ruled that this provision is a restriction on the right to participate in the government of one's country and a violation of Article 3 (2) of the African Charter.

The right to equality before the law is a prerequisite for the enjoyment of some other rights, and its interpretation has further added to the ban on discrimination and unfair treatment.¹⁵⁵ In *Mr Mamboleo M. Itundamilamba v Democratic Republic of Congo*,¹⁵⁶ the African Commission stated that the right to equality ensures that parties in a dispute are accorded similar and equal opportunities from the formulation to the implementation of the law.¹⁵⁷ Thus, the right to equality encompasses the right to equal opportunity for parties to a case from access to the court, to the preparation and defence of the case.¹⁵⁸ A similar decision was reached in *Burkinabe Movement for Human and Peoples' Rights v. Burkina Faso*,¹⁵⁹ where the Commission held that the respondent state violated Article 3 because it failed to provide sufficient justification for undue prolongation

¹⁵³ See the case of *Alex Thomas v. United Republic of Tanzania* (App. No. 005/2013), Judgment on Merits (20 November 2015), para 139-140.

¹⁵⁴ App. 009/2011 (judgment delivered 14 June 2013), para 117-119.

¹⁵⁵ Communication 302/05- In *Mr Mamboleo M. Itundamilamba v. Democratic Republic of Congo*, para 97; see also, Article 26 ICCPR; Article 1 of UDHR.

¹⁵⁶ Communication 302/05.

¹⁵⁷ *Ibid*, para 99.

¹⁵⁸ Communication 286 /2004 –*Dino Noca v Democratic Republic of the Congo*.

¹⁵⁹ Communication 304/97.

of a case spanning 15 years with no verdict when other cases on the same subject matter had been concluded.¹⁶⁰

In *Burkinabe Movement for Human and Peoples' Rights v. Burkina Faso* case, the complainants were among the magistrates suspended, dismissed and retired between 1983 and 1987 by the 'Conseil National de la Révolution' regime. At the end of this regime, an amnesty was introduced by the Burkinabé state to rehabilitate these workers. Following this amnesty programme, many workers were restored to their position, while many others who were unaffected by the measure demanded to be compensated in kind just as the complainants. However, more than 15 years after the complainants had filed this request at the Supreme Court of Burkina Faso, the court has failed to give any verdict on the case. On this note, the Commission admitted that it is clear that the failure to proceed with the complainants' case by the Supreme Court constitutes a denial of justice and a violation of the equality of all citizens before the law.¹⁶¹

The right to equality prohibits discrimination by persons or authorities acting under the law or in the discharge of the functions or business of a state office.¹⁶² It is not enough for states to have legislation condemning discrimination; they have to take positive steps to provide redress. Hence, where a person in authority uses his/her offices to take decisions that discriminate and cause an imbalance in the treatment of persons, such acts amount to a violation of this right.¹⁶³ It is based on this that the Commission in *Antonie Bissangou v Congo*¹⁶⁴ ruled that the respondent state violated article 3 due to its failure to implement the ruling of the court of the first instance even after the Minister of Justice had instructed the Minister of the Economy, Finance and the Budget to enforce the ruling. In this case, the complainant alleged that leaving the discretion of what

¹⁶⁰ *Ibid*, para 38.

¹⁶¹ *Ibid*, para 40. See also, Communication 286 /2004 –*Dino Noca v Democratic Republic of the Congo*.

¹⁶² See, article 12 (4) of Tanzania Constitution and Article 29 of Algerian Constitution.

¹⁶³ Communication 253/02, *Antonie Bissangou v Congo*.

¹⁶⁴ *Ibid*.

ruling to enforce or not, to the Minister of the Economy, Finance and the Budget, violates his right to equality before the law and equal protection by the law.¹⁶⁵

3.3.3 Right to life

The right to life is a basic right for every individual. This means that nobody should have his/her life terminated by another, including the government.¹⁶⁶ By implication, governments are obliged to make laws that safeguard the life of individuals within their territory. Consequently, this right is duly emphasised in numerous international human rights instruments¹⁶⁷ as well as AU member states' constitutions.¹⁶⁸ For instance, article 2 ECHR protects this right and puts a specific obligation on the state, such as preventing public authorities from taking lives and requiring them to take steps to protect lives. On the African continent, article 4 of the African Charter provides in clear terms that 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'. This provision prohibits any form of arbitrary deprivation of life because it is the foundation upon which other rights are exercised.¹⁶⁹

By way of contrast, the right to life in the European system is absolute.¹⁷⁰ The European system does not allow derogation of this right by state parties, not even as a punishment for the worst crime.¹⁷¹ However, this right will not be breached if death occurs when a public authority uses necessary force to stop unlawful violence, make a lawful arrest, stop a riot or uprising, and prevent

¹⁶⁵ *Ibid*, para 69-71.

¹⁶⁶ Another shortcoming to this provision is that the African Charter is silent on whether suicide may fall under the violation of the right to life. Although this is also absent in other regional treaties, the increasing number of suicides in many African states, or instance, Nigeria, may require the scope of the right to life to be expanded. This may require the need to investigate the causes and circumstances surrounding the incident in order to hold persons or institutions accountable.

¹⁶⁷ Article 2 of ECHR; Article 4 of American Convention on Human rights; Article 3 of UDHR; and, Article 6 of ICCPR.

¹⁶⁸ Article 11 of 1996 Constitution of South African; Article 14 of 1977 Constitution of Tanzania; section 33 of 1999 Constitution of Nigeria; Article 13 of 1992 Constitution of Togo; Article 7 of 2001 Constitution of Senegal; Article 16 of the 1994 Constitution of Malawi; Article 16 of 2005 Constitution of DRC; Article 24 of 2005 Burundi Constitution; Article 20 of 2011 Constitution of Morocco; and, Article 13 of 2012 Constitution of Somali.

¹⁶⁹ Vincent Nmehielle, *The African Human Rights System: Its Laws, Practices and Institutions* (n 15 above) 85.

¹⁷⁰ See Article 15 of ECHR, and, Protocol 13 to the ECHR- (abolition of death penalty).

¹⁷¹ Protocol 13 to the ECHR.

escaping from lawful detainment.¹⁷² On the other hand, while the African Charter agrees that the right to life is inviolable, it is silent on what may constitute an arbitrary deprivation of this right leading to a good number of AU state constitutions listing exceptions to the absolute enjoyment of the right to life.¹⁷³ For instance, section 33 of the 1999 Constitution of Nigeria provides as follows:

'(1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. (2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary - (a) for the defence of any person from unlawful violence or for the defence of property: (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) for the purpose of suppressing a riot, insurrection or mutiny'.¹⁷⁴

Notwithstanding the approach in various AU member states constitutions, the African Commission re-emphasised in *Forum of Conscience v Sierra Leone* that the right to life is a human rights bedrock from which other rights proceed.¹⁷⁵ This means that state parties would be accountable for violation of article 4 where state agents execute persons after summary and arbitrary trials, or where death occurs due to denial of food, medical attention, sand burning and torture.¹⁷⁶ Furthermore, any inappropriate and unnecessary use of lethal force by law enforcement officers leading to a loss of life is tantamount to arbitrary, excessive, wrongful and

¹⁷² Article 2 ECHR.

¹⁷³ Right to life is absolute in Rwanda- Article 10 of the 2003 Constitution of Rwanda, Chad- Article 17 of 1996 Constitution of Chad, South Africa- Article 37 of the 1996 Constitution of South Africa, and other states.

¹⁷⁴ See generally, Article 13 of 1992 Constitution of Ghana; Article 18 of the 1997 Constitution of Gambia; Article 14 and 15 of the 1994 Constitution of Ethiopia.

¹⁷⁵ Communication 223/98 - *Forum of Conscience v Sierra Leone*, para 19.

¹⁷⁶ Communication 48/90-50/91-52/91-89/93- *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, para 48-50.

unlawful killing.¹⁷⁷ Other acts that violate the right to life include the death penalty, extra-judicial, summary and arbitrary killings whether during a violent suppression of peaceful demonstrations, in lawful detention because of bad conditions and ill-treatment, or participation in an illegal political rally.¹⁷⁸

The Commission's interpretations have sustained the meaning of the right to life within the ambit of international human rights law framework. For example, in *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v DRC*, the Commission held that the extra-judicial execution of unarmed protesters violates article 4 provision of the African Charter.¹⁷⁹ Similarly, in *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Interafricaine des Droits de l'Homme v Rwanda*, the Commission held that the extra-judicial killings of Rwandan villagers by the Rwandan Armed Forces is a violation of the right to life guaranteed by the Charter.¹⁸⁰ In this case, it emphasised that any killing other than that ordered by law through a competent judicial body is a violation of the right to life.

The issue relating to the death penalty has attracted significant attention from the African Commission. Unlike Protocol No. 6 to the ECHR which abolishes the death penalty, the African Charter and its protocol lack such protection. In *Interights 'et al'. (on behalf of Mariette Sonjaleen Bosch) v Botswana*,¹⁸¹ the Commission agreed that the death penalty could be imposed only after full consideration of circumstances relating to the offence and offender within the sphere of domestic law.¹⁸² Nevertheless, the Commission further urged Botswana to take all measures in line with the article 1 obligation to refrain from exercising

¹⁷⁷ Communication 295/04- *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum v Zimbabwe)*, para 123.

¹⁷⁸ Communication 266/03- *Kevin Mgwanga Gunme, 'et al'. v Cameroon*, para 100-112.

¹⁷⁹ Communication 25/89-47/90-56/91-100/93 para 43.

¹⁸⁰ Communication 27/89, 46/91, 49/91, 99/93.

¹⁸¹ Communication 240/01.

¹⁸² *Ibid*, para 31.

the death penalty¹⁸³ in line with the African Commission Resolution Urging States to Envisage a Moratorium on the Death Penalty¹⁸⁴ and UN 2nd Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty.¹⁸⁵ In this case, the complainant alleged that the imposition of a death sentence had violated her right to life and that her execution method, which is by hanging, is a cruel method and would further expose her to inhuman treatment and punishment, unnecessary suffering, degradation, and humiliation. However, the Commission was silent on whether the method of execution violates the prohibition of inhuman and degrading treatment.

The Commission has remained consistent in its call for the abolition of the death penalty in the region. According to the Commission, the death penalty violates other human rights such as the right to dignity and freedom from torture, cruel, inhuman and degrading treatment or punishment.¹⁸⁶ At present, many African countries retain the death penalty as a punishment for crimes. For instance, as of September 2016, out of the seventeen African countries that permit the death sentence, five countries carried out an execution in 2015.¹⁸⁷ On the other hand, forty-one persons sentenced to death were granted State Pardon in Nigeria in 2015, while no public execution has been recorded in Nigeria since 2011.¹⁸⁸ What is unknown is whether Nigeria is doing this in line with the moratorium on the death penalty.

¹⁸³ Communication 240/01, para 52.

¹⁸⁴ Adopted at the 26th Ordinary Session of the African Commission held from 1st to 15th November 1999, Kigali, Rwanda, available at > <http://www.achpr.org/sessions/26th/resolutions/42/> <, accessed 08 July 2017.

¹⁸⁵ Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

¹⁸⁶ New Guidance on the Right to Life from the African Commission, ‘General Comment No. 3 of the African Charter on Human and Peoples’ Rights, available at ><http://www.chr.up.ac.za/index.php/centre-news-a-events-2015/1564.html>< accessed 06 July 2017.

¹⁸⁷ The Telegraph, ‘Mapped: The 58 countries that still have the death penalty’ (1 September, 2016), available at > <http://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/> <, accessed 07 July 2017. Countries that still retain death sentence are: Botswana, Chad, Comoros, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Ethiopia, Gambia, Lesotho, Libya, Nigeria, Somalia, Somaliland, South Sudan, Sudan, Uganda, and Zimbabwe. The following carried out executions as follows: Chad (10), Egypt (22+), Somalia (25+), South Sudan (5+), and Sudan (3).

¹⁸⁸ Amnesty International, ‘Death Penalty 2015: Facts and Figures’, (April 6, 2016), available at > <https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/> < accessed 08 July 2017.

Specifically, while article 6 (2) ICCPR somewhat acknowledges the death penalty, the UN Second Optional Protocol to the ICCPR abolishes the death penalty.¹⁸⁹ In contrast, the Resolution Urging States to Envisage a Moratorium on Death Penalty provides as follows:

- '1. urges all States parties to the African Charter on Human and Peoples' Rights that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter;
2. Calls upon all States parties that still maintain the death penalty to (a) limit the imposition of the death penalty only to the most serious crimes; (b) consider establishing a moratorium on executions of the death penalty; (c) reflect on the possibility of abolishing the death penalty'.¹⁹⁰

This means that the African Commission permits the adoption of the death penalty by states for offences they consider most serious crimes without an explanation of what constitutes serious crimes. Again, the African Commission Resolution is not for the immediate and complete abolition of the death penalty, but for state parties to first limit their imposition, and secondly, to consider its abolition through legislative measures. Surprisingly, the Commission failed to use the opportunity in this Resolution to either completely abolish the death penalty or forbid the death sentence on certain classes of persons based on age and other circumstance such as pregnancy.¹⁹¹

Several other situations within the African continent contradict the African Charter expression that 'human beings are inviolable'. For instance, the African

¹⁸⁹ Article 1 of Second Optional Protocol to the International Covenant on Civil and Political Rights; Liberia, however, reintroduced the death penalty for offence of armed robbery, terrorism, and hijacking in 2008. As at June 2018, only 15 African States are parties to the UN Protocol on the death penalty. They are Cape Verde Island (2000), Djibouti (2002), Mozambique (1993), Namibia (1994), Rwanda (2008), Sao Tome and Principe (2017), Seychelles (1994), South Africa (2002), Madagascar (2012), Angola (2013), Gabon (2014), Togo (2016), Guinea-Bissau (2013), Benin (2012) and Liberia (2005).

¹⁹⁰ Resolution Urging States to Envisage a Moratorium on Death Penalty.

¹⁹¹ However, article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa prohibits the use of the death penalty on pregnant or nursing women.

Charter lacks clarity relating to when one becomes a human being to enjoy the right to life. The approach is different under the American Convention, which explicitly guarantees the right to life from the moment of conception.¹⁹² Significantly, the 2010 Kenyan Constitution is similar to the American Convention on this issue. Article 26 of this constitution provides as follows:

'(1) every person has the right to life. (2) the life of a person begins at conception. (3) a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law. (4) abortion is not permitted unless, in the opinion of a trained health professional, there is a need for emergency treatment or the life or health of the mother is in danger, or if permitted by any other written law'.¹⁹³

The Commission agrees that the right to life is clearly under pressure in Africa.¹⁹⁴ Such pressure is manifest through violation of means of the livelihood, state party negligence or use of excessive force resulting to death by state agents. In *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, the Commission ruled that the right to life implies the right to food, health and other social, economic rights necessary for a dignified life.¹⁹⁵ In this case, the complainants alleged that the respondent state polluted and degraded the environment of the Ogoni people of Nigeria to a level humanly unacceptable, which made living a near-impossible task for the community. In its recommendation, the Commission observed that collective rights, environmental rights, and economic and social rights are essential elements of the right to life.¹⁹⁶

¹⁹² Article 4 of American Convention on Human Rights.

¹⁹³ This is similar to the position of Article 4 (1) of the American Convention on Human Rights.

¹⁹⁴ New Guidance on the Right to Life from the African Commission, 'General Comment No. 3 of the African Charter on Human and Peoples' Rights', adopted at the 57th Ordinary Session held from 4 to 18 November 2015 in Banjul, The Gambia, available at ><http://www.chr.up.ac.za/index.php/centre-news-a-events-2015/1564.html>< accessed 06 July 2017.

¹⁹⁵ Communication 155/96 - *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, para 64.

¹⁹⁶ *Ibid*, para 68.

The decision in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* is a departure from the Commission's recommendation in communications where death is a direct consequence of state party action. The Commission has over time found state parties in violation of article 4 where their organs and persons carrying out legal duties are directly the cause of death or due to state negligence, to ensure the protection of the African Charter rights. In *Commission nationale des droits de l'Homme et des libertés v Chad*,¹⁹⁷ the facts presented by the complainant show that unknown gunmen and soldiers killed some journalists and other civilians. In defence, the respondent state claimed that its agents did not perpetuate this act and that it lacked control of the actions of its agents and other nonstate actors, given that the country was at war. Despite this claim, however, the African Commission ruled that the African Charter does not allow derogation from state parties, even during emergencies and further ordered that the respondent state, having failed to establish security and stability in the country, and by the government participation in the war, was in violation of Article 4.¹⁹⁸

Accordingly, killings during an armed conflict that do not conform to international humanitarian law and 'enforced disappearance' violate the right to life.¹⁹⁹ The standard to which international law expects states to operate is the same across the board; life must only be taken in the circumstances permitted by the law. The reality is that the Commission has sometimes requested that investigations into extra-judicial killings are set up by states and an entirely independent body of individuals must carry such out with the state providing the necessary resources.²⁰⁰ In *Amnesty International, Comite Loosli Bachel and*

¹⁹⁷ Communication 74/92: *Commission nationale des droits de l'Homme et des libertés v Chad*.

¹⁹⁸ Ibid, para 20. See also the following cases, Communication 27/89-46/91-49/91-99/93- Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda; Communication 155/96 - *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*.

¹⁹⁹ Ibid. The General Comment No. 3 was drafted by the Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa, one of the special mechanisms under the African Commission and adopted at the 57th Ordinary Session held from 4 - 18 November 2015 in Banjul, The Gambia.

²⁰⁰ Communication 48/90-50/91-52/91-89/93 - *Amnesty International, Comite Loosli Bachel and Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*.

Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan, the Commission held that findings from such investigations must be made public and prosecutions must, after that, be initiated in accordance with the information discovered.²⁰¹ What this recommendation entails is the need for an independent judiciary that can guarantee redress for victims and the political will of the government to ensure investigation and suppression of acts likely to cause extra-judicial killings.

To understand the position of the Commission on the violation of the right to life, it ruled in *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*,²⁰² that the death of Mr Chirwa in prison custody due to inadequate health care and food, as well as the shooting and killing of peaceful protesters by the police, violated article 4.²⁰³ Similarly, in *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, the African Commission in this case reinstated that the state has a duty and obligation not to purposely let a person die while in custody due to denial of other rights such as healthcare.²⁰⁴ In these cases, the Commission emphasised the duty of state parties to investigate the cause of death and use its organs to provide redress to victims.

However, the Commission has over time been criticised for unsatisfactory responses to state party violations of the right to life and for its inability to find the violation of article 4 in some seemingly unjustified circumstances.²⁰⁵ Take, for instance, in *International Commission of Jurist v Rwanda*,²⁰⁶ which was later merged with several other communications,²⁰⁷ the complainant alleged that the

²⁰¹ *Ibid.*

²⁰² Communication 64/92-68/92-78/92_8AR.

²⁰³ The Commission also stated that Malawi was in violation of the right to fair hearing, liberty and freedom from torture.

²⁰⁴ Communication 137/94-139/94-154/96-161/97, para 103.

²⁰⁵ Vincent Nmehielle, *The African Human Rights System: Its Laws, Practices and Institutions* (n 13 above) 87.

²⁰⁶ Communication 49/91.

²⁰⁷ Communication 27/89, 46/91, 49/91, 99/93 - *Organisation Mondiale Contre La Torture and Association Internationale des jurists Democrates Commission, Commission Intenationale des jurists, Union Interfricaine des Driots de l'Homme v Rwanda*.

respondent state arrested and detained thousands of people on the grounds of ethnicity and destroyed their villages, and as well, massacred many of them. The Commission, in this case, failed to use the evidence provided by the complainant, instead requested permission from the Rwandan government to conduct an on-site investigation, which was done four years after despite the Rwandan government's quick response to the request. In particular, the alleged violations in this communication were later engulfed in the Rwandan genocide of 1994.

3.3.4 Prohibition of torture and cruel treatment

Torture and inhuman and degrading treatment violate human dignity. The international community has developed a standard to protect against torture and inhuman and degrading treatment containing a minimum guarantee to be provided by every system under articles 4 and 5 UDHR. While article 5 UDHR and article 3 ECHR share similar language, article 5 of the African Charter prohibits, in addition to torture, inhuman and degrading treatment or punishment, all forms of exploitation and degradation of man particularly slavery and the slave trade. Article 5 of the African Charter guarantees three rights: the right to the respect of the human dignity; the recognition of legal status; and, the prohibition of all forms of the exploitative and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment. What this article has done is mostly to combine the protection under articles 3 and 4 ECHR and 4 and 5 UDHR in one.²⁰⁸ However, unlike the ECHR and UDHR, the African Charter is silent on forced labour and servitude.

Many African states have had experience of bad leadership, war, armed conflict and military rule, many of which were known for the exploitation and degradation of human beings. For instance, the Commission in *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan* held that torture constitutes the intentional and systematic infliction of physical or

²⁰⁸ See also, articles 5 and 6 of the Inter-American Convention. Article 6 of the Inter-American Convention protects the right to respect of physical, mental and moral integrity.

psychological pain and suffering to punish, intimidate or gather information.²⁰⁹ Torture means any act by which severe pain, suffering, whether physical or emotional, is intentionally inflicted, and includes beating, solitary confinement of prisoners, extremely poor feeding of prisoners, chaining and locking up in overpopulated cells lacking hygiene, burning and burying under desert sand, electrocution of genital organs, water-boarding, pepper spray, and confinement in very cold underground cells.²¹⁰

Firstly, article 5 recognises the right to respect the dignity inherent in a human being. Human dignity is inherent in a human being, forms the basis of the human rights concept, and has been part of international human rights law since the adoption of the UDHR.²¹¹ Dignity enables the human family to engage in the activities that embody what we wish to become despite the nature of our origins and incident lifestyle.²¹² Further, dignity had played a crucial role in enabling differing human rights views to put aside the perceived ideological differences and focus on specific practices that should be prohibited.²¹³ However, in an analysis of the term 'human dignity' as used by the U.S. Supreme Court and state courts around the globe, Rao agreed that courts have different concepts of dignity which they base on how they balance individual rights with the demands of social policy and community values.²¹⁴ Governments and religious bodies in debates for or against their position on controversial issues such as forced labour, under-age marriage, torture, abuse of domestic staff and gay rights, have used human

²⁰⁹ Communication 279/03-296/05 *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, para 145.

²¹⁰ Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98 - *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayantsDroit, Association mauritanienne des droits de l'Homme v Mauritania*, para 115-117.

²¹¹ Article 1 of UDHR; Roberto Andorno, 'Human Dignity and Human Rights' (2013) *Handbook of Global Bioethics* 45. Consequently, the preambles to both the ICCPR and ICESER acknowledge that human rights are derived from the dignity of the human person.

²¹² Edwin Cameron, 'Dignity and Disgrace- Moral Citizenship and Constitutional Protection' In Hugh Corder, Veronica Federico, and Romano Orru (eds), *The Quest for Constitutionalism: South Africa since 1994* (Routledge, 2016) 100.

²¹³ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law*, 655.

²¹⁴ Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183.

dignity.²¹⁵ What is clear in article 5, however, is the protection of human dignity against all forms of exploitation and degradation of man. Therefore, can article 5 which prohibits forms of inhuman and degrading treatment be said to be exhaustive?

Ankumanh stressed that the contemporary exploitation and degradation of human beings are sometimes rooted in traditional and religious practices and manifest in the form of early marriage, betrothal of girls, illegal sale and traffic in human beings, forced marriage, child labour, forced labour, pledging of young girls for debt, and use of domestic servants for extremely low pay.²¹⁶ As one would expect, public authorities must not inflict the sort of treatment listed in article 5 on anyone, and they must protect individuals against such treatment from other individuals. Nonetheless, there seems to be an alarming increase in contemporary exploitation and degradation by individuals in some African countries. For instance, the abuse of domestic servants in many countries.²¹⁷

On the meaning of torture, the Commission in *Gabriel Shumba v Republic of Zimbabwe* held that torture includes acts capable of causing serious physical or psychological suffering, which humiliates any individual to the extent of being forced to act against one's will or conscience.²¹⁸ In this case, the following acts were construed to constitute torture, inhuman and degrading treatment and punishment; namely, forceful drinking of one's own blood or urine, spray of a chemical substance on the body, being urinated upon by security officials, beatings, electrocution, and denial of food and water. Indeed, these acts caused physical injuries, mental and psychological trauma to the victim.²¹⁹ Hence, the

²¹⁵ Ariel Zylberman, 'Human Dignity' (2016) 11(4) *Philosophy Compass* 201.

²¹⁶ Evelyn Ankumanh, *The African Commission on Human and Peoples' Rights: Practice and Procedure* (n 8 above) 119.

²¹⁷ Emeka Okafor, 'The use of Adolescents as Domestic Servants in Ibadan, Nigeria' (2009) 24 (2) *Journal of Adolescent Research*, 169.

²¹⁸ Communication 288/2004 - *Gabriel Shumba v Republic of Zimbabwe*; Communication 236/2000 - *Curtis Francis Doebbler v. Sudan*, para. 36.

²¹⁹ Communication 288/2004.

understanding of what may constitute torture and degrading treatment can be endless.

Likewise, the Commission in *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants Droit, Association mauritanienne des droits de l'Homme v Mauritania* held that a situation where detainees were left to die a slow death at the hands of government officials constituted cruel, inhuman and degrading treatment and punishment.²²⁰ Similar pronouncement was also made in *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, where Sierra Leonean refugees were harassed, deported, property looted, physical bodily injuries and mutilation such as cutting off their ears, arms, and legs, and arbitrary arrests and assassinations following President Conté's speech on 9th September 2000 which incited soldiers and civilians. The African Commission, in this case, ruled that the punishment and treatment meted out were in extreme violation of Article 5 and other articles of the Charter.²²¹

However, there is an evolving international law effort to curb the acts of torture, cruel and inhuman treatment and punishment. At the UN level, the international community has enacted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984²²² and Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2006.²²³ For instance, article 1 of this Convention

²²⁰ Ibid, para 118.

²²¹ Communication 249/02 - *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, para 46; also, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, it ruled that Article 5 was violated in relation to Ken Saro-Wiwa treatment during detention from 1993-1995.

²²² Adopted by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987. Have either been signed or ratified by all African States except Tanzania and Zimbabwe.

²²³ Adopted on 18 December 2002 at the 57th Session of the General Assembly of the United Nations by resolution A/RES/57/199; entered into force on 22nd June 2006. Have either been signed or ratified by all African States except Algeria, Botswana, Comoros, Cote d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Kenya, Lesotho, Libya, Malawi, Namibia, Sao Tome and Principe, Seychelles, Somalia, Sudan, Swaziland, Uganda, Tanzania, and Zimbabwe.

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides as follows:

'for the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

It appears that the approach adopted in the reasonings of the African Commission decisions aligns with the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Similar to this UN Convention, the African Commission adopted 'Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa (Robben Island Guideline)'.²²⁴ This Guideline is implemented through an independent body called the Committee for the Prevention of Torture in Africa.²²⁵

The Robben Island Guideline is not binding on states; it is a mere declaration. However, the Robben Island Guideline requires states to prohibit, prevent and respond to the needs of torture victims, requires states to criminalise torture, establish complaints and investigate procedures, and take steps to

²²⁴ Adopted during the 32nd Ordinary Session held at The Gambia between 17th and 23rd October 2002. For more information on the context of the 'Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa', see available at > http://www.achpr.org/files/instruments/robben-island-guidelines/achpr_instr_guide_rig_2008_eng.pdf< accessed 14 July 2017.

²²⁵ The mandate of this Committee includes: organization of seminars to national and international actors; development and making proposals to the African Commission on possible strategies for the promotion and implementation of the Guideline; promotion and facilitation of the implementation of the Guideline in AU Member States; and, reporting to the African Commission on the status of implementation of the Guideline, available at > <http://www.achpr.org/mechanisms/cpta/>< accessed 13 July 2017.

guarantee that the conditions of detention comply with international standards. At present, many state laws still contain a penalty which constitutes inhuman and degrading treatment and punishment. For instance, section 18 of Southern Nigeria Criminal Code and section 68 (1) (f) of Northern Nigeria Penal Code permit flogging as a punishment for offences despite the constitutional prohibition of torture or inhuman or degrading treatment.²²⁶ Furthermore, the Commission observed in *Curtis Francis Doebbler v Sudan*²²⁷ that Sudan's laws contain several forms of corporal punishment that violate the prohibition of torture and degrading treatment such as stoning, amputation and whipping. Based on this, the Commission stated that these forms of punishment are cruel, inhuman, and degrading and further requested Sudan to amend its laws in line with this observation.²²⁸ On the other hand, there is a noticeable jurisprudence from the African Court concerning article 5. However, many of the cases relating to this article are declared inadmissible for non-exhaustion of local remedies.²²⁹

3.3.5 Right to personal liberty and security of the person

The right to personal liberty and security of the person protects individuals from having their freedom arbitrarily taken away. It focuses on individual freedom from unreasonable imprisonment or detention. This right can be qualified under two headings: the right to be free, and the right against arbitrary arrest and detention. From the declaration of rights during the 18th century French Revolution to contemporary regional human rights instruments, the right to liberty is protected. For instance, article 3 UDHR provides that 'everyone has the right to life, liberty

²²⁶ Section 34 (1) of the 1999 Constitution of Nigeria.

²²⁷ Communication 236/2000 - *Curtis Francis Doebbler v Sudan*, para. 36. The African Commission in this case ruled that state-imposed physical violence as punishment on individuals is akin to state-sponsored torture and inhuman punishment. See para 42.

²²⁸ Concluding Observation and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, available at > http://www.achpr.org/files/sessions/12th-eo/conc-obs/4thand5th-2008-2012/concluding_observation_.pdf accessed 30 October 2018.

²²⁹ Instances of cases in this category are: App. No. 006/2011 – *Association des Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d'Ivoire*; App. No. 005/2011 – *Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines*; App. No. 008/2011 – *Ekollo M. Alexandre v Republic of Cameroon and Federal Republic of Nigeria*; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v. Republic of South Africa*; App. No. 004/2012 – *Emmanuel Joseph Uko and Others v. Republic of South Africa*; and App. No. 001/2012 – *Frank David Omary and Others v United Republic of Tanzania*.

and security of person' while article 9 UDHR provides that 'no one shall be subjected to arbitrary arrest, detention or exile'. On the other hand, article 9 ICCPR provides that 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law'.

Unlike the UDHR, the ECHR protects the right to liberty and security of person but with a list of instances when this right can be deprived such as lawful arrest and detention or detention of a minor by legal order.²³⁰ However, article 6 of the African Charter, in protecting this right provides that 'everyone shall have the right to liberty and the security of person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'. Like other international human rights instruments, article 6 guarantees individual physical liberty by prohibiting state arbitrary arrest and detention. It suggests that while the individual is conferred with the right to be free, the state is obliged to use its apparatus to guarantee the safety and security of individuals.

The right to personal liberty and security is not absolute and can be legitimately deprived in appropriate circumstances by the government.²³¹ There are circumstances in which a government can detain a person as long as it acts within the law, and this includes when a person is found guilty of a crime and sent to prison; acting in compliance with a court order; and, upon reasonable suspicion of committing a crime or absconding after committing a crime.²³² Therefore, not every action that restricts the physical freedom of an individual would constitute a violation of the right to liberty.²³³ Hence, in *Monim Elgak, Osman Hummeida and*

²³⁰ Article 5 ECHR.

²³¹ Article M of 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Provisions applicable to arrest and detention of individuals).

²³² Further instances may include stopping a person from illegally entering a country or when a person is capable of spreading a disease.

²³³ Communication 379/09 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*.

Amir Suliman (represented by FIDH and OMCT) v Sudan, the Commission found that constraint of physical liberty would amount to a violation of Article 6 where it falls outside the strict confines of the law.²³⁴

The African Commission has severally upheld the position of the law that arbitrary arrest and detention is a violation of the right to liberty.²³⁵ For instance, in *Krischna Achutan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa v Malawi)*, the Commission ruled that the arbitrary arrest of Mr Banda and others without recourse to redress from national courts is a violation of Article 6 of the African Charter and the constitution of Malawi.²³⁶ The Commission described arbitrariness to include elements of injustice, lack of due process of law, inappropriateness and lack of predictability.²³⁷ In *Article 19 v The State of Eritrea*, the Commission further made it clear that an arrest or detention may be legal according to domestic law but can be rendered illegal due to an unjust and inappropriate procedure and nature.²³⁸

The right to personal liberty and security of person includes some procedural safeguards for individuals which state authorities must follow. For instance, a person must be informed of the reason for detention, brought before a competent court within a reasonable time, may be granted bail or challenge the lawfulness of such detention.²³⁹ Therefore, where an arrest and detention lack a legal basis or fails to meet the legal conditions, it would constitute a violation of article 6.²⁴⁰ However, state authorities have the responsibility to provide detention

²³⁴ *Ibid*, para 103.

²³⁵ Communication 64/92, 68/92, 78/92 - *Krischna Achutan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa v. Malawi)*; Communication 25/89-47/90-56/91-100/93 - *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v DRC*; Communication 288/04 - *Gabriel Shumba v Zimbabwe*; Communication 368/09 *Abdel Hadi, Ali Radi & Others v Republic of Sudan*; Communication 274/03 et 282/03 - *Interights, ASADHO and Maître O. Disu v Democratic Republic of the Congo*; Communication 266/03 - *Kevin Mgwanga Gunme et al v Cameroon*.

²³⁶ Communication 64/92, 68/92, 78/92.

²³⁷ Communication 257/2003, *Article 19 v The State of Eritrea*.

²³⁸ Communication 257/2003.

²³⁹ Communication 274/03 and 282/03, *Interights, ASADHO and Madam O. Disu v DRC*, para 65. In this case, the Commission interpreted article 6 to include the right of the individual to be informed about the reasons for his arrest and charges preferred against him at the time of the individual's arrest'.

²⁴⁰ Communication 228/99 - *Law Office of Ghazi Suleiman v Sudan*.

centres that safeguard the inherent dignity of human beings in accordance with the provisions of the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa. This resolution prohibits the use of unauthorised places of detention and use of incommunicado detention.²⁴¹

Similarly, the length of detention may constitute a violation of the right to liberty. For instance, the Commission found a violation of article 6 where a person has been in detention without trial for three years under a Police Detention Order and a Presidential Detention Order.²⁴² Likewise, the Commission took a similar approach when it held that arrest and detention for seven years without trial is a gross violation of the right to liberty irrespective of any justifiable circumstances that may be presented by a state party.²⁴³ Nonetheless, the Commission has failed to stipulate a timeframe for which arbitrary detention without trial may constitute a violation of article 6.

Based on the ongoing analysis, it seems that there is a nexus between the enjoyment of the right to liberty and the prohibition of arbitrary arrest and detention on the one hand, and the right to a fair trial by a court of competent jurisdiction.

3.3.6 Right to a fair trial

The right to a fair trial is recognised by several international human rights instruments such as the UDHR, ICCPR and ECHR. For instance, while articles 7,²⁴⁴ 8²⁴⁵ and 11²⁴⁶ UDHR enshrine some fair trial rights, article 10, as the key provision provides 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. However, article 14 ICCPR

²⁴¹ Nsongurua Udombana, 'The African Commission on Human and Peoples' Right and the Development of Fair Trial Norms in Africa' (2006) 6 (2) African Human Rights Law Journal, 298.

²⁴² Communication 11/88, *Henry Kalenga v. Zambia*.

²⁴³ Communication 103/93 - *Alhassan Abubaka v. Ghana*.

²⁴⁴ Equality before the law and equal protection of the law.

²⁴⁵ The right to an effective remedy.

²⁴⁶ The presumption of innocence.

provided exhaustive and well-defined protection of the right to a fair trial. This article provides for the following; the presumption of innocence,²⁴⁷ minimum fair trial rights in criminal proceedings,²⁴⁸ protection of juveniles,²⁴⁹ the right to appeal,²⁵⁰ and prohibition of double jeopardy/conviction.²⁵¹ Thus, the right to a fair hearing can be summarised as an umbrella right which encompasses all other rights that focus on ensuring that a criminal or civil trial is not conducted in an unfair manner against the citizen.

On the regional level, the right to a fair trial is explicitly proclaimed in various treaties as well as in state constitutions.²⁵² Similar to ICCPR language in article 14, article 6 of ECHR is equally exhaustive and covers individual entitlement in the determination of civil rights and obligations or any criminal charge while article 7 protects individuals from retrospective criminal legislation. Likewise, article 7 of the African Charter provides for the right to have one's cause heard. Aligning with ICCPR and ECHR, the African Charter listed other related rights for the protection of an individual to include- the right to appeal; the right to defence; the right to be informed in a language one understands of the charges; the right to a defence counsel; presumption of innocence; trial by an impartial court; trial within reasonable time; personal criminal liability; and protection from retrospective criminal liability.²⁵³ Other fair trial rights enshrined in the African Charter are contained in articles 3²⁵⁴ and 26.²⁵⁵ In all, the right to fair trial remains the legitimate means to filter the innocent from the guilty and to ensure accountability through punishment, and redress to victims.

²⁴⁷ Article 14 (2) of ICCPR.

²⁴⁸ Article 14 (3) of ICCPR.

²⁴⁹ Article 14 (4) of ICCPR.

²⁵⁰ Article 14 (5) of ICCPR.

²⁵¹ Article 14 (7) of ICCPR.

²⁵² Article 8 of the American Convention and Article 6 of ECHR. For state constitutions, see, Section 36 of the 1999 Constitution of Nigeria; Article 50 of 2010 Constitution of Kenya; Article 28 of 1995 Constitution of Uganda; Article 34 and 35 of 2012 Constitution of Somalia; Article 13 of 2010 Constitution of Madagascar; Article 9 of 1992 Constitution of Mali.

²⁵³ Article 7 of the African Charter.

²⁵⁴ Equal protection of the law and equal protection before the law.

²⁵⁵ State duty to guarantee the independence of courts.

The right to a fair trial is one of the most extensive rights as well as one of the most litigated right under the African Charter given the available case law jurisprudence of the African Court and the African Commission.²⁵⁶ Despite variations in the placement of fair trial rights, its aim remains to ensure proper administration of justice to every individual except in the circumstances specified by such instrument. In spite of this aim, the court, state authorities, and persons in official capacity might impede a fair trial in any event where one or all of these rights are violated.

The first fair trial right protected under article 7 is the right to an appeal to competent national bodies. Even though the Charter failed to define the term 'appeal', Black's law dictionary defines it as:

'the complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse. The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial'.²⁵⁷

From this definition of appeal, there is no gainsaying that the right to appeal is a necessary individual right for the sake of justice, fairness and equity. The enjoyment of this right goes beyond the establishment of national courts.

Article 7 (1) (a) requires state laws to allow appeals to competent organs. For instance, in *Constitutional Rights Project (in respect of Zamani Lekwot and six others) v Nigeria*, the complainants stated that section 8 (1) of Civil Disturbances (Special Tribunal) Act No. 2 of 1987 of Nigeria prohibits the courts from reviewing its decisions and operation.²⁵⁸ Hence, an appeal was not allowed from tribunal to any other national judicial body. However, the Commission ruled that this Act violated article 7 (1) of the African Charter and urged Nigeria to take steps to

²⁵⁶ Violation of Article 7 either standing alone or in conjunction with other Articles appeared in 10 out of the 33 cases before the African Court as at April 2017, and 78 out of 306 cases as at April 2017.

²⁵⁷ Black's Law Dictionary Free Online Legal Dictionary (2nd edn), available at > <http://thelawdictionary.org/appeal/>< accessed 18 July 2017.

²⁵⁸ Communication 87/93.

remedy the situation. Similarly, the Commission in *Constitutional Rights Project (in respect of Wahab Akamu, G. Adegba and others) v Nigeria* held that domestic law foreclosing appeal against a judicial sentence especially in criminal cases bearing the death penalty is a violation of article 7(1) (a).²⁵⁹ This case concerned pronouncement of the death sentence under the Robbery and Firearms (Special provision) Decree No. 5 of 1984 of Nigeria under which section 11 (4) prohibited an appeal from this special tribunal.²⁶⁰ It means that military and special tribunals where the death penalty is enforced do not enjoy exceptions to a right to appeal.²⁶¹

The right to appeal is closely related to the right to legal redress. This position is maintained because an appeal provides an avenue to undo a perceived injustice or error with a view that a superior court makes a new pronouncement against or in favour of the lower court.²⁶² This line of reasoning was maintained in *Interights, ASADHO and Madam O. Disu v Democratic Republic of Congo*.²⁶³ In this case, some individuals were denied the opportunity to seek redress for illegal detention, and to appeal against the court decision without reason or compensation. However, the right to appeal may be declined when a party misses the time limit for bringing a case or in other circumstances as may be prescribed by domestic law.

Determination of judicial claims, whether an appeal or at first instance, must take place in competent and impartial courts or tribunal. A 'competent national court' involves the expertise of the judge and the inherent justice of the laws under which they operate.²⁶⁴ Hence, article 7 (1) (d) and 26 would be violated

²⁵⁹ Communication 223/98 - *Forum of Conscience v. Sierra Leone*, para 17 -20.

²⁶⁰ Communication 60/91 - *Constitutional Rights Project (in respect of Wahab Akamu, G. Adegba and others) v Nigeria*. See also, Communication 223/98 - *Forum of Conscience v. Sierra Leone*, para 17 -20.

²⁶¹ Communication 222/98 and 229/99 - *Law Office of Ghazi Suleiman v Sudan*, para 53; and, Communication 243/01 - *Women's Legal Aid Centre (on behalf of Moto) v Tanzania*, para 47.

²⁶² Communication 281/03 - *Wetsh'okonda Kosso and others v. DRC*, para 93; Communication 253/02 - *Antoine Bissangou v. Congo; Kenneth Good v. Botswana*; Communication 292/04 - *Institute for Human Rights and Development in Africa v Angola*, paras 86-87; See also, the definition of appeal in Black's Law Dictionary Free Online Legal Dictionary 2nd edition, available at > <http://thelawdictionary.org/appeal/>< accessed 18 July 2017.

²⁶³ Communication 274/03 and 282/03, para. 72.

²⁶⁴ Communication 48/90-50/91-52/91-89/93, in *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, para 62. See also, article 2 (3) (b) of ICCPR.

where courts are denied qualified personnel to ensure impartiality is guaranteed.²⁶⁵ Nevertheless, the Commission in *Civil Liberties Organisation, Legal Defence Centre and Assistance Project v Nigeria*, held that military tribunals, being establishments of law are assumed to be equitable, impartial and independent in its administration of justice, and should not be negated because they are presided over by military officers.²⁶⁶

In addition to the availability of competent courts, where a domestic law denies a person the opportunity of being heard or represented during or after detention, such violates article 7(1) (a) and (c).²⁶⁷ It is a principle of international law that an accused/detained person is entitled to a legal representative and an opportunity to challenge the matter of their detention or decision from its outcome before competent national organs.²⁶⁸ As a result, the Commission in *Civil Liberties Organisation, Legal Defence Centre and Assistance Project v Nigeria* further emphasised that the provisions of article 7 are not derogable because they provide minimum protections to every individual.²⁶⁹

Furthermore, persons accused of committing an offence or in detention are to be presumed innocent until proven guilty by a competent, impartial and independent court or tribunal.²⁷⁰ One of the ultimate goals of the presumption of innocence is to avoid passing judgment on an accused person before a competent court or tribunal gives its ruling or judgment.²⁷¹ In *Jean-Marie Atangana Mebara v Cameroon*, the Commission ruled that a situation where government authorities made statements affirming embezzlement by officials arrested and under trial during its 'Operation Sparrow Hawk' violates their right to the presumption of

²⁶⁵ *Ibid*, para 69.

²⁶⁶ Communication 218/98, *Civil Liberties Organisation, Legal Defence Centre and Assistance Project v Nigeria*, para 27.

²⁶⁷ Communication 241/2001 - *Purohit and Moore v The Gambia*.

²⁶⁸ *Ibid*, para 71.

²⁶⁹ Communication 218/98, *Civil Liberties Organisation, Legal Defence Centre and Assistance Project v Nigeria*, para 27.

²⁷⁰ Article 7 (b) of the African Charter.

²⁷¹ Communication 416/12, *Jean-Marie Atangana Mebara v Cameroon*, para. 97.

innocence.²⁷² According to the Commission, such practice, if encouraged or allowed, is capable of influencing the final decision of the trial court.²⁷³

Substantively, violation of the presumption of innocence would occur where state officers publicly declare the accused persons guilty of the offence for which they are facing prosecution in a court.²⁷⁴ Should this be the case, however, the intended goal of the protection is to promote carefulness in people, particularly persons in authority, not to say anything capable of giving the impression that they wished to influence the outcome of an ongoing trial before a court.²⁷⁵

Presumption of innocence also involves the right of an accused person to examine and be examined by witnesses while defending himself.²⁷⁶ The accused person may exercise this right by himself or through a legal counsel of choice.²⁷⁷ This right creates a duty for state parties, in particular, in criminal proceedings. Therefore, state law would violate article 7 (1) (c) of the African Charter if it gives a tribunal/court the power to veto the accused person's choice of counsel or decline certain persons from appearing as representatives of the accused persons.²⁷⁸ For instance, in *Krishna Achuthan (on behalf of Aleke Banda)*, *Amnesty International (on behalf of Orton and Vera Chirwa v Malawi)*, the Commission ruled that a criminal trial without a legal representative is a violation of the individual's right to a fair hearing under article 7 (1) (c).²⁷⁹ Thus, denying an accused person

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ Communication - 222/98 and 229/99, *Law Office of Ghazi Suleiman v. Sudan*, para 56.

²⁷⁵ See Article N (6) (e) of 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Provisions applicable to proceedings to criminal charges).

²⁷⁶ *Ibid.*, Article N (6) (f).

²⁷⁷ Article 7 (c); Communication 274/03 and 282/03 – *Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo*, para. 75.

²⁷⁸ *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*.

²⁷⁹ Communication 64/92, 68/92 and 78/92 - *Krishna Achuthan (on behalf of Aleke Banda)*, *Amnesty International (on behalf of Orton and Vera Chirwa v. Malawi)*; Communication 231/99 - *Avocats Sans Frontières (on behalf of Bwampamyé) v. Burundi*, para 11.

access to his counsel while in detention violates the right to judicial assistance and defence.²⁸⁰

The Charter was not explicit in guaranteeing free legal aid or legal assistance. However, the Commission has held that legal representation and lawyer's access to appropriate information must continue from the time of the arrest until the determination of the charge against an accused person.²⁸¹ Likewise, for criminal cases bearing the death penalty, the right to defence would be violated if an accused person's representative withdraws from a trial for reasons such as constant harassment and assault from government security agents or officials.²⁸²

Nonetheless, free legal aid or assistance is a right in criminal cases where an accused cannot afford the financial means to engage a lawyer under the European system.²⁸³ Similarly, it is an inalienable right of an accused person under the American system to be assisted by a state lawyer where an accused fails to engage a lawyer on time or where he does not want to defend himself personally.²⁸⁴ However, the non-recognition of legal aid in the African Charter is unjustifiable, especially given the international attention this right has attracted in other regional instruments and the economic situation in many African countries. Still, at the international level, Part B, Principles 1 and 2 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems²⁸⁵ recognise legal aid as an essential element of a criminal justice system and a responsibility of states. However, the right to legal aid has gradually become

²⁸⁰ Communication 274/03 and 282/03 – *Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo*, para 75.

²⁸¹ Communication 137/94-139/94-154/96-161/97 - *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*; Communication 231/99 - *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*, para 9; Communication 288/04 - *Gabriel Shumba v Zimbabwe*.

²⁸² *Ibid*, para 97.

²⁸³ Article 6 (3) (c) of the ECHR.

²⁸⁴ Article 8 (2) (e) of the American Convention.

²⁸⁵ Resolution 67/187 adopted by the General Assembly on the report of the Third Committee (A/67/458) 2012.

an integral part of many African Charter state parties' constitution. For example, Article 35 (2) (c) of the South African constitution states:

'everyone who is detained, including every sentenced prisoner, has the right to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly'.²⁸⁶

Besides the African Charter, African states have by such constitutional inclusion, shown their commitment to protecting this aspect of the right to a fair hearing because the right to legal aid is an entitlement of an accused person that need not be requested.²⁸⁷ According to the African Court in *Alex Thomas v Tanzania*, indigent persons facing criminal trial are particularly entitled to the right to free legal assistance.²⁸⁸

In addition to the failure to recognise the right to legal aid, two notable gaps in the African Charter are the absence of the right of an accused to be informed in a language he/she understands of the charges against him/her or reason of arrest, and non-recognition of the right to an interpreter. In contrast with the European system where the right to an interpreter is an absolute right given their diversity in language,²⁸⁹ one would have expected that this right should have been part of the African Charter given Africa's numerous indigenous and ethnic languages spread across its English, French, Arabic, Spanish or Portuguese colonial past. At present, while the right to an interpreter has been recognised in Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,²⁹⁰ the right to be informed in a language one understands is presently captured in the African Commission's Resolution on the Right to Recourse

²⁸⁶ 1996 Constitution of South Africa. Similar provisions on the right to legal aid can be seen I Article 28 (3) (e) of 1995 Constitution of Uganda; Article 42 (2) (f) (v) of 1994 Constitution of Malawi; Article 50 (2) (h) of 2010 Constitution of Kenya; Article 34 (6) of 2005 Constitution of Sudan; Article 29 (1) of 2003 Constitution of Rwanda, and Article 18 (2) (d) of 1991 Constitution of Zambia.

²⁸⁷ App. No. 007/2013 – *Mohamed Abubakari v Tanzania*; App. No. 006/2013 - *Wilfred Onyango Nganyi and 9 others v Tanzania*.

²⁸⁸ App. No. 005/2013 - *Alex Thomas v Tanzania*, para 116-124.

²⁸⁹ Article 6 (3) (e).

²⁹⁰ Article N (4).

Procedure and Fair Trial.²⁹¹ However, both the Guidelines and Resolution are not binding on state parties like the provisions of the African Charter. In *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayantsDroit, Association mauritanienne des droits de l'Homme v Mauritania*, the Commission held that Article 7 was violated for using the Arabic language in a trial where 3 out of the 21 accused persons spoke and understood Arabic fluently and without an interpreter.²⁹²

Although the African Charter recognises the right to be tried within a reasonable time by an impartial court and tribunal under article 7 (1) (d), prolonged and undue delay in the commencement of trial or trial proceedings is a violation of Article 7 (1) (d).²⁹³ In *Wilfred Onyango Nganyi and nine others v Tanzania*, the African Court observed that slow justice brings about loss of confidence in the judicial institutions and in the peaceful settlement of disputes which thus is a denial of justice to the accused persons.²⁹⁴ In the instant case, the Court rejected the respondent state's argument that the complexity and seriousness of the case caused the prolongation from 2006 to 2013. Unfortunately, however, the Court did not provide what amounts to a reasonable time. Similarly, while in *Constitutional Rights Project v Nigeria*, the Commission ruled that Nigeria violated the provisions of the right to fair trial by detaining protesters for three years without trial,²⁹⁵ it also ruled in *Comité culturel pour la démocratie au Bénin v Benin* that arrest and detention of persons for several months without trial violates article 7 (1) (d).²⁹⁶ In these cases, no attempt has been made to rationalise what amounts to a reasonable time.

²⁹¹ Adopted at the African Commission 11th Ordinary Session in Tunis, Tunisia, from 2nd to 9th March 1992.

²⁹² Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98.

²⁹³ App. No. 006/2013 – *Wilfred Onyango Nganyi and 9 others v Tanzania*.

²⁹⁴ *Ibid*, para 127.

²⁹⁵ Communication 102/93, para 12.

²⁹⁶ Communication 16/88 - *Comité culturel pour la démocratie au Bénin / Benin* (joined with 17/88 and 18/88). See also, Communication 39/90_10AR - *Pagnouille (on behalf of Mazou) v. Cameroon*; Communication 206/97 (2000) - *Centre for Free Speech v. Nigeria*, para 19-20; Communication 103/93 - *Abubakar v. Ghana*, para 10-12.

What, from the above cases, constitutes a reasonable time? In answering this question, the African Commission has held that a reasonable time depends on the circumstances of each case and cannot be expressed in a blanket time limit standard that can be applied generally across the board.²⁹⁷ For instance, the facts in *Article 19 v Eritrea*, concerning detention incommunicado of over 18 journalists and political opponents without trial in Eritrea from September 2001 was held by the Commission as a violation of article 7 (1) (d) because state parties are not permitted to derogate from its obligation under the African Charter even in time of war. According to the Commission, neither the existence of a war in Eritrea nor a backlog of cases awaiting trial justifies the excessive delay experienced in violation of article 7 (1) (d).²⁹⁸

3.3.7 Freedom of conscience and religion

Article 8 of the African Charter guarantees two individual rights; namely, the right to freedom of conscience and the right to free practice of religion. Under the European system, this right is protected in article 9 ECHR and includes the right to change your religion or beliefs at any time and the right to put one's thoughts and beliefs into action. From these terms, this right could include the right to participate in religious activities, wear religious clothing and to freely talk and declare one's belief. Unlike the African Charter, article 18 ICCPR broadly protects freedom of thought, conscience and religion. Despite this, the African Charter omitted the right to change one's religion, either alone or in community with others and the right to practice one's religion in public or private.²⁹⁹ In spite of this omission, it is argued that the freedom to change one's religion or belief is still recognised in Africa as it is akin to the freedom to adopt, retain and practice religion in any circumstance as chosen by the individual.³⁰⁰ However, there is a

²⁹⁷ Communication 275/03 - *Article 19 v Eritrea*, para 97.

²⁹⁸ Communication 275/03, para 98-99.

²⁹⁹ Article 9 (1) of ECHR; Article 12 (1) of American Convention; Article 18 of ICCPR; and, Article 18 of UDHR.

³⁰⁰ Johan Vyver and Christian Green, 'Law, Religion and Human Rights in Africa: Introduction' (2008) 8 (2) *African Human Rights Law Journal*, 337.

need to expressly cover these omissions because of the increasing intolerance to religious activities by governments and individuals across many African states.

Religion or belief is a powerful tool for the promotion of moral values within a political society.³⁰¹ Religion or belief have been cited as the basis for the rejection of certain entitlements connected with human rights. For example, the 1998 Lambeth Conference of Anglican Bishops from Botswana, Malawi, Zambia, and Zimbabwe forbids and expressly rejects homosexual practices and rights as highly incompatible with the belief of the church and the people of Africa.³⁰² The position is similar to the practice in many African countries where homosexuality and same-sex marriages are opposed or criminalised on the basis of cultural values.

Freedom of conscience and religion guarantee a person's rights to profess and practice one's religion without fear in both public and private places.³⁰³ The right to freedom of conscience and religion involves the freedom to manifest religion or belief in worship, practice, observance, teaching, religious education, language, ceremonies, diet, customs, and dress.³⁰⁴ This right also protects philosophical beliefs such as atheism alongside other beliefs as long as they do not offend public safety, order, health or morals, or for the protection of others.³⁰⁵ That notwithstanding, the manifestation of this right can be limited.

Indeed, freedom of conscience and religion can be restricted subject to law and order.³⁰⁶ For example, under the ECHR, such limitation would take place 'in the interest of public safety, protection of public order, health or morals, or for the protection of the rights and freedom of others.'³⁰⁷ The African Charter does not explicitly list restrictions in article 8; instead, it acknowledges that no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms. That notwithstanding, the Commission held in *Free Legal*

³⁰¹ *Ibid.*

³⁰² Resolution 1.10 of the Lambeth Conference of Anglican Bishops of 1998.

³⁰³ Vincent Nmeielle, *The African Human Rights System: Its Laws, Practices and Institutions* (n 15 above) 105.

³⁰⁴ HRC General Comment No. 22 1993.

³⁰⁵ Article 18 (3) ICCPR. See, *Campbell and Cosans v UK* (App. No. 7511/76, European Court of Human Rights).

³⁰⁶ Article 9 (2) of ECHR; Article 12 (3) of American Convention; Article 18 (3) of ICCPR.

³⁰⁷ Article 9 (3).

Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire that the respondent state violated article 8 for allowing prosecution by government agencies on the ground of belief without evidence that such practice or belief in any way threatened law and order.³⁰⁸ The Commission, in this case, ruled that harassment of members of a religious group known as 'Jehovah Witnesses' by government agencies constitutes a violation of the right to religion because article 8 allows individuals or groups to worship or assemble in connection with a religion or belief, to establish and maintain places for these purposes, and to celebrate ceremonies in accordance with the precepts of one's religion or belief.³⁰⁹

However, beliefs must be consistent with the basic standards of human dignity, concern essential aspects of human life or behaviour, be sincerely held and be worthy of respect in a democratic society.³¹⁰ Freedom of religion will not be deemed violated where a display of religious practice conflicts with legal provisions of the law.³¹¹ For instance, in *Garreth Anver Prince v South Africa*, the complainant alleged a violation of his right to religion by the respondent state through a prohibition of cannabis which he needs for sacramental use for his Rastafari religious belief. His prayer is that the use of cannabis should be exempted for Rastafari. The African Commission held that the use of cannabis conflicts with the law of South Africa and attracts a penalty recognised by the law which serves a rational and legitimate purpose for all; and thus, cannot constitute a violation of the right to conscience and religion.³¹²

Religion must not be exercised in a manner that violates the equal right to protection under the African Charter even when it is a state law. At present, the

³⁰⁸ Communication 25/89, 47/90, 56/91 and 100/93 - *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire*.

³⁰⁹ *Ibid*, para. 45; Communication 212/98 - *Amnesty International v Zambia*, para 54-55.

³¹⁰ *Williamson and others v Secretary of State of Education and Employment* (2005) UKHL 15.

³¹¹ Communication 255/02 - *Garreth Anver Prince v South Africa*.

³¹² *Ibid*, para 40-42.

constitutions of Egypt,³¹³ Libya,³¹⁴ Morocco,³¹⁵ Tunisia,³¹⁶ Somalia,³¹⁷ and Algeria³¹⁸ recognise Islam as their state religion, whereas Zambia³¹⁹ has declared itself a Christian nation. In some countries, other religious beliefs and practices are not accommodated or outlawed, and this practice indeed poses some challenges to the enjoyment of this right by members of the outlawed religions. Hence, state parties to the African Charter are in violation of the Charter rights and freedom when they fail to protect individuals from the harmful effects that imposition of religion or beliefs might cause. For instance, the Commission in *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*,³²⁰ held that Sudan violated article 8 of the African Charter and further ruled that Islamic Sharia religious law could not be imposed as national law in a secular state that comprises diverse religious practices.³²¹ The complainants, in this case, stated that non-Muslims were persecuted to persuade their conversion to Islam, prohibited from preaching or building their churches, and were prohibited from using the national press for their religious activities. Furthermore, they averred that non-Muslims faced constant harassment and oppression including the expulsion of Christian missionaries, and were subjected to arbitrary arrest, expulsion and denial of access to work, education and food aid on account of their religious belief.

Therefore, state laws that expressly prohibit individuals from actions that manifest one's convictions, religion or belief violate the freedom of religion and belief. In this regard, where state law is explicit on the restriction of religion or belief that is not contrary to collective security, morality, rights of others and

³¹³ Article 2 of 2014 Constitution of Egypt.

³¹⁴ Article 1 of 2011 Constitution of Libya.

³¹⁵ Article 3 of 2011 Constitution of Morocco.

³¹⁶ Article 1 of 2014 Constitution of Tunisia.

³¹⁷ Article 2 of the 2012 Constitution of Somalia.

³¹⁸ Article 2 of 1989 Constitution of Algeria.

³¹⁹ Preamble of the 2016 Constitution of Zambia (as amended).

³²⁰ Communication 48/90, 50/91 and 89/93.

³²¹ *Ibid*, para 74-76.

common interest, such an act may be deemed a violation of the African Charter.³²² However, although there is no controversy about having a state religion, it has been established that it is fundamentally unjust for religious laws to apply in cases against non-adherents of such religion.³²³ In *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, the Commission held that a limitation to the right to practice religion should be based on exceptionally good reasons, necessitated by significant public security interests or other justification and proportionate to the specific need for which this right is denied.³²⁴

3.3.8 Right to receive information and freedom of expression

Article 9 guarantees two branches of related rights: the right to receive information and, the right to express and disseminate opinion. This right protects the right to hold an opinion and to express it freely without government interference. The expression of this right involves expressing one's views, whether through public protest or demonstrations or published works such as books or even through the internet and social media. Equally important, it protects one's right to access or receive information as may be expressed by other people.

Freedom of expression and information is a recognised international human right as enshrined in several instruments.³²⁵ However, article 9 of the African Charter is not as expansive, exhaustive or adequate as the ICCPR and the ECHR. For example, the African Charter seems not to cover the right to hold opinions, thoughts, states' rights on broadcasting, television or cinema enterprises,³²⁶

³²² Article 27 of the African Charter. See also, Communication 276/03 - *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, para 172-173.

³²³ Communication 48/90, 50/91 and 89/93 - *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, para 73-74.

³²⁴ Communication 276/03 - *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, para 172-173.

³²⁵ See, for example, Article 10 of ECHR, Article 13 of the American Convention, Article 19 of ICCPR and Article 19 of UDHR.

³²⁶ Article 10 (1) ECHR.

conditions for limitation,³²⁷ and the medium of expression of this right.³²⁸ What is clear is that the protection guaranteed under the African Charter may as well cover more than the mere right to receive information and to express and disseminate opinion. For example, this right can be seen as the foundation for the various freedom of information law in twenty-three African countries.³²⁹

Access to information is described as the cornerstone of good governance, and it gives individuals the right to information on the environment, political opinion and participation, corruption and human rights from government and its organs.³³⁰ The freedom to receive information and to express opinion distinguishes open from closed societies, and it is a right vital to the existence of a free press or the media.³³¹ In this regard, freedom of expression as a fundamental right has great significance to the functioning of a democratic and constitutional process.³³²

Where national law is inconsistent with the Charter protection of this right, such inconsistency would constitute a violation. According to the African Commission, international human rights standards must always prevail over contradictory national law.³³³ To put it differently, the phrase 'within the law' evidenced in article 9 (2) of the African Charter would be referenced to international norms.³³⁴ For example, the Court ruled in *Lohe Issa Konate v Burkina Faso* that restrictions from the national laws of Burkina Faso on the freedom of

³²⁷ Article 10 (2) ECHR; article 13 (2) and (3) of American Convention; and, Article 19 (3) of ICCPR.

³²⁸ Article 13 (1) of American Convention; Article 19 (1) of ICCPR.

³²⁹ The countries are Angola – 2002; Ethiopia – 2008; Uganda – 2005; Zimbabwe – 2002; Liberia – 2010; Guinea – 2010; Nigeria – 2011; Tunisia – 2011; Niger – 2011; Togo – 2016; Burkina Faso – 2015; Sudan – 2015; South Sudan – 2013; Côte d'Ivoire – 2013; Mozambique – 2015; Sierra Leone – 2013; Rwanda – 2013; South Africa – 2000; Tanzania – 2016; Kenya – 2016; Morocco – 2016; Malawi – 2017; and, Ghana – 2019. This information showcases data available as at 25 July 2019 from of 25 July 2017 from ><https://advox.globalvoices.org/2019/05/27/right-to-information-with-its-new-law-in-place-will-ghana-go-the-way-of-nigeria/><, accessed 20 September 2019; and, ><http://www.africafex.org/access-to-information/22-african-countries-that-have-passed-access-to-information-laws><, accessed 25 July 2017.

³³⁰ International Development Research Centre, 'Access to information gains ground in Africa', available at ><https://www.idrc.ca/en/article/access-information-gains-ground-africa>< accessed 25 July 2017.

³³¹ Sara Hugelier 'Freedom of Expression and Transparency: Two Sides of one Coin' (2010-2011) 47 (1) *Jura Falconis* Jg., 61.

³³² Jack Beatson and Yvonne Cripps, *Freedom of Expression and Freedom of Information: Essays in Honour of Sir A. Mason* (Oxford University Press, 2000) 17.

³³³ *Constitutional Rights Project, Civil Liberties Organisations and Media Rights Agenda v Nigeria*, para 66.

³³⁴ Communication 313/05 – *Kenneth Good v Botswana*, para 188; Communication 54/91-64/91-98/93-164/97-196/97-210/98 – *Malawi African Association and Others v Mauritania*, para 102.

expression violate the dictates of article 9.³³⁵ Importantly, state party restriction to the enjoyment of this right can come under article 27 of the Charter, which consists of respect for the rights of others, collective security, morality, and common interest. Therefore, restriction of freedom of expression should be based on legitimate public interest proportionate to and necessary to achieve the desired benefit.³³⁶

Restrictive national laws, policies and directives to the enjoyment of the right to expression is a violation of the African Charter. In *Scanlen and Holderness v Zimbabwe*, the African Commission noted that sections 79 and 80 of the Access to Information and Protection of Privacy Act 2003 of Zimbabwe imposes restrictive accreditation conditions which is an excessive burden on journalists; thereby, further restricting their effective enjoyment of the right to freedom of expression.³³⁷ Notwithstanding the effects of national laws, the Commission has identified freedom of expression as a cornerstone of democracy.³³⁸ According to the Commission, there is a relationship between freedom of expression and democracy. For instance, the Declaration of Principles on Freedom of Expression in Africa provides as follows: 'no one shall be subject to arbitrary interference with his or her freedom of expression, and any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society'.³³⁹ Therefore, in *Kenneth Good v Botswana*, the Commission observed that though the expression of opinion on state affairs is always sensitive to political leaders, any restriction thereto must serve a legitimate interest and be necessary in a democratic society.³⁴⁰

As is evident from the Declaration of Principles on Freedom of Expression in Africa, it would amount to a violation of this right if an individual was forced to

³³⁵ App. No. 004/2013, para 131.

³³⁶ Communication 105/93-128/94-130/94-152/96 - *Constitutional Rights Project, Civil Liberties Organisations and Media Rights Agenda v Nigeria*, para 69.

³³⁷ Communication 297/05, para 123.

³³⁸ Preamble to Declaration of Principles on Freedom of Expression in Africa.

³³⁹ Principle II (1) and (2).

³⁴⁰ Communication 313/05, para 187; see also, Communication 228/99 - *The Law Offices of Ghazi Suleiman v Sudan*, para 5.

flee from a country because of his political views and opinions of a government.³⁴¹ Furthermore, the Commission in *Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l'Homme v Mauritania*³⁴² evaluated articles 11 and 18 of the Mauritanian Constitution and articles 4, 25 and 26 of the Decree 91-024 of the 25 July 1991 of Mauritania, and noted that if national laws can entirely avoid the right to expression, it would make its protection inoperable. The Commission, thus, ruled that Mauritanian laws violated the right to expression and further stated that international human rights law will always take precedence over national laws except where such laws conform to article 27 of the African Charter.³⁴³

Furthermore, the right to receive information and freedom of expression in the African region is an essential right for the individual formation of opinion.³⁴⁴ The relevance of this right has been demonstrated in the case law jurisprudence of the African Charter,³⁴⁵ the establishment of a Special Rapporteur on Freedom of Expression and Access to Information,³⁴⁶ and the African Commission Declaration of Principles on Freedom of Expression in Africa.³⁴⁷ This right extends to the protection of journalists in the continent. For example, in *Abdoulaye*

³⁴¹ Communication 232/99 - *John D. Ouko v Kenya*, para 28.

³⁴² Communication 242/01.

³⁴³ *Ibid*, para 77.

³⁴⁴ Vincent Nmeihelle, *The African Human Rights System: Its Laws, Practices and Institutions* (n 15 above) 107; Giorgio Maliverni, 'Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights' (1983) 4 Human Rights Journal, 446.

³⁴⁵ App. No. 004/2013 – *Lohe Issa Konate v. Burkina Faso*; App. No. 013/2011 – *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo and Burkinabe Human and Peoples' Rights Movement v Burkina Faso*; APP. No. 005/2013- *Alex Thomas v Tanzania*; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v. Republic of South Africa*; Communication 379/09 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*; Communication 313/05 : *Kenneth Good v Republic of Botswana*; Communication 323/06: *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*; Communication 279/03-296/05 : *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*; Communication 297/05: *Scanlen & Holderness v Zimbabwe*; Communication 266/03 : *Kevin Mgwanga Gunme et al v Cameroon*; Communication 294/04 : *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*; Communication 242/01 - *Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l'Homme v Mauritania*; Communication 232/99 - *John D. Ouko v Kenya*.

³⁴⁶ Established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 71 at the 36th Ordinary Session held in Dakar, Senegal from 23rd November to 7th December 2004.

³⁴⁷ Adopted by the African Commission at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002: ACHPR /Res.62 (XXXII) 02.

Nikiema, Ernest Zongo, Blaise Ilboudo and Burkinabe Human and Peoples' Rights Movement v Burkina Faso, the African Court find a violation of article 9 following the respondent state's inability to protect the assassinated investigative journalist despite numerous reports about threats to life and attempts to abduct him due to the nature of his work. The African Court, in this case, concluded that the right of a journalist, which should be safeguarded by the respondent state, is specifically the right to life and the right to freedom of expression.³⁴⁸

Similarly, the Commission in *Constitutional Rights Project, Civil Liberties Organisations and Media Rights Agenda v Nigeria*, observed that freedom of expression is vital to every individual's personal development and political consciousness as well as participation in the public affairs of one's country.³⁴⁹ In this case, the Commission considered whether the respondent state law requirement for registration of newspapers and their prohibition thereof violated article 9. It noted that though excessive high registration fees will constitute a violation, the fact that the government bans a specific publication is inconsistent with the law and a violation of freedom of expression.³⁵⁰

3.3.9 Right to freedom of association

The right to freedom of association protects one's right to join political parties, trade unions and voluntary groups. This right envisages some components which include the freedom of individuals to come together for the protection of their group interest, which may be political, social or religious, professional, sports, cultural or otherwise.³⁵¹ The language of UDHR in protecting this right is simple and straightforward, unlike the expansive and broad language enshrined in the ICCPR. Article 20 UDHR provides- 'everyone has the right to a peaceful assembly and association. No one may be compelled to belong to an association'. It is clear from this provision that article 20 UDHR covers both the right to assembly and association as well as the right not to join/assemble. However, while this language

³⁴⁸ App. No. 013/2011, para 180.

³⁴⁹ Communication 105/93-128/94-130/94-152/96, para 54.

³⁵⁰ See, *Constitutional Rights Project, Civil Liberties Organisations and Media Rights Agenda v Nigeria*, para 71.

³⁵¹ Vincent Nmeielle, *The African Human Rights System: Its Laws, Practices and Institutions* (n 15 above) 110.

style is evident in ECHR, the African Charter and ICCPR adopted a different language approach.

Unlike the UDHR, the African Charter and the ICCPR separates the right to freedom of association and assembly. Article 10 of the African Charter provides: 'every individual shall have the right to free association provided that he abides by the law. Subject to the obligation of solidarity provided for in article 29 no one may be compelled to join an association'.³⁵² Equally important, freedom of association is recognised under Article 8 of the ICESCR to cover the field of labour and trade unions. Generally, this right allows people to associate with other people and is relevant when people are forming, joining or exiting a union, political party or for protest.

As evident in ECHR and UDHR, this right is merged with the right to freedom of assembly due to their interrelatedness and nature. This is because the nature of both rights allows individuals to come together for a lawful purpose and to express their thoughts. While this language style is not known to article 10 of the African Charter, the Charter, like all other human rights instruments outlaws forced membership of any association but is subject to article 29 of the Charter.³⁵³ This ideology was affirmed in *Tanganyika Law Society and Legal and Human Rights Centre v Tanzania* when the African Court noted that the right to freedom of association implies freedom to associate and freedom not to associate. The Court further ruled that freedom of association will be negated if a person is forced to associate with others; therefore, the law prohibiting individual candidature under the Electoral Act of Tanzania by requiring individuals to belong and be sponsored by a political party in the general elections violates the freedom of expression.³⁵⁴

The right to free association is both an individual and a collective right. It allows people to either individually or jointly further their interest through legal

³⁵² See also, Article 16 of American Convention; Article 11 of ECHR; and Article 22 of ICCPR.

³⁵³ Article 29 of the Charter provides for individual duties such as participation in defence of one's country.

³⁵⁴ App. No. 009/2011, para 113-114.

means such as a Non-Governmental Organisation or political party.³⁵⁵ In this regard, restriction to the enjoyment of this right must meet the African Charter requirement. For instance, In *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, the Commission stated that restriction of this right must meet article 27 conditions.³⁵⁶ However, individuals do not have the absolute right to membership of an association, and as well, associations retain the right to create guidelines for its membership and retain the right to admit or discontinue an individual's membership.³⁵⁷

The right to freedom of association under the African Charter can be restricted just as in all the other regional human right instruments.³⁵⁸ As it is evident, the grounds for a restriction must meet the article 27 requirement.³⁵⁹ Article 29 (4) imposes a duty on the individual, which seems to be an exception against the forceful membership protection. For instance, it would not be deemed a violation of the African Charter rights if an individual is forced into a body for the preservation and strengthening of social and national solidarity when threatened.³⁶⁰ This entails that an individual may be conscripted into the military or other institutions under certain circumstances.

However, the arbitrary arrest of an individual because of his/her political belief or membership of a political party is a violation of the freedom of association.³⁶¹ Presently, some African countries have laws that restrict citizens' right to association. For instance, in *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, the Commission ruled that section 7 of the Process and Transitional Powers Act, Decree No. 2 of 1989 of Sudan which prohibits any assembly for a political purpose in a public or private place, without

³⁵⁵ Communication 379/09 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, para 118.

³⁵⁶ *Ibid.*

³⁵⁷ Vincent Nmehielle, *The African Human Rights System: Its Laws, Practices and Institutions* (n 15 above) 110.

³⁵⁸ Article 16 (2) of American Convention; Article 11 (2) of ECHR; and, Article 10 (1) of African Charter.

³⁵⁹ *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*.

³⁶⁰ Article 29 (4) of the African Charter read together with Article 10 (2).

³⁶¹ Communication 205/97- *Kazeem Amitu v. Nigeria*, para 22.

special permission, is a violation of the African Charter. It further held that this law is disproportionate to the measures it intended to maintain being, public order, security, and safety, and thus, a violation of the freedom of association.³⁶² Similarly, the African Commission in *Lawyers of Human Rights v Swaziland* held that the Proclamation of 1973 which abolishes and prohibits the existence, and the formation of political parties or organisations of a similar nature in Swaziland is a violation of the freedom of association and the right to assemble freely and peacefully.³⁶³

In spite of these rulings, the Commission has adopted a Resolution on the Right to Freedom of Association in Africa, and this has acted as a reference point in many of its case-law jurisprudence. This Resolution provides an update on some of the gaps in the African Charter protection of the right to association. However, it is not binding on African Charter state parties.

3.3.10 Right to freedom of assembly

The freedom of assembly involves the individual right to come together and collectively pursue, express, promote, and defend shared ideas.³⁶⁴ This right permits the freedom to assemble peacefully in public places and is often used in the context of the right to protest. This right protects one's right to protest peacefully with others and must be enjoyed freely and without coercion.³⁶⁵ However, the right to assemble freely complements the right to freedom of association. Assembly is an 'intentional and temporary gathering in a private or public space for a specific purpose' and allows individuals to indulge in

³⁶² Communication 48/90-50/91-52/91-89/93 - *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*. Para. 82. See also, Communication 212/98 - *Amnesty International v Zambia*, para 56 and Communication 225/98 - *Huri - Laws v Nigeria*. The Commission held differently in these cases that where state interference in freedom of association is not proportionate to whatever measures sought to be maintained, such act would be considered arbitrary and in violation of this right.

³⁶³ Communication 251/02, para 60; see also Communication 242/01 - *Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l'Homme v Mauritania*.

³⁶⁴ Jeremy McBride, *Freedom of Association: The Essentials of Human Rights* (Hodder Arnolf, London, 2005) 18-20.

³⁶⁵ Article 5 of African Commission Guidelines on Freedom of Association as Pertaining to Civil Society and Guidelines on Peaceful Assembly.

demonstrations, inside meetings, strikes, processions, rallies or sit-ins.³⁶⁶ Unlike some other rights, the right to assemble freely with others is an individual and a group right but can only be expressed collectively. Some forms of assembly are essential characteristics of democratic government and a medium to express satisfaction or otherwise of view, policies or system of governance within society. A peaceful assembly encompasses a temporary gathering without riot, use of arms or chaos. In an event where an individual or small group of bad actors are involved, such person or groups should be removed rather than break up the assembly.³⁶⁷

The right to freedom of assembly is fused with the right to freedom of association under the ECHR and UDHR. The African Charter enshrines this as an independent right, just as ICCPR. Article 11 of the African Charter provides that 'every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular, those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others'. The African Charter language is similar to article 21 ICCPR to the extent that the ICCPR included more grounds for restriction such as public order and morals.

The right to freedom of assembly prevents government imposition of lawful restrictions by state parties or the use of excessive force by state organs against the citizens. For instance, the complainants in *Kevin Mgwanga Gunme et al v Cameroon* alleged that the respondent state used excessive force to suppress peaceful demonstrators and further arrested and detained several of them for participating in what the respondent tagged unlawful political rallies. In its ruling, the Commission concluded that the respondent state must guarantee the right to assemble which is violated in the instant case.³⁶⁸ This right prohibits the use of excessive force by state organs in suppressing demonstration, riot or to break up

³⁶⁶ Human Rights Council (A/HRC/20/27), *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Maina Kiai, at its twentieth session on 21st May, 2012, para 24.

³⁶⁷ African Commission, 'Freedom of Association, as Pertaining to Civil Society, and Freedom of Assembly in Africa: A Consideration of Selected Cases and Recommendations' (2014) III.C.2, 26.

³⁶⁸ Communication 266/03, para 135-138.

an assembly except when there is an imminent threat of death or serious injury.³⁶⁹ Similarly, where a person has been prevented from participating in a meeting with other people to discuss human rights issues or is punished by state authorities for participating in such meetings, the Commission has found a violation of Article 11.³⁷⁰

As noted in article 11, this right can be restricted under certain conditions;³⁷¹ a fact enshrined in other international human rights instruments. However, any form of blanket prohibition or interference in relation to time, location, or speech content by the state towards the enjoyment of this right is prohibited.³⁷² The position is that any interference or restriction must be in compliance with the law and must be proportionate, and imposed as a measure of last resort.³⁷³ Hence, detaining individuals for holding unauthorised meetings in the absence of justification by the respondent state in the interest of national security, the safety, health, ethics and rights and freedoms of others, is a violation of the right to freedom of assembly.³⁷⁴

The African Commission has adopted a Guidelines on Freedom of Association as Pertaining to Civil Society and Guidelines on Peaceful Assembly to assist states in the implementation and adoption of legal frameworks on this right.³⁷⁵ This Guideline enshrines that freedom of assembly is not a privilege and

³⁶⁹ African Commission, 'Freedom of Association, as Pertaining to Civil Society, and Freedom of Assembly in Africa: A Consideration of Selected Cases and Recommendations' (2014) III.C.2, 26.

³⁷⁰ Communication 228/99 - *Law Offices of Ghazi Suleiman v Sudan*, para 56-57.

³⁷¹ The following conditions are recognised under article 27 of the African Charter, national interest, national security, the safety, and rights and freedoms of others.

³⁷² African Commission, 'Freedom of Association, as Pertaining to Civil Society, and Freedom of Assembly in Africa: A Consideration of Selected Cases and Recommendations' (2014) III.C.2, 25. See also, Report of the Study Group on Freedom of Association and Assembly in Africa, available at > http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association_assembly_in_africa.pdf< accessed 29 March 2019.

³⁷³ See United Nations Human Rights Council (A/HRC/20/27), *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, para 39.

³⁷⁴ Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98 - *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayantsDroit, Association mauritanienne des droits de l'Homme v Mauritania*, para 108-110.

³⁷⁵ Adopted at the 60th Ordinary Session of the African Commission on Human and Peoples' Rights, Niamey, Republic of Niger, from 8 to 22 May 2017.

thus does not need a state licence or permission for its enjoyment.³⁷⁶ Nonetheless, the Amnesty Annual Report on Africa 2016/2017 has alleged that the following countries witnessed widespread repression, violence and arbitrary crackdown on protests and gatherings; Angola, Benin, Burundi, Cameroon, Chad, Côte d'Ivoire, Democratic Republic of the Congo (DRC), Equatorial Guinea, Ethiopia, Gambia, Guinea, Mali, Nigeria, Sierra Leone, South Africa, Sudan, Togo and Zimbabwe.³⁷⁷

3.3.11 Right to freedom of movement and residence

The right to freedom of movement and residence includes the right to move and reside freely within a country for those lawfully within the country and the right to enter and leave any country of which you are a citizen.³⁷⁸ This right allows individuals to visit, reside and work in other countries. In a human rights treaty such as the UDHR, this right is protected under article 13 whereas, under the ICCPR, it is protected under articles 12 and 13. For instance, article 13 UDHR provides that 'everyone has the right to freedom of movement and residence within the borders of each country. Everyone has the right to leave any country, including his own, and to return to his country'. This right is enshrined in various regional human rights instruments as well as AU member states' constitutions.³⁷⁹ At the African regional level, article 12 of the African Charter covers the following rights; namely, the individual right to freedom of movement and residence within a state; the individual right to leave and return to any country; the individual right to asylum in any country; and, restriction on the expulsion of non-nationals from a country. It is clear that the broad protection under the African Charter is exercisable if the person abides by the law.³⁸⁰ To this end, legislation for the

³⁷⁶ Article 10 of the Guideline. See also the ruling by the Nigeria Court of Appeal in *Inspector-General of Police v All Nigeria Peoples Party and others*, (Nigeria Court of Appeal, 2007).

³⁷⁷ Amnesty International, *Amnesty International Report 2016/2017: The State of the World's Human Rights*, available at > <https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF>< accessed 01 November 2018.

³⁷⁸ Jeremie Gilbert, *Normadic Peoples and Human Rights* (Routledge, 2014) 73.

³⁷⁹ Article 22 of American Convention; article 17 of 1977 Constitution of Tanzania, and section 41 of 1999 Constitution of Nigeria.

³⁸⁰ Article 12 (2) of the African Charter.

protection of national security, law, and order, public health or morality can restrict the enjoyment of this right.³⁸¹

The right to freedom of movement applies to nationals, non-nationals, and even aliens who are resident of any state party.³⁸² Regardless, an alien's right to enter, reside or remain in another country is determinant on the laws of the receiving country as well as international conventions. But in contrast with the American Convention and the ICCPR,³⁸³ the African charter failed to outlaw the expulsion of citizens from their state of origin. This omission can be said to be strange given that many African leaders have over time expelled their citizens for holding contrary views which invariably renders such individuals stateless. For example, the African Commission in both *John D Ouko v Kenya*³⁸⁴ and *Sudan Human Rights Organization and Center on Housing Rights and Evictions v Sudan*³⁸⁵ ruled that respondent states violated article 12 in circumstances where complainants fled their respective countries of nationality because of harassment, persecution, and threats by government agents. This line of reasoning was again followed in *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* where the complainant alleged that they were forced to flee their country of nationality due to constant harassment, intimidation, as well as the fear of inhuman and degrading treatment, should they return to Sudan. In this case, the Commission ruled that because the anticipated fear based on previous experience prevented them from residing in Sudan, the respondent violates article 12 (1) of the Charter.³⁸⁶

Unlike the Inter-American Convention and the UDHR, the African Charter explicitly prohibits mass expulsion of non-nationals from a country.³⁸⁷ The American Convention provides protection against deportation where the right to

³⁸¹ Article 12 (2) of the African Charter.

³⁸² Article 12 (3) and (4) of the African Charter.

³⁸³ Article 22 of American Convention; Article 12 (4) of ICCPR.

³⁸⁴ Communication 232/99.

³⁸⁵ Communication 279/05 – 296/05.

³⁸⁶ Communication 379/09, para 123 and 126.

³⁸⁷ Article 12 (5) of the African Charter.

life or personal freedom of an alien is in danger of being violated on the grounds of race, nationality, religion, political opinion and social status.³⁸⁸ This provision implies that some rights enshrined in the Convention must be guaranteed by the demanding state before deportation or expulsion can be allowed. This approach creates a human rights duty on the demanding state and a legal assurance that the deportee would not have his rights infringed on any of the discriminatory grounds. On its part, article 12 of the African Charter lacks such guarantee and protection concerning the movement of non-nationals.

Despite the express international human rights protection on the right to leave any country including his own, and to return to his country, Article 12 (2) emphasises the need for regulations from both domestic laws and international conventions.³⁸⁹ For instance, in *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, the Commission made it clear that Mr Monim Elgak and Mr Amir Osman have the right to return to their country except if the respondent state shows that their return will pose a danger to national security, law and order or public health or morality.³⁹⁰ However, suggesting that article 27 exception can justify state party refusal for someone to return to his/her country invariably has the potential to make such a person a refugee in another country or even stateless, without nationality.

However, the decision as to who is permitted to remain in a country is a function of the competent authorities of that country and should be reached after careful and just legal procedures, and with due regard to the international norms and standards.³⁹¹ Indeed, measures short of the standards and norms provided in the African Charter is unacceptable and a violation of Article 12 (4).³⁹² Given these principles, the expulsion of a non-national because of the expression of political

³⁸⁸ Article 22 (8) of American Convention.

³⁸⁹ Communication 313/05 - *Kenneth Good v Republic of Botswana*.

³⁹⁰ Communication 379/09, para 126.

³⁹¹ Communication 97/93, *Modise v Botswana*, para 84.

³⁹² Communication 159/96 - *African Commission Union Inter Africaine des Droits de l'Homme and others v Angola*, paras 16 and 20.

opinion has been found to violate article 12 of the African Charter.³⁹³ This is because expression by any individual, whether a national or non-national of the state, is not a ground for which this right can be restricted. On the other hand, the Commission in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, held that deportation could only be legal and in accordance with the law when due process of law for the protection of rights have been accorded to the victims of deportation.³⁹⁴ It further held that inhuman treatment and degrading treatment of deportees during the process of deportation amounts to non-compliance with international law and standards and a violation of Article 12.³⁹⁵

Generally, under articles 12 (4) and (5) the expulsion of non-nationals must not be based on national, racial, ethnic or religious grounds. In *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, the Commission defined mass expulsion as that which targets national, racial, ethnic or religious groups as a whole.³⁹⁶ Despite this protection under the African Charter, however, African states still expel non-nationals based on ethnicity, race, and religion.³⁹⁷

3.3.12 Right to participate freely in the government of one's country

The right to participate freely in the government is shaped by the objective to get individuals involved in decision-making which affects their interest. Its foundation is based on the idea that everyone enjoys the opportunity to participate in creating a society which in turn fulfils one's interest.³⁹⁸ Indeed, this right is protected in various instruments. For instance, while article 21 UDHR and article 25 ICCPR

³⁹³ Communication 313/05 - *Kenneth Good v Republic of Botswana*, para 201.

³⁹⁴ Communication 294/04 - *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, para 116.

³⁹⁵ *Ibid*, para 115.

³⁹⁶ Communication 249/02, para 44.

³⁹⁷ Communication 227/99 - *Democratic Republic of Congo / Burundi, Rwanda, Uganda*; Communication 204/97 - *Movement burkinabé des droits de l'Homme et des peuples v Burkina Faso*, para 47; Communication 292/04 - *Institute for Human Rights and Development in Africa v Angola*, para 66-68.

³⁹⁸ Oji Umozuruike, *The African Charter on Human and Peoples Rights* (Martinus Nijhoff Publishers, 1997) 32.

adopted the similar language as well as protection of three branches of this right,³⁹⁹ the HRC General Comment No. 25 emphasised that state parties have a duty to anyone entitled to vote or be elected are able to exercise this right. On the other hand, article 23 American Convention, article 3 First Protocol to ECHR and article 13 of the African Charter contain similar protection of this right. For instance, while article 13 of the African Charter provides that every citizen shall have the right to participate freely in the government of his country either directly or through chosen representatives and the right to equal access to the public service of the country, every individual shall have equal right of access to public property and services, article 20 states that 'they shall freely determine their political status...'. Furthermore, the language of the American Convention can be said to be more explicit than the African Charter in the protection of this right.⁴⁰⁰

The above analysis resonates with the fact that government exclusion has been witnessed in many African states at some point in their history through one or more of the following; namely, military coups, one-party autocracies, dictatorships and monarchies. At present, a few African states are engulfed in various political crises or have experienced one form of pre and post-election crisis. For instance, while Kenya and Nigeria had in the past experienced pre and post-election violence which led to the loss of lives and property, intimidation, and abduction of political opponents, Uganda, Algeria and Cameroon have had their President in office for more than two decades.

This right forms the foundation for a representative democratic process and ensures that public affairs and property are genuinely public. This right suggests that the electorates own the power which they repose in their representatives in various elective positions which guarantee their involvement in the decision-

³⁹⁹ The rights protected include (a) the right to take part in the government of one's country; (b) right to equal access to public service; (c) the right to vote and be elected in a genuine periodic election which will be by universal and equal suffrage and will be held by secret ballot, guaranteeing the free expression of the will of the electors.

⁴⁰⁰ Article 23 (1) (b) stipulates: 'to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters'; see also Article 25 of ICCPR.

making process on policies that affect them. At present, however, there is a general move towards democracy across the globe, and this twist has increased international support and observation of elections in various UN member states.

However, it is noteworthy that article 13 (1) and (2) of the African Charter explicitly refers that only citizens can enjoy the right to freely participate in government and access to the public service of a country. This implies that domestic laws may put some limits on the way elections are held, age, capacity, or decide the electoral system for citizens to enjoy this right to vote and be voted for, and the right of access to public services of a country. For example, section 65 of the 1999 constitution of Nigeria stipulates that a person shall be qualified for election as a member of (a) the Senate, if he is a citizen of Nigeria and has attained the age of 35 years; and (b) the House of Representatives, if he is a citizen of Nigeria and has attained the age of 30 years. Likewise, article 25 ICCPR suggest that citizens will, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, enjoy the right provided in article 25. However, the ICCPR language suggests that this right is absolute and should never be unreasonably restricted.

As noted in article 13 of the African Charter and other regional instruments, the enjoyment of this right must be in accordance with the provision of the law; thus, not absolute. However, such limiting national laws must not be discriminatory or contradict any provisions of the African Charter and more especially, article 2.⁴⁰¹ For instance, in *Purohit and Moore v Gambia* the African Commission concluded that the rights specified under article 13 (1) are for every citizen and any denial thereto can only be justified by reason of legal incapacity or non-citizenship but not mental incapacity.⁴⁰² Likewise, the African Court in *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* agreed that the Eleventh Constitutional Amendment passed by the Tanzanian National Assembly on 2

⁴⁰¹ Communication 211/98 - *Legal Resources Foundation v Zambia*, para 67.

⁴⁰² Communication 241/01, para 75. In this case, persons regarded as lunatics were exempted from voting under the Lunatic Detention Act.

December 1994 and assented to by the President of the United Republic of Tanzania on 17 January 1995, which bars 32 candidates from contesting Presidential, Parliamentary as well as Local Government elections as independent candidates violates the right to participate in public or government affairs in one's country.⁴⁰³

Nevertheless, virtually all international human rights instruments seem to agree that elections are the most acceptable means to guarantee the protection of the right to participation in government.⁴⁰⁴ In this regard, it can be argued that any change of government that lacks free participation of people in process and outcome is a violation of this right.⁴⁰⁵ Despite the recognition of this right in the African Charter, many African states are lagging in guaranteeing genuine periodic elections. For instance, the Court has found a violation of Article 13 in *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Cote d'Ivoire* because the respondent state violated its commitment to establish an independent and impartial electoral body.⁴⁰⁶ Similarly, in *Constitutional Rights Project v Nigeria*, the Commission has found a violation of article 13 (1) right because the respondent state annulled the results of a general election without reasonable grounds. In this case, the Commission stated that the inevitable consequence of the right to participate in government is that the results of the free expression of the will of the voters are respected.⁴⁰⁷

3.3.13 Right to property

The right to property guarantees an individual's right to own property or possessions such as patents, houses, land, shares, leases, pensions, money and objects. The right to property, as a traditional fundamental right in democratic

⁴⁰³ App. Nos. 009 and 011/2011. Similar decisions have been reached in Communication 251/02 - *Lawyers of Human Rights v Swaziland*, para 62; see also the decision in Communications 147/95 and 146/96 - *Sir Dawda Jawara v The Gambia*.

⁴⁰⁴ Article 21 of UDHR; Article 25 of ICCPR; Article 23 of American Convention; Article 3 of Protocol 1 of ECHR.

⁴⁰⁵ Article 4 (p) of the Constitutive Act of the African Union expressly rejects the unconstitutional change of government, while Article 30 explicitly sanctions states that seize power through unconstitutional means.

⁴⁰⁶ App. No. 001/2014 – *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Cote d'Ivoire*.

⁴⁰⁷ Communication 102/93v- *Constitutional Rights Project v Nigeria*, para 49.

and liberal societies, is guaranteed in international human rights instruments as well as national constitutions.⁴⁰⁸ For instance, while article 17 UDHR stipulates that 'everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property', the ICCPR did not recognise this right.⁴⁰⁹

The regional instruments recognise the right to property to varying degrees. A right to property is not explicitly stipulated in the ECHR but recognised in Protocol 1, article 1 to ECHR as an entitlement to natural and legal persons and no one shall be deprived of this right except in the public interest and subject to the conditions provided for by law and by the general principles of international law. This article further gives states the right to enforce such laws to control the use of property in accordance with a general interest or to secure the payment of taxes. On the African continent, article 14 of the African Charter protects the right to property by stipulating 'the right to property shall be guaranteed. It may only be infringed upon in the interest of public need or the general interest of the community and accordance with the provisions of appropriate laws'. While article 21 (1) of the African Charter recognises the right of all peoples to dispose of their wealth and natural resources freely, article 21 (2) states that 'in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to adequate compensation'. However, article 21 of the American Convention is more explicit and is unique by including the right to just compensation and prohibition of usury and other exploitation.

Although the object of this right consists of property already owned or to be owned by a person through lawful means, all the regional instruments are explicit that this right may be legally curtailed. Such restriction must comply with

⁴⁰⁸ Communications 71/92 - *Rencontre africaine pour la défense des droits de l'Homme v Zambia*; Communication 292/2004 - *Institute for Human Rights and Development in Africa v Republic of Angola*; and, Communication 159/1996 - *Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme and Others v Angola*.

⁴⁰⁹ The absence of this right in ICCPR is due to controversy about the definition and scope of the right such as who is to enjoy property right (natural person or corporation) and types of property to be protected. See generally, Curtis Doebbler, *Introduction to International Human Rights Law* (CD Publishing, 2006) 3-7.

reasons stipulated in these instruments or by the general principles of international law. Under this circumstance, forced eviction and state destruction of property would amount to a violation of article 14. For example, the African Commission in *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan* found a violation of article 14 where a complainant alleged forced evictions and destruction of houses and property by military forces and armed groups in the Darfur region of Sudan.⁴¹⁰

To enjoy this right, therefore, it is immaterial whether the victim holds a legal title to the property or not. What is relevant is evidence to show that such a victim has been deprived of the use of their property under conditions which are not permitted by article 14.⁴¹¹ In *Malawi African Association and Others v Mauritania*, the African Commission considered land property for individual enjoyment under the Charter⁴¹² and further agreed that the individual's right to property includes the right to have access to one's property, the right not to have this property invaded and encroached upon, and the right to undisturbed possession, use and control of that property by the owner.⁴¹³

From the preceding, removal of people from their homes and encroachment thereto is a violation of the right to property if the respondent state fails to prove the exceptions to the enjoyment of this right. This was the decision in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* where the Africa Commission ruled that the government's encroachment and takeover of the native land of the Endorois

⁴¹⁰ Communication 279/03-296/05, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, para 193 and 194.

⁴¹¹ *Ibid*, para 205.

⁴¹² Communication 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, para 128.

⁴¹³ Communication 155/96 - *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, para. 62; Communication 225/98 - *Huri - Laws v Nigeria*, para. 52-54; Communication 373/09 - *INTERIGHTS, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme vs. Mauritania*, para 44.

people is not proportionate to any public need and not in accordance with national and international law.⁴¹⁴

This takes us to the question of who can be the owner of a property. Though the explanation is not included in the African Charter, the case law jurisprudence shows that this right can be enjoyed individually and collectively.⁴¹⁵ For example, it was found in *Dino Noca v Democratic Republic of Congo* that Congo violated Noca's right to property when it used its national law to deprive him of his property because he is not a citizen of DRC. In this case, Noca, an Italian national, alleged that his property was stolen under the pretext of the execution of presidential measures referred to as economic measures based on the Congolese law of 2 July 1974 concerning the abandoned or undeveloped property and other assets acquired by the state under the law.⁴¹⁶ It was further noted in this case that the right to ownership of property imposes a duty on states to protect the holders through legislation and the provision of remedies.⁴¹⁷ In a similar communication, the Commission found a violation of the right to property where confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses were allegedly carried out by state agents and majority non-black Mauritians.⁴¹⁸

However, a property can be owned by a non-juristic body. Although this position is not explicitly enshrined in the African Charter, the Commission in *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* ruled that state confiscation of the Complainants' equipment because of a new media law - Access to Information and Protection of Privacy Act (AIPPA) enacted in 2002 by the Respondent State, deprived them of a source of income

⁴¹⁴ Communication 276/03 - *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, para 238.

⁴¹⁵ Communication no 97/93 - *John K. Modise v Botswana*, par. 94.

⁴¹⁶ Communication 286 /2004 – *Dino Noca vs Democratic Republic of the Congo*, para 158.

⁴¹⁷ *Ibid*, para 162.

⁴¹⁸ Communication 54/91-61/91-96/93-98/93-164/97-196/97-210/98 - *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*, para 128.

and livelihood and thus was a violation of their right to property guaranteed under Article 14.⁴¹⁹

3.4 The complementing African Commission resolutions, principles and guidelines accompanying the African Charter

The previous section demonstrates that normative provisions of the African Charter relating to civil and political rights are literally not as expanded as the ICCPR. To cover these normative gaps, African Charter rights are often complemented by resolutions, principles and guidelines adopted by the African Commission. Therefore, this section examines whether these resolutions, principles and guidelines have influenced the realisation of civil and political rights in the region and whether they enjoy the binding force of law on member states. Arguably, the complementing resolutions, principles and guidelines accompanying the African Charter provide useful guidance on the efforts made by the African Commission in closing the African Charter normative gaps given that the African Commission often refer to them in its case law and interpretation of the African Charter provisions. On the other hand, it is worthy of mention that these complementing resolutions, principles and guidelines are developed in accordance with article 45 (1) (b) which empowers the African Commission to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms.

3.4.1 African Commission Declaration of Principles on Freedom of Expression in Africa

At the regional level, the right to freedom of expression is enshrined in article 9 of the African Charter. Conversely, the right to freedom of expression under article 9 of the African Charter is not as expansive, exhaustive and adequate as the ICCPR and ECHR provisions. The Declaration of Principles on Freedom of Expression in Africa was drafted to accompany and complement the African Charter protection of this right. For instance, it shows dissatisfaction by the African Commission in

⁴¹⁹ Communication 284/03, para 179.

the normative provision of the African Charter relating to the right to freedom of expression. Arguably, the right to freedom of expression was not understood at the time of the African Charter enactment because many African states were undemocratic and would not want a free press or any means for transparency and accountability. If indeed freedom to the right to expression provision under article 9 were seen as adequate, then there would have been no need for a complementing declaration to elaborate on the means of dissemination and other principles of this right.

Indeed, the significance of this declaration is varied. First, it re-emphasised the relevance of free press and the right to freedom of expression to a nation and the enjoyment of other human rights. Furthermore, it recognises vast activities that underline the objectives of this declaration such as diversity, interference with freedom of expression, freedom of information, private broadcasting, public broadcasting, regulatory bodies for broadcasting and telecommunications, promoting professionalism, attacks on media practitioners, protection of sources and other journalistic material amongst others. This shows that this declaration offers an enhanced legal document on the enjoyment of the right to freedom of expression. However, this declaration did not explicitly state if its provisions are legally binding on state parties; instead, it urges state parties to make efforts to give practical effect to its principles. Therefore, the conclusion that may be drawn from this declaration is that although it provides a comprehensive guarantee of the enjoyment of freedom of expression, it is not legally binding on state parties despite the African Commission citation of it in the interpretation of the right to freedom of expression.

3.4.2 African Commission Guidelines on Freedom of Association and Assembly in Africa

The Guidelines on Freedom of Association and Assembly in Africa provide authoritative guidance to state parties to ensure that domestic law, policy and practice conform to regional and international standards. The guidelines, adopted in 2017, provide a monitoring and accountability tool to NGOs and guidance to

state parties on legislative protection and the practical implementation of the right to freedom of association and assembly. As a guideline, it is not binding on state parties; however, the African Commission urges state parties to refer to it in enacting, amending or reviewing domestic laws, national policies and practices that relate to the enjoyment of the right to freedom of association and assembly. From the preceding, it is submitted that the relevance of these guidelines is to guide states in the amendment or enactment of policies and legislation relating to the freedom of association and assembly.

Unlike the other resolutions of the African Commission, this guideline responds to restrictive national laws by providing state parties with an authoritative understanding of how to give effect to the right to freedom of association and assembly under the African Charter and other international human rights instruments. Therefore, while it is clear that this guideline is an expression of the African Commission concern on state party restriction of article 10 and 11 of the African Charter, it further acknowledged some of the principles of these rights which were omitted in the African Charter such as the right to form and join trade unions. In addition, this guideline put forward a definition of association and assembly and further provided ten fundamental principles that guide the interpretation of the right to association and assembly. The impact of this definition would clarify state parties' relationship with groups and unions to ensure the enforcement of the right to freedom of association and assembly.

One crucial factor about this guideline is that it is exhaustive and comprehensive in areas concerning formation, administration, purpose and activities, oversight, financing, limitation, notification, reporting, sanctions and remedies of article 10 and 11 of the African Charter. For example, it prohibits some practical realities in state parties such as state imposition of criminal sanctions in the context of law governing assemblies. This is because the position put forward in this guideline would indeed make a difference where a state party considers realising the effective enforcement of the right to freedom of association and assembly. However, it is submitted that the enjoyment of the right to freedom

of association and assembly is unpleasant in many African countries. This is because many African governments are uncomfortable when criticised or challenged, thereby resulting in the use of inappropriate force to suppress opponents, protests and union activities.⁴²⁰

3.4.3 African Commission Resolution Urging States to Envisage a Moratorium on Death Penalty

At the outset, the right to life covered in article 4 of the African Charter does not abolish the death penalty. In addition, the normative provision of article 4 is brief in scope as well as marred with uncertainty as to its absoluteness. Consequently, many state parties have national legislation that bears the death penalty as a punishment for certain serious offences. Considering this position in many African countries as well as the position in ECHR and the Second Optional Protocol to the ICCPR, the African Commission has remained consistent in its call for the abolition of the death penalty. Emphatically, while Benin and fourteen other African countries have abolished the death penalty,⁴²¹ five African countries applied the death penalty in 2018.⁴²²

It is clear from the provision of article 4 that the drafters of the African Charter did not envisage the right to life to be absolute. Indeed, this position was reaffirmed in the resolution urging states to envisage a moratorium on the death penalty because it explicitly did not abolish or condemn the death penalty in state parties. If the position of this resolution were firm in abolishing the death penalty, the Commission and the Court would interpret their complaints involving the legal sentence to death as a violation of the African Charter rather than making a

⁴²⁰ Between January and June 2019 alone, the government of Nigeria, Sudan and Benin have suppressed many peaceful demonstrations; thus, leading to the death, detention and torture of many peaceful protesters.

⁴²¹ The countries include Cape Verde Island, Djibouti, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Seychelles, South Africa, Madagascar, Angola, Gabon, Togo, Guinea-Bissau, Benin, and Liberia. However, Liberia reintroduced the death penalty for offences of armed robbery, terrorism, and hijacking in 2008.

⁴²² The five countries are Egypt, Somalia, Sudan, South Sudan and Botswana. See, africanews, 'Five African countries applied death penalty in 2018- Amnesty Report' available at > <https://www.africanews.com/2019/04/11/five-african-countries-applied-death-penalty-in-2018-amnesty-report/>< accessed 27 May 2019.

request for states to consider a moratorium on the death penalty.⁴²³ Indeed, the resolution urging states to envisage a moratorium on the death penalty is a request by the African Commission on states that still maintain the death penalty to either ensure that accused persons in a trial to which the death penalty is a punishment are fairly tried or establish a moratorium on executions with a view to abolishing the death penalty. Therefore, it is neither explicitly mandating state parties to abolish the death penalty nor enjoying the binding force of law on African Charter state parties.

Since this resolution requests that state parties to the African Charter ratify the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty; the African Commission has assumed a weak position to abolish the death penalty legally. This is because the African Court could rely on the Second Optional Protocol to the ICCPR to make binding orders against violating state parties. In conclusion, the hope of the African Commission that state parties ratify and enforce the Second Optional Protocol to the ICCPR seems the only available legally binding mechanism in the region. Therefore, the conclusion that may be drawn from the resolution urging states to envisage a moratorium on the death penalty is that it did not sufficiently clarify Africa's position on issues of the death penalty.

3.4.4 African Commission Resolution on the Right to Recourse and Fair Trial

The African Commission resolution on the right to recourse and a fair trial provide more comprehensive guidance on the right to a fair trial. Contrasted with the provision of the African Charter, this resolution covered some of the African Charter omitted principles of a fair trial such as the right to an interpreter and the right to be informed at the time of arrest in a language which one understands of the reason for the arrest. Although the protection of the right to a fair trial under article 7 is not exhaustive and well defined like article 14 ICCPR, this recognition

⁴²³ For instance, see the following African Court decisions- App No 001/2015-*Armand Guehi v Tanzania*; App. No. 007/2015- *Ally Rajabu v Tanzania*; App. No. 017/2016 *Deogratius Nicolaus Jeshi v Tanzania*; App. No. 018/2016- *Cosma Faustine v Tanzania*. In all these cases, Tanzania responded to the African Court that it would not implement its order not to execute the applicants because its domestic laws recognise the death penalty.

of omitted rights in this resolution shows that the African Commission understands the need for comprehensive fair trial principles to effective enforcement of civil and political rights.

The consequences of human right omissions in the African Charter is that individuals cannot rely on the African Charter alone in proceedings that involve the violations of omitted rights. In other words, the Commission must refer to other international human rights instruments where the subject matter of the violation relates to omitted principles of fair hearing. Interestingly, however, the resolution on the right to recourse and a fair trial proceeded to list fair trial principles whether covered by article 7 of the African Charter or not. In particular, it provided for the right to appeal, the right to be tried within a reasonable time, the presumption of innocence, the right to adequate time and facilities for the preparation of a defence and to communicate in confidence with counsel of choice, equality before the courts and the right to have the cause heard. In addition, the above resolution urges state parties to create awareness of the accessibility of the recourse procedure and to provide the needy with legal aid. Indeed, this resolution demonstrates that this right is a cornerstone to the enjoyment of several other rights; thereby, it should be clarified and elaborated. This resolution provides better guidance on the protection of the right to a fair trial under article 7 of the African Charter.

3.4.5 African Commission Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment (Robben Island Guidelines) in Africa

The Robben Island Guidelines provided better guidance on the normative protection of the right to the respect of the dignity inherent in human beings and the prohibition of exploitation and degradation of man. The overall goal of this Guideline in relation to article 5 of the African Charter shows that the African Commission can play a role in combating torture in Africa and provide a framework that national actors can refer to in realising effective enforcement of the prohibition of torture. In addition, the Robben Island Guidelines take a different

approach from the above-discussed resolutions and guidelines by establishing a follow-up committee to promote the implementation of the Guidelines and help the African Commission deal effectively with the question of torture and inhuman treatment.⁴²⁴

A crucial position in the Robben Island Guidelines that makes it comprehensible is that its implementation requires a progressive and methodical approach.⁴²⁵ The Robben Island Guidelines agree that torture is a prevalent phenomenon despite the progress made at the international level by establishing institutions such as the International Criminal Court and legal frameworks such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. One would have thought that the Robben Guidelines enjoy the binding force of law given that its self-executing nature and the flagrant reality of torture in many African states. However, the prohibition of torture has been assumed to be part of international customary law applicable to UN member states, and it is contemporarily linked to the absolute respect for human dignity.⁴²⁶ Equally important, the Commission continues to interpret article 5 of the African Charter as an absolute prohibited right. For instance, in *Thomas Kwoyelo v Uganda*, the African Commission asserted that an absolute prohibition of torture applies at all times and in any place whatsoever.⁴²⁷

In the same way, the African Commission in interpreting the article 5 provision has over time reiterated the position in the Robben Island Guidelines. For instance, the African Commission in *Gabriel Shumba v Zimbabwe* further reiterated that the Guidelines deal with three broad issues: namely prohibition of torture, prevention of torture, and responding to the needs of victims of torture.⁴²⁸ Emphatically, the African Commission seized the opportunity in this case to

⁴²⁴ The Committee for the Prevention of Torture in Africa implements the Robben Island Guidelines.

⁴²⁵ Jean-Baptiste Niyizurugero and Patrick Lessene, *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: Practical Guide for Implementation* (2008) available at > http://www.achpr.org/files/special-mechanisms/cpta/rig_practical_use_book.pdf< accessed 27 May 2019.

⁴²⁶ *Ibid*, pg 7.

⁴²⁷ Communication 431/12, para 201.

⁴²⁸ Communication 288/04, para 146.

reference one of the goals of the Robben Island Guidelines which is recommending state parties' ratification of all regional and international instruments prohibiting torture.⁴²⁹ It follows that the context of the Robben Island Guidelines meets the worldview on the prohibition of torture and this makes it a useful tool to both regional and national efforts in preventing and prohibiting torture as well as providing legal support for victims of torture. However, until the useful input in the Robben Island Guidelines is incorporated into the African Charter, they are not binding on state parties.

3.5 Conclusion

The African Charter has been attributed as an extraordinary and powerful instrument of liberalisation, and an unprecedented event in the history of Africa.⁴³⁰ As suggested in the introduction, the African Charter offers a number of key insights. It indicates that the African Charter norms are wanting in depth and consistency with existing human rights instruments. In its practice, the African Charter institutions have fluctuated between a rigid interpretation of the norms and judicial activism that may be necessary to cover the normative shortcomings in the African Charter. The main argument here is not that the African Charter has not contributed tremendously to the regional human rights discourse despite its normative shortcomings. To this end, it has been shown that reforms to the African Charter norms can foundationally rely on the interpretation afforded by the regional institutions. This is because the direction of the interpretations of the Charter provisions and the complementing documents accompanying the African Charter is correcting some of the normative shortcomings of the Charter. Given such circumstances, there is a need for state parties to allow amendment of the African Charter to attune some of its provisions to meet international human rights standards. When this is agreed, any amendment to the African Charter may consider enshrining certain civil and political rights as non-derogable rights as evident in the ICCPR, ECHR and the American Convention.

⁴²⁹ *Ibid*, para 147.

⁴³⁰ Keba Mbaye and Birame Ndiaye, 'The Organisation of African Unity' in Karel Visak and Philip Alston (eds), *The International Dimension of Human Rights* (2nd edn, Greenwood Press, 1982) 583.

CHAPTER FOUR: POLITICAL AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF AFRICAN CHARTER CIVIL AND POLITICAL RIGHTS

4.0. Introduction

The previous chapter examined the normative framework of the African Charter and demonstrated that the African Charter civil and political rights norms are not entirely adequate when contrasted with the ICCPR and other regional human rights treaties. Even with the inadequacies of the normative provisions, the previous chapter has shown that African Charter norms have enjoyed substantial interpretation at the African Court and African Commission. Therefore, this chapter seeks to highlight and analyse the relevant political and institutional frameworks involved in the enforcement of the African Charter norms. In particular, the political and institutional frameworks involved in the protection of the African Charter are principally the Organisation of Africa Unity (OAU, now, Africa Union), the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Humana Peoples' Rights (African Court). These organs play crucial roles in realising the effective enforcement of civil and political rights according to the provisions and dictates of the African Charter and the Court Protocol. This is done in order to examine whether these frameworks are legally strengthened to enforce civil and political rights adequately.

4.1 Human rights protection in Africa: The emergence and role of the OAU

It is, of course, imperative to consider the history and transformation of this regional organisation in order to demonstrate whether human rights fall amongst its goals and principles and whether such goals, if they exist, are implemented and respected. To ascertain whether regional human rights goals and principles are implemented and respected, this section further examines the relevant AU organs involved in human rights protection and enforcement. In particular, this section discusses the emergence, role and position of the OAU (now, AU) in African Charter protection.

Most African states emerged out of the struggle for control of political and economic self-determination from European colonialism,¹ which began after the implementation of the 1941 Atlantic Conference and Charter.² Following this implementation, a few independent African countries emerged between 1945 and 1960, perhaps motivating others to adopt the right to self-determination as a foundational argument for their liberation.³ One would have thought that the human rights foundation that underpinned liberation from European colonisation would have influenced emerging states to adhere to other human rights tenets in the UDHR.

Human rights protection in colonised Africa colonies was mostly non-existent.⁴ Adequate human rights protection was non-existent in African colonies because their colonial countries were interested in political and economic control, which conflicts with human rights tenets.⁵ This is because it would be

¹ The 1884 Berlin Conference initiated the international guideline for the acquisition of African territories even after established European empires, notably: Britain, France and Portugal had already claimed vast areas for themselves. This Conference initiated the scramble and provided guidelines that ensured European nations avoided warring among themselves because of Africa. Notable European nations that colonised Africa in the 19th century are Britain, France, Portugal, Belgium, Germany, Italy and Spain. British colonies included Nigeria, Ghana, Togo, Tanzania, Camoroons (part of Cameroon), Swaziland, Uganda, Kenya, amongst others. France colonised Gabon, Congo, Comoros, Morocco, Tunisia, Chad, Niger, and Ivory Coast amongst others. The Spanish had Equatorial Guinea and Western Sahara, among others. Portugal had control over Guinea Bissau, Angola, Mozambique, Cape Verde, Sao Tome and Principe, and some others. Italy exercised control over Libya, Italian Somaliland and Italian Eritrea (part of Somalia and Eritrea). Belgium got Rwanda and Burundi after Germany. However, Germany lost its colonies after the First World War to Britain, France and Belgium which included colonies such as German Kamerun (now Cameroon and part of Nigeria), German East Africa (now Rwanda, Burundi and most of Tanzania), German South West Africa (now Namibia), and German Togoland (now Togo and eastern part of Ghana).

² The Atlantic Conference and Charter resulted from USA and Britain's post-war world discussion on 12 February 1941 between British Prime Minister Churchill and USA President Roosevelt, which included provisions for the autonomy of imperial colonies. Thereafter, pressure from USA and African elites after World War 2 on imperialist nations and in particular, Britain, to abide by this Charter resulted in the independence of individual African States. For example: Nigeria got her independence on October 1, 1960; Ghana, March 6, 1957; Morocco, April 7, 1956; Tunisia, March 20, 1956; Mali, June 20 1960; Burkina Faso, August 5 1960; Swaziland, September 6 1968; Angola, November 11 1975; Eritrea, May 24 1993. For general information of dates of independence, see African Union Member States Profile, available at > <https://au.int/memberstates>< accessed 18 March 2019.

³ Makau Mutua, 'The African Human Rights System: A Critical Evaluation' (2000) available at > <http://hdr.undp.org/sites/default/files/mutua.pdf>< accessed on 18 March 2019.

⁴ John Oloka-Onyango, 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?' (2000) 6 Buffalo Human Rights Review, 4.

⁵ *Ibid.*

conventionally difficult for colonial countries to assert such economic and political control and at the same time, respect human rights values.

However, the emergence of independent African countries transferred leadership responsibilities to indigenous Africans; thereby, placing the region on a new era and path. The responsibilities include human rights protection in their respective countries, creating a regional organisation, and eradicating colonisation and apartheid. However, while these leaders seriously pursued other goals, such as creating a regional organisation and eradicating colonialism and apartheid, African leaders failed to make human rights a priority in the region. For example, soon after the independence of many countries in the 1960s, the newly independent countries proceeded with discussions to form a regional body. Although it is agreed that a regional organisation was essential, one would have expected human rights to be part of its main objectives and purpose to give succour and dignity to the battered peoples' of Africa having moved from slavery to colonisation.

Nevertheless, the formation of the regional organisation was as a result of regional events and conferences aimed at liberating colonised African countries.⁶ For example, at the 1958 All African People Conference held in Accra, Ghana, initiated by President Kwame Nkrumah and attended by all independent African states: Libya, Ethiopia, Liberia, Morocco, Tunisia, Sudan, United Republic of Egypt and Ghana, African leaders strongly condemned various forms of racial and discriminatory laws and practices going on in many colonised African states. In particular, the agenda of this conference was centred on anti-colonialism, anti-imperialism, anti-racialism, African unity, and non-alignment.⁷ African countries resolved that the idea of colonisation in the African region is unacceptable and urged the liberated countries to rally support for the decolonisation of the

⁶ Rachel Murray, *Human Rights in Africa: From OAU to AU* (Cambridge University Press, 2004) 2. These conferences also condemned human rights violations within the continent.

⁷ Hakim Adi and Marika Sherwood, *Pan-African History: Political Figures from Africa and the Diaspora since 1787* (Routledge, London, 2003) 143; see generally, All African Conference 1958', available at > <https://www.sahistory.org.za/dated-event/all-african-people-conference-held-accra-ghana>< accessed 03 January 2019.

remaining African colonies. However, this conference also made little reference to human rights respect apart from an emphasis of the right to self-determination.

The preceding position was reiterated in another conference of nine independent states held in Monrovia to discuss the Algerian provisional government situation in 1959.⁸ The success of this conference gave rise to more discussions in the 1960s which reinvigorated pursuit of a non-violent revolution for the independence of colonised African states and the creation of the OAU as a talking shop for Africa.⁹ By 1961, the 1961 Pan-African Conference held again in Monrovia recommended the establishment of an Organisation of African and Malagasy States¹⁰, which later resulted in the adoption of the OAU in 1963.¹¹ The emergence of OAU gave African countries a common front to articulate regional issues and collaborate with international communities. Above all, it provided a regional platform to discuss and agree on the regional human rights system.

The emergence of the OAU presented an opportunity for Africa to guarantee human rights protection. However, the only mention of human rights in the OAU Charter relates to respect of UDHR as one of OAU's purposes.¹² Whether the mention of UDHR was enough to guarantee human rights protection in new African countries depended on how the OAU pursues its objectives and purposes. However, Young-Anawaty¹³ and Mangu¹⁴ argued that the OAU showed less concern for human rights protection. This is because OAU's core human rights

⁸ The nine independent states that participated are Libya, Sudan, Liberia, Tunisia, Ethiopia, Guinea, Ghana, Morocco and United Arab Republic.

⁹ Rachel Murray, *Human Rights in Africa: From OAU to AU*, (n 6 above) 2.

¹⁰ Taslim Elias, 'The Charter of the Organisation of African Unity' (1965) 59 *American Journal of International Law*, 243.

¹¹ Charter of the OAU, adopted 25 May 1963, 47 UNTS 39; 2 ILM (1963) 766. Twenty-two of twenty-seven independent African states attended the 1961 conference. It is imperative to note that many African states regained their independence in the 1960s while several others did not get their independence until the 1970s and even up to the 1990s. For instance, South Africa-1994, Zimbabwe-1980, Guinea Bissau-1974, Eritrea-1993, and Angola-1975.

¹² Article II (1) (e) of OAU Charter.

¹³ Amy Young-Anawaty, 'Human Rights and the ACP-EEC Lomé II Convention', (1980) 13 *New York University Journal of International Law and Policy* 63.

¹⁴ Andre Mangu, *The road to Constitutionalism and Democracy in Post-Colonial Africa: The case of Democratic Republic of Congo* (PHD Thesis, Department of Constitutional and Public International Law, University of South Africa, June 2002) 262.

focus merely emphasised the principle of the self-determination of colonised African countries and the struggle against apartheid in South Africa.¹⁵ The lesson that may be gleaned from the above is that while the OAU vigorously pursued the ultimate goal to liberate colonised African states, it failed to show much commitment to ensuring UDHR protection in liberated member states.

The OAU overlooked human rights abuses in liberated member states on its strong reliance on the principle of non-interference and sovereignty.¹⁶ Although the principle of non-interference is a recognised international principle that forbids countries from interfering in the internal affairs of another country,¹⁷ this concept has the potential to reduce acts of aggression by stronger state(s). However, strict reliance on this principle would help state parties evade accountability for human rights violations and intervention from external bodies. One would agree that such strict reliance on the principle of non-interference exacerbated OAU's stance in internal activities of liberated states, thereby giving member states human rights obligations a back seat.

Human rights enjoyed low esteem in some newly independent African countries before the adoption of the African Charter. Linked to this is the fact that human rights atrocities became worse in countries with authoritarian governments

¹⁵ Aisha Abdullahi, Statement at the 5th High Level Dialogue on Democracy, Human Rights and Governance in Africa: Trends, Challenges and Prospects, 'Reflecting, Celebrating and Advancing Human and Peoples' Rights in Africa with a Special Focus on the Rights of Women' Arusha, Tanzania 23-26 November 2016, available at ><https://www.au.int/web/en/speeches/statement-he-dr-aisha-l-abdullahi-commissioner-political-affairs-african-union-commission-1>< accessed 26 June 2017.

¹⁶ Article III (3) of OAU Charter. See also, Jeremy Sarkin. 'The Role of the United Nations, The African Union and Africa's Sub-regional Organizations in dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) *Journal of African Law* 53(1), 1; Henry Steiner, Philip Alston and Ryan Goodman, *International human rights in Context: Law, Politics and Morals* (3rd edn, Oxford University Press, 2008) 1064; Oji Umuzuruike, 'The African Charter on Human and Peoples' Rights'(1983) 77 *American Journal of International Law*, 902; Oji Umuzuruike, 'The Domestic Jurisdiction Clause in the OAU Charter' (1979) 311 *African Affairs*, 197.

¹⁷ See, article III (3) of OAU Charter. This principle was also reaffirmed in the UN Friendly Relations Declaration 1970 as follows: 'no state or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal affairs of any other state. Consequently, armed intervention and all forms of interference or attempted threats against the personality of a state or its political, economic and cultural elements, are in violation of international law'. See, Friendly Relations Declaration (UN General Assembly, 1970), available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>< accessed 13 August 2016.

and internally armed crises.¹⁸ For instance, military regimes and coups, internal wars and other conflicts became manifest across the continent. Furthermore, human rights provisions were absent in some OAU member states constitutions.¹⁹ These practical consequences of OAU's position indicated why its voice was not heard amidst cases of abuse perpetrated by African leaders.²⁰

However, the submission that the OAU needed to ensure more human rights protection in the region is twofold: on the one hand, many African countries soon after independence joined the United Nations (UN) and became signatories to some UN human rights instruments such as the UDHR and the ICCPR. This implication of becoming state parties to these instruments means that they are obliged to ensure the respect of the rights therein enshrined. Secondly, there was international and local pressure for African leaders to respect human rights. In this sense, the OAU organised myriad conferences which eventually led to the emergence and adoption of the African Charter and other human rights related instruments.²¹ For example, the OAU played a dominant role in convincing the UN to set up a Liberation Committee against colonialism and apartheid, which was used to support internal struggles for independence in South Africa, Angola, Namibia, Mozambique, and Guinea.²² Other human rights related instruments adopted under the auspices of the OAU include the 1969 Convention on the

¹⁸ For instance, the 1967-1970 civil war in Nigeria and the numerous military and civilian dictators that governed several African states such as Uganda, Chad, Sudan and Mali, from the 1960s.

¹⁹ For instance, 1961 Constitution of Tanzania did not contain any human rights provisions.

²⁰ Haroub Othman, 'Africa and the Protection of Rights' (1995) 6 (1) African Law Review, 51. See Articles 2 and 3 of OAU Charter. For instance, article 2 (e) of the OAU Charter states that the purpose of the OAU is to 'promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'.

²¹ Tiyanjana Maluwa, 'International law making in the Organisation of Africa Unity: An Overview' (2000) 12 African Journal of International Comparative Law, 201. Human rights related treaties and conventions enacted by the OAU include OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969; African Charter on the Rights and Welfare of the Child 1990; and, the Court Protocol 1998.

²² Vincent Nmejielle, *The African Human Rights System: Its Laws, Practice and Institutions* (Martinus Nijhoff Publishers, 2001)70.

Specific Aspects of Refugee Problems in Africa,²³ the Lusaka Manifesto of 1969,²⁴ and the Grand Bay Declaration of 1999. For instance, one could, however, argue that the 1969 Refugee Convention was essential given the several internal political conflicts, wars, dictatorial leadership and military coups in many African countries, thereby leading to an increase in the number of people seeking refuge and asylum from the 1960s. Despite these efforts, human rights protection and enforcement under the OAU was inadequate. Therefore, the next opportunity for Africa to clarify the scope of its human rights, thereby dealing with the concerns raised against the OAU presented itself when African governments embarked on a journey to transform the OAU to AU.²⁵

4.1.2 The transformation of the OAU to AU

The transformation of the OAU to AU²⁶ presented another opportunity for Africa to expand its regional human rights scope. The transformation became possible following the African leaders' official launch of the AU in July 2002 after their decision in September 1999 to replace the OAU with a new body in order to realise Africa's potential.²⁷ The emergence of the AU also demonstrates an attempt to reposition Africa's desire to boost international human rights law principles in the region.²⁸ A key reason for this is that the OAU Charter did not adequately recognise human rights as its principles and objectives. This may have contributed to the poor human rights situation in many OAU member states. However, it should be noted at the outset that the AU Constitutive Act incorporates a vast number of

²³ This was done to address the increasing refugee crisis within the region from countries at war and dictatorship such as Algerian war 1954-1962; Nigeria civil war 1967-1970; violence in Congo, Rwanda and Burundi; refugees from Portuguese-administered Angola, Mozambique and Guinea-Bissau; and, Ewe refugees from Ghana, amongst many others. See also, Rachel Murray and Amanda Lylyod, 'Institutions with Responsibility for Human Rights Protection under the African Union' (2004) 48 (2) *Journal of African Law*, 167.

²⁴ This Manifesto renewed African leaders' faith in the equality of all men, human dignity and non-discrimination.

²⁵ Kindiki Kithure, 'The Normative and Institutional Framework of the African Union relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal' (2003) 3 *African Human Rights Law Journal*, 99.

²⁶ The AU was founded on 26 May 2001. It currently has 55-member States. South Sudan joined the African Union in 2011 while Morocco re-joined in January 2017 after 33 years withdrawal from the regional body due to the regional body's recognition of Western Sahara.

²⁷ African Union, *About the African Union*, available at > <https://au.int/en/overview>< accessed 12 April 2019.

²⁸ Vincent Nmehielle, 'Development of the African Human Rights System in the Last Decade' (2004) 11 (3) *Human Rights Brief*, 6.

human rights provisions as part of its objectives and principles.²⁹ For example, while article 3 (h) recognises the promotion and protection of human rights in accordance with the African Charter and other relevant human rights instruments, article 4 (m) recognises the respect for democratic principles, human rights, the rule of law and good governance as part of the cardinal principles of the AU.

More specific Constitutive Act provisions with human rights connotation include the promotion of social justice to ensure balanced economic development,³⁰ respect for the sanctity of life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities,³¹ promotion of gender equality;³² and, condemnation and rejection of an unconstitutional change of governments.³³ Furthermore, while article 30 provides that any governments that come into power through an unconstitutional means shall be suspended from the Union, article 23 further imposes sanctions on member states that fail to comply with the decisions and policies of the Union.³⁴ The implication is that human rights have assumed a more prominent position in the operation, purpose and principles of the regional organisation.

From the foregoing, it is evident that the AU has assumed more in its role of ensuring the adequate protection of human rights in the continent. For instance, the Constitutive Act empowers the AU to intervene in the internal matters of member states in respect of grave circumstances such as genocide, crimes against humanity and war crimes.³⁵ In this sense, the AU has over time intervened in

²⁹ Articles 3 and 4 of the Constitutive Act of the African Union. See, Tiyanjana Maluwa, 'The Constitutive Act of the African Union and Institute Building in Post-Colonial Africa' (2003) 16 *Leiden Journal of International Law*, 157.

³⁰ Article 4 (n) of the Constitutive Act.

³¹ Article 4 (o) of the Constitutive Act.

³² Article 4 (l) of the Constitutive Act.

³³ Article 4 (p) of the Constitutive Act.

³⁴ It is worthy to note that the AU on 25th March 2013 suspended the Central African Republic (CAR) from all AU activities. The Central African Republic was readmitted into the AU three years after in 2016, after it completed its transitional process and restored its constitution. Sudan was suspended in June 2019 when the military failed to hand over power to a civilian government after ousting President Al-Bashir.

³⁵ Article 4 (h) of the Constitutive Act of the AU. See also, Carolyn Martorena, 'The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights' (2008/2009) *George Washington International Law Review*, 583.

member states' internal conflicts on the strength of article 4 (h) of the Constitutive Act.³⁶ Indeed, such remarkable strides have helped de-escalate internal crises as well as reduce potential gross human rights violations. Therefore, it can be argued that this position was assumed in order to improve the human rights situations in member states.

However, the transformation of OAU to AU has not entirely erased insincerity and lack of political will in condemning gross human rights abuses in many states.³⁷ AU member states continue to commit widespread human rights abuses with little or no interference from the AU. For example, the recent suppression and killing of over one hundred protesters in Sudan following the call for a change of government between May and June 2019. Given situations like this, Nsongurua had earlier argued that AU human rights commitment is not meaningfully different from the OAU.³⁸ Likewise, it is submitted that this argument cannot be entirely correct because the AU has made many strides towards repositioning human rights in the continent such as strengthening its sanction regime in 2018³⁹ and the enactment of the Protocol on the Statute of the African Court of Justice and Human Rights 2008.⁴⁰ Without a doubt, the AU has more work

³⁶ Some of the states where the AU has interfered are Sudan 2006; CAR 2016; South Sudan 2018; Cote d'Ivoire 2003, and Somalia 2018. In 2012, the AU suspended Mali following a military coup that ousted President Toure. Other countries that have at some point faced suspension include Egypt, Guinea-Bissau, and Madagascar.

³⁷ See, for instance, the human rights violations committed by several African leaders in recent times. Countries where leaders have recently committed widespread abuse without much interference from the AU include South Sudan, Sudan, Ethiopia, and Benin after the 2019 election. See also, The Guardian, 'Burundi President threatens to fight African Peace keepers' available at ><https://www.theguardian.com/world/2015/dec/30/burundi-president-pierre-nkurunziza-threatens-fight-african-union-peacekeepers>< accessed 18 March 2019. For example, the threat by President Nkurunziza of Burundi to use state military against AU Peacekeepers amidst serious allegation of human rights abuses.

³⁸ Nsongurua Udombana, 'Can a Leopard change its spots? The African Union Treaty and Human Rights (2002) 17 Australian University Law Review, 1177.

³⁹ African Union, African Union strengthens its sanctions regime for non-payment of dues, available at ><https://au.int/en/pressreleases/20181127/african-union-strengthens-its-sanction-regime-non-payment-dues>< accessed 13 April 2019. What the AU has done is that it has agreed to easily impose sanction on state parties whenever they fail to meet the regional obligations under the AU Constitutive Act. Whether this will enhance the realisation of human rights enforcement depends on the nature of sanctions to be imposed on member states.

⁴⁰ The African Court of Justice and Human Rights merges the African Court on Human and Peoples Rights and the African Court of justice and will come into force after 15 member states ratification. So far, only 7 African states have ratified the Protocol and they are Mali, Liberia, Libya, Gambia, Congo, Burkina Faso, and Benin.

to do in ensuring that African states abide by their African Charter obligations and be proactive in reducing human rights violation in its member states.⁴¹

4.1.2 Relevant AU organs to human rights protection

From the outset, it should be recalled that this section is examining the role of the regional organisation in realising effective enforcement of African Charter civil and political rights. This is necessary in order to illustrate some of the regional challenges in the enforcement of African Charter rights and freedoms and to determine whether the transformation of the OAU to AU has resolved the entire organisational challenges in human rights enforcement. The AU has several organs with responsibilities for its key programme areas.⁴² The organs include the Assembly of the Union, the Executive Council of Ministers, Pan African Parliament, Commission, Permanent Representative Committee, Peace and Security Council, Economic Social and Security Council, and the Judicial and Human Rights Institutions comprising of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples Rights and the African Committee of Experts on Human and Peoples Rights. Many of these organs seem unrelated to human rights protection. However, a few AU organs explicitly bear responsibility under the African Charter and its Protocol, and they are the Assembly of the Union and the Executive Council of Ministers.

4.1.2.1 AU Assembly

The Assembly of the Union (former AHSG) is the supreme organ of the AU and is composed of Heads of State and Government. The Assembly of the Union plays a crucial role in the enforcement of human and peoples' rights under the African Charter and the Court Protocol. For instance, it is involved in consideration of the annual reports of the African Commission,⁴³ the follow-up of African Commission

⁴¹ Magnus Kilander, 'Human Rights Developments in the African Union during 2014' (2015) 15 African Human Rights Law Journal, 537.

⁴² Key programme areas include conflict resolution, peace and security; agricultural development; democracy, law and human rights; education, science and technology; and, gender equality and development.

⁴³ Article 54 of the African Charter.

findings,⁴⁴ the decision concerning publications of African Commission findings,⁴⁵ amendment of the African Charter,⁴⁶ and may request any other human rights related task to be performed by the Commission.⁴⁷ The Constitutive Act gives the AU Assembly more human rights enforcement related functions than the Charter of the OAU.⁴⁸ For example, the Assembly can suspend a member state from the AU in instances where a government comes into power through unconstitutional means⁴⁹ or impose sanctions for non-compliance with the decisions and policies of the Union.⁵⁰ This implies that if a member state of the AU fails to comply with regional responsibilities or allows a change of legitimate government, as was the case under the auspices of the OAU, the AU is bound to intervene and use its powers to deal with such a state. Furthermore, one would expect that if these provisions are adequately implemented, the AU will not compromise on democratic tenets as condoned by the OAU in the 1980s and 1990s when military coups were rampant in the continent.

The role of the AU Assembly indicates that neither the African Commission nor the African Court can circumvent the position of the AU Assembly if the African Charter rights are to be enjoyed in the region. However, the question here is not whether the AU Assembly play a crucial role in realising effective human rights enforcement but whether it has applied its position to realise effective enforcement of human rights in Africa. In answering this question, one would need to analyse human rights situations in the region and how the AU has responded. For instance, the AU suspended Sudan in June 2019 following the killings of protesters demanding that the military should hand over to a civilian government. Although the AU is yet to use its position to influence member states compliance with African Court and African Commission decisions or request the amendment of the African Charter, its late or little interference to stop human rights abuses in member states

⁴⁴ Article 58 of the African Charter.

⁴⁵ Article 59 of the African Charter.

⁴⁶ Article 68 of the African Charter,

⁴⁷ Article 45 (4) of the African Charter.

⁴⁸ Vincent Nmehielle, 'Development of the African Human Rights System in the Last Decade' (n 28 above).

⁴⁹ Article 30 of the Constitutive Act.

⁵⁰ Article 23 of the Constitutive Act.

is discouraging. Therefore, with widespread human rights abuses still going on in many African countries such as CAR, Mali, Somalia, Benin, Cameroon, Burundi, Sudan and South Sudan, to mention a few, the AU Assembly cannot be said to have clearly applied its powers.

4.1.2.2 Council of Ministers

The Executive Council of the African Union comprises ministers designated by the governments of member states.⁵¹ Although there is no mention of the Council of Ministers in the African Charter, the Court Protocol mandates this body to monitor the execution of African Court decisions on behalf of the AU Assembly.⁵² This specific role is a complete departure from the approach in the African Charter but similar to the European system of monitoring ECtHR decisions. However, the fundamental question posed is whether the Council of Ministers has adequate enforcement power since it acts on behalf of the AHSG. To answer this question, suffice it to add that though state parties have complied with a few African Court judgments, there is no evidence of the involvement of the Council of Ministers in persuading compliance.⁵³ Therefore, this role has not yielded the expected results in human rights enforcement in the region.

4.2 The African Commission on Human and Peoples' Rights

Having examined the role of the OAU in African Charter development and enforcement, this section will discuss the African Commission, a creation of the OAU for African Charter promotion, protection and interpretation. This section explores the arguments concerning the role of the African Commission in realising effective enforcement of African Charter civil and political rights. In this light, it is, of course, essential to consider the uncertainties concerning the mandate of the African Commission as well as the special mechanisms that support the African Commission to actualise its mandate. Therefore, this section is relevant and

⁵¹ Article 10 of the AU Constitutive Act.

⁵² Article 29 (2) of the AU Constitutive Act.

⁵³ Executive Council 34th Ordinary Session, *Activity Report of the African Court on Human and Peoples' Rights* (February 07-08 2019) available at > <http://en.african-court.org/images/Activity%20Reports/Activity%20report%20January%20-%20December%20%202018.pdf>< accessed 06 May 2019.

connected to human rights discussion in Africa because its mandate and structure make it a cornerstone to test the regional enforcement of human rights and state party voluntary compliance with decisions.

The African Commission, a body established by the African Charter consists of 11 members chosen from amongst African personalities with high reputation, morals, integrity, and impartiality and sound knowledge of human and peoples' rights.⁵⁴ The members of the African Commission serve in their personal capacity⁵⁵ for a term of 6 years.⁵⁶ The Assembly of African Heads of State and Government elect the Commissioners by secret ballot from nominees forwarded by State Parties, and the Commission will not include more than one national of the same country.⁵⁷ The business of the Commission is carried out during sessions; however, while the Ordinary Session is held twice a year, the African Commission may meet, if need be, in Extraordinary Sessions.⁵⁸ This implies that the Commission's seating arrangement is a part-time method. One would have thought that being the sole enforcement institution, a full-time seating pattern should have been considered given the widespread human rights abuses in many African countries at the time of adopting the African Charter.

Furthermore, the African Commission is a quasi-judicial institution. This is because the Commission only has a partly judicial character and in effect cannot pronounce a binding decision on parties. The impact of adopting a single quasi-judicial institution in the absence of a judicial institution is colossal in the efforts to carry out its mandate and in its relationship with state parties. For instance, this can be construed to form part of the reasons why state parties do not comply with its recommendations. Arguably, if the African Charter had intended to establish a Commission with a mandate to issue a binding decision, a court would

⁵⁴ Article 30 and 31 of the African Charter. The African Commission was inaugurated on 2nd November 1987.

⁵⁵ Article 31 (2) of the African Charter.

⁵⁶ Article 36 of the African Charter.

⁵⁷ Article 33 of the African Charter.

⁵⁸ The first session of the African Commission took place on 2nd November 1987 in Ethiopia while the first extraordinary session took place 13-14 June 1989 in The Gambia. In addition, the Commission had held 63 Ordinary Sessions and 24 Extraordinary Sessions as at November 2018. See generally, the website of the African Commission, available at > <http://www.achpr.org/sessions/>< accessed 23 May 2017.

have been unnecessary. Therefore, in Bekker's view, Africa's desire for a single quasi-judicial human rights institution was primarily to deflect international and local pressure and avoid a system that could hold them accountable.⁵⁹ Whether Bekker's opinion is correct depends on the relationship between the Commission and state parties towards realising effective enforcement of African Charter rights.

It is clear that recognising the Commission in the African Charter as the sole enforcement institution exposed some shortcomings in the African human rights system.⁶⁰ Indeed, it exposed that the African Charter enforcement arrangement is not perfect. This is because if the region had intended to have an effective enforcement system, a judicial institution would have accompanied the Commission. However, having an imperfect enforcement arrangement from the outset lays a faulty foundation for voluntary state party compliance with African Commission recommendations. Significantly, non-compliance with the Commission's decisions makes it meaningless and fruitless for victims as well as a complete disservice by states.⁶¹ The implication, therefore, is that it reduces the advantages of implementation, such as strengthening the protective mandate of institutions and impacting on the lives of victims whose rights have been abused.⁶²

One could, however, question whether the Commission has the opportunity to carry out its functions optimally without interference. According to articles 58 and 59, some of the Commission's duties are influenced and determined by the

⁵⁹ Gina Bekker, 'The African Commission on Human and Peoples' Rights' (2013) 13 (3) *Human Rights Law Review*, 499; Gina Bekker, 'The African Court on Human and Peoples' Rights; Safeguarding the Interest of African States' (2007) 52 *Journal of African Law*, 151.

⁶⁰ Richard Gittleman 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law*, 667; Jean-Bernard Marie 'Relations between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions, A Comparison and Appraisal' (1987) 20 *Vanderbilt Journal of Transnational Law*, 585; Jack Donnelly 'Human Rights and Western Liberalism' in Abdullahi An-Naim and Francis Deng (eds), *Human Rights in Africa: Cross Cultural Perspectives* (Brooking Institution Press, 1990) 31.

⁶¹ Rachel Murray and Elizabeth Mottershaw, 'Mechanisms for the Implementations of decisions of the African Commission on Human and Peoples' Rights (2014) 36 (2) *Human Rights Quarterly*, 349.

⁶² See generally, 'Statement on the implementation of the decision of the Africa Commission 292/04 *IHRDA v Angola*' available at > <https://www.ihrda.org/2016/04/ihrdas-statement-on-implementation-of-the-african-commissions-decision-in-communication-29204-ihra-angola-58th-ordinary-session-of-the-commission/> accessed on 18 June 2019.

AHSG.⁶³ The impact of such interference had at some point reduced the capacity of the Commission to effectively realise its enforcement mandate when it was making declaratory judgments and delaying in making public its annual reports.⁶⁴ One would have thought that since the Commission was the sole enforcement institution prior to the adoption of the Court Protocol, reducing further interference that impacts on effective enforcement of the African Charter rights would have been ideal.

However, an opportunity to reduce such interference and enhance its capacity to enforce the African Charter presented itself when the Commission, relying on article 42 (2) of the African Charter, adopted the Rules of Procedure of the African Commission on Human and Peoples' Rights at its 47th Ordinary Session in 2010. Although this rule was adopted after the emergence of the African Court, it allowed the Commission to take a broad approach in ensuring that African Charter rights are effectively realised. The Rules of Procedure of the African Commission strengthen enforcement in two significant ways. First, it recognises a working relationship between the African Commission and the African Court, which allows both institutions to transfer cases amongst themselves. This relationship enables the Commission to refer a complaint to the African Court in circumstances where a state has not complied or is unwilling to comply with its recommendation.⁶⁵ Although this position reaffirms the quasi-judicial nature of the Commission which impacts on the binding nature of its recommendations, it provides an opportunity for the Commission to seek a binding decision from the Court. Under the Rules, the Commission can also transfer a complaint to the African Court if it is convinced that a situation in a member state constitutes a

⁶³ Article 58 requires the Commission to draw the attention of the AHSG to any situation where it finds serious human rights violation, without suggesting that the Commission can on its own, make recommendations. On the other hand, article 59 mandates the Commission to make its findings confidential until it gives approval for them to be made public.

⁶⁴ Rachel Murray and Elizabeth Mottershaw, 'Mechanisms for the Implementations of Decisions of the African Commission on Human and Peoples' (n 61 above) 349; Zeray Yihdego. 'The African Union: Founding Principles, Frameworks and Prospects'. (2011) 17 (5) *European Law Journal*, 568; Manuel Manrique, et al., 'Human Rights Protection Mechanisms in Africa: Strong Potential, Weak Capacity' (2013, European Parliament Policy Briefing) Available at > [http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491487/EXPO-DROI_SP\(2013\)491487_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491487/EXPO-DROI_SP(2013)491487_EN.pdf)< accessed 18 March 2019.

⁶⁵ Rule 118 (1) of the Rules of Procedure of the African Commission.

severe and massive violation of human rights under article 58 of the African Charter.⁶⁶ This implies that the Commission can circumvent the article 58 purpose which requires it to draw the attention of the AHS. Secondly, it recognises a follow-up procedure where state parties are expected to report to the Commission on steps taken to comply with the Commission's decision within 180 days of the recommendation. Whether this procedure has enhanced state party compliance with African Commission recommendations, it is clear that the Commission used the opportunity in its Rules to close another major gap in the African Charter. However, state parties have over time declined to comply with the Commission's recommendations.

4.2.1 The mandate and functions of the African Commission

Article 45 explicitly mandates the African Commission to promote, protect, and interpret the African Charter as well as carry out other functions assigned to it by the AHS. The distinction between the article 45 mandate when compared with the European and American regional system, is broad. First, the African Commission is today the only regional Commission with a protective mandate even with the existence of a regional court. Suffice it to add that before the European Commission became obsolete in 1998, one of its principal functions was to assist the European Court in considering whether petitions were admissible by the ECtHR.⁶⁷ Likewise, the functions of the American Commission are limited to the promotion of rights through awareness, recommendations to governments, receiving information on state measures in matters of human rights, and advisory services to states.⁶⁸ However, analysis of the African Commission mandate is necessary in order to determine whether the African Commission is capable of ensuring civil and political rights enforcement.

⁶⁶ Rule 118 (3) of the Rules of Procedure of the African Commission.

⁶⁷ Created by Article 19 of the Convention alongside the Court. It also had an intermediary role shielding the Court from frivolous cases. It would refer serious cases to the Court-the only body with powers to issue binding legal decisions. See Dana Neacsu, 'European Human Rights System' (2015) available at > http://library.law.columbia.edu/guides/European_Human_Rights_System< accessed on 18 March 2019.

⁶⁸ Article 41 of the American Convention.

4.2.1.1 Promotional mandate and activities of the African Commission

The first mandate of the African Commission is to promote the African Charter through its numerous activities. This is because good promotion of human rights impacts on human rights protection; thereby, the Commission must take its promotional activities seriously. Indeed, promotional activities are a reliable means of enhancing the knowledge needed to realise effective enforcement. Such activities include undertaking studies and research, organising seminars and conferences, disseminating information, formulating principles and making recommendations to governments, and, cooperating with other African and International Human Rights Institutions.⁶⁹ The Commission can receive state party reports to enable it to examine the steps undertaken to recognise and enforce the Charter rights.⁷⁰ The duty to receive state party reports seems the most important promotional activity that assists the realisation of effective enforcement of the Charter rights. This is because it allows the Commission to interact with states concerning the domestic efforts adopted to ensure that the Charter rights are given effect, and examine whether state commitment is adequate to ensure implementation, as well as monitor state party compliance with decisions.

4.2.1.1.1 State reporting system

It is clear from the preceding that the state reporting system is vital to the African Commission mandate to promote and protect the African Charter. Therefore, article 62 mandates each state party to submit reports every two years on the legislative and other measures taken to give effect to the Charter. Although article 62 fails to mention which body receives the reports, the Commission has over time and in practice accepted this responsibility. Such practice under the African Charter is similar to the ICCPR system,⁷¹ which requires state parties to submit reports on measures taken to give effect to the treaty rights and freedom. However, the text of article 62 of the African Charter is brief when compared to the lengthy and procedurally text of the ICCPR. For instance, while the ICCPR

⁶⁹ See article 45 (1) (a) (b) and (c) of the African Charter.

⁷⁰ Article 62 of the African Charter.

⁷¹ Article 40 of ICCPR.

requires state parties to 'report on the measures' adopted, the African Charter requires state parties to 'report on the legislative and other measures' taken. Therefore, such an obvious difference signposts the African Charter's emphasis on legislative measures in addition to other measures suitable to state parties.

The Commission's function to receive state reports is essential from both the enforcement and promotional perspectives. This function allows the Commission to access and advise states on African Charter implementation efforts.⁷² Firstly, the reporting system directly helps in advancing human rights enforcement through the recommendations the African Commission make to state parties.⁷³ Secondly, the reporting system is the backbone of the Commission concerning its promotion and protective mandate.⁷⁴ However, this procedure should not be wholly relied upon by the Commission in assessing state party commitment to African Charter rights and freedoms. This is because the reporting system is based on self-criticism and good faith, which potentially requires a strong state political will to evaluate itself.⁷⁵

Indeed, some states have not taken their reporting obligations seriously. For instance, as at March 2019, only fourteen states are up to date with reporting;⁷⁶ six states have never submitted,⁷⁷ while eighteen states have more than three reports overdue.⁷⁸ Therefore, irregular or outright non-submission of state reports is amongst the significant challenges impeding the African

⁷² Morris Mbondenyi, *International Human Rights and their Enforcement in Africa* (Law Africa Publishing, 2011) 303.

⁷³ For example, the Commission may recommend that states institute a moratorium on the death penalty. See African Commission Concluding Observation and Recommendations on the Initial Periodic Report of Botswana, May 2010, para 53.

⁷⁴ Badawi Elsheikh, 'The African Commission on Human and Peoples Rights: Prospects and Problems' (1989) 7 *Netherlands Quarterly of Human Rights*, 281.

⁷⁵ James Crawford, 'The UN Human Rights Treaty System: A System in Crisis' in Philip Alston and James Crawford (eds) *The Future of Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 2.

⁷⁶ The fourteen states are Angola, Botswana, Cote d'Ivoire, DRC, Eritrea, Kenya, Mali, Mauritius, Namibia, Niger, Nigeria, Rwanda, South Africa, and Togo.

⁷⁷ Comoros, Equatorial Guinea, Guinea Bissau, Sao Tome and Principe, South Sudan and Somalia.

⁷⁸ 44th Activity Report of the African Commission on Human and Peoples Rights, available at > http://www.achpr.org/files/activity-reports/44/actrep44_2018_eng.pdf accessed 05 March 2019.

Commission mandate.⁷⁹ However, the Commission has introduced a country-specific concluding observation procedure which demands that state reports include responses to main areas of concern and the recommendations outlined in the Commission's concluding observation.⁸⁰ This approach was adopted to ensure state parties respond on specific areas of interest to the Commission and to encourage more state submission of reports. However, one can argue that it still has not changed state attitude to the submission of reports.

4.2.1.2 Protective mandate of the African Commission

The African Commission has the mandate to protect human and peoples' rights under the conditions laid down by the Charter.⁸¹ Protection means the safety or benefit that a government or an organisation affords to citizens or individuals.⁸² However, while article 45 (2) of the African Charter fails to illustrate how the Commission can exercise this mandate, chapter three of the African Charter highlights the procedure of the Commission in dealing with communications or complaints.

To carry out its protective mandate, the Commission receives and considers complaints or communications alleging human rights violations and makes recommendations after its findings. The communication procedure provides the opportunity for victims of human rights abuse to seek redress against their violators at the Commission. This procedure, in addition, outlines the criteria to be met by a complainant before the Commission can hear a claim. In particular, the Commission's function in determining complaints include ascertaining the

⁷⁹ Both state parties and the Commission do not take the reporting obligations under article 62 seriously. For instance, the Commission is yet to adopt the use of sanctions provided under the AU Constitutive Act to encourage state party reporting and the few days it uses during ordinary sessions to cover its protective, promotional and state reports potentially speaks volumes of the quality of work it does.

⁸⁰ See, The Federal Ministry of Justice, *Nigeria's 6th Periodic Country Report: 2015-2016 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria*, (Abuja, August 2017) available at > http://www.achpr.org/files/sessions/62nd_os/state-reports/6th-2015-2016/nigeria_state_report_6th_2015_2016_eng.pdf< accessed 05 March 2019.

⁸¹ Article 45 (2) of the African Charter.

⁸² Lexicon Online Dictionary definition of 'protection', available at > <https://www.lectlaw.com/def2/p191.htm>< accessed 06 March 2019.

facts, determining admissibility and jurisdiction,⁸³ notifying the state concerned,⁸⁴ making necessary investigations,⁸⁵ making its findings known to the parties and the AHSG,⁸⁶ and in case of failure to comply with its findings, instituting an action in the African Court.⁸⁷ What must be borne in mind is that the protective mandate of the Commission applies to all cases where the breach of the Charter rights is alleged against state actors. Specifically, articles 47-54 cover inter-state communications while articles 55-60 cover 'other communications'.

4.2.1.2.1 Communication from states

The African Charter inter-state provision is similar to the ECHR⁸⁸ and many UN human rights treaties, including the ICCPR.⁸⁹ The African Charter recognises two procedures for inter-state communication or settlement under articles 47-54 of the African Charter. Firstly, the African Charter envisages a situation where state parties may want to settle their dispute through a friendly or bilateral negotiation before approaching the Commission under article 47. In such circumstances, a state party may communicate in writing to the other member state and draw its attention to the matter; also, such communication will be addressed to the Secretary-General of the OAU and the chairman of the Commission.⁹⁰ However, the Commission in *DRC v Burundi, Rwanda, and Uganda* stated that while the procedure under article 47 is not mandatory, the requirement to inform the OAU Secretary-General is also not obligatory. Although this gives state parties the opportunity to report or request another state to abide by the African Charter obligations, especially when such violations are carried out in another/respondent state party, it also seem controversial because a state claim may not wholly

⁸³ Article 56 of the African Charter.

⁸⁴ Article 57 of the African Charter.

⁸⁵ Articles 46 and 51 of the African Charter.

⁸⁶ Articles 52 and 54 of the African Charter.

⁸⁷ Rule 118 of the Rules of Procedure of the African Commission.

⁸⁸ Article 33 of the ECHR.

⁸⁹ Under the ICCPR unlike the ECHR, the procedure is generally optional and both states must recognise the competence of the treaty implementation body to receive such communication.

⁹⁰ Article 47 and 48 of the African Charter. See also, Rule 88 of the Rules of Procedure of the African Commission. This communication shall be addressed to the Secretary-General of the OAU and the Chairman of the Commission.

capture the entirety of individual victims whose rights have been violated by acts of one's state or another state.

State parties to the African Charter have an unfettered legal standing to institute an obligatory state versus state communication. For instance, the procedure under article 49 allows a state party to refer a case against another member state directly to the Commission by addressing a communication to the Chairman, Secretary-General of the OAU and the country concerned.⁹¹ The concept of obligatory state versus state communication is correct given the absence of any admissibility requirement which a state party may meet before invoking this procedure. Besides, this concept gives state parties the power to institute action against another state when there is a violation of any provision of the Charter. In addition, this procedure provides a platform for state parties to seek justice from another where substantial violations occur, and it is immaterial if the citizens of the complainant states are victims of such reported abuse. Therefore, this procedure has the potential to enhance human rights protection if optimally adopted by state parties on behalf of individuals within the African continent. For instance, governments whose citizens are victims of xenophobic attacks in other countries or where non-nationals are illegally expelled may institute an action and seek redress on behalf of their citizens. It presents a link for AU member states to report issues in another country such as the May/June 2019 cases of abuse in Sudan.

One could, however, question whether inter-state communication is adequately invoked under the African human rights system. Comparing the number of inter-state communications to the human rights abuses going on in many African countries, it is correct to agree that this procedure has been poorly invoked. For instance, inter-state communication procedure has only appeared in three communications at the African Commission.⁹² Such an insignificant number

⁹¹ It is noteworthy to mention that the Rules 93-101 of Procedure of the African Commission relating to interstate communications do not make a clear distinction between cases brought under article 47 and 48 on the one hand, and article 49 on the other hand.

⁹² See Communication 227/99, *Congo v Burundi, Rwanda, and Uganda*; communication 422/12 – *The Sudan v South Sudan*; communication 478/14 – *Djibouti v Eritrea*.

of communications in a continent where African governments, through their agents, are continually violating human rights, and where non-nationals are widely targeted for various human rights violations is discouraging and unimaginable. Whether such low usage is because states see the inter-states procedure as a hostile and quite drastic response by another state desiring to address human rights concerns,⁹³ the story is not the same under the European system. For instance, the inter-state communication procedure under the ECHR shares in the success story of the Convention because the numerous inter-state cases litigated by the European Court has underlined its continued relevance.⁹⁴

From the foregoing, it is suggested that inter-state communication potentially affects a large number of individuals because it provides human rights protection to the group as well as individuals. For example, the facts in *DR Congo v Burundi, and Rwanda v Uganda*, the first inter-state communication before the Commission concerns the mass killings of civilians by soldiers, the deliberate spread of HIV/AIDS amongst the local population, rape cases, mass looting of civilian property and natural mineral wealth in the region, and forced movement into 'concentration camps'.⁹⁵ What is clear from this communication is that the complainant state party sought collective redress against the human rights violations of its citizens. In this case, the Commission found that the occupation of part of the complainant territory constitutes a violation of the Charter and further urged Rwanda, Uganda and Burundi to vacate DRC territory. This decision further implies that the interstate procedure has the potential to protect weaker countries and its citizens from the hostile acts of another while also advancing human and peoples' rights enforcement.

⁹³ Scott Lekie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 Human Rights Quarterly, 249.

⁹⁴ Isabella Risini, *The Inter-State Application under the European Convention of Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Martinus Nijhoff, 2018) 1. For example, between 2006 and 2017, Georgia has instituted three applications against Russia using the inter-state procedure at the European Court on Human Rights.

⁹⁵ Communication 227/99, *DR Congo v Burundi, Rwanda, and Uganda*.

4.2.1.2.2 Individual (other) communication

Apart from inter-state communication, article 55 permits the African Commission to receive 'other communications'. Although the Charter fails to define the term 'other communications', the text of article 55 (1) suggests that communications other than state parties' communication. This article shows that the Charter does not aim to restrict access to the Commission to only state parties. In other words, it suggests that the Commission can consider complaints from individuals, groups, or NGOs subject to the admissibility requirement in article 56 of the Charter. Suffice it to add that while the Commission has received well over 400 complaints since its inception in 1987, nearly all are from individuals and NGOs.⁹⁶ This implies that the analysis of 'other communications' under article 55 and 56 is essential to the Commission interpretation and enforcement of civil and political rights.

It is clear from case law jurisprudence that the Commission is expected to consider communications from individuals and NGOs without requiring the complainant to be a victim or family member of the victim.⁹⁷ Although this approach indicates that the African Commission is more liberal when compared to its American counterpart which only allows NGOs recognised in member states to appear before the American Commission,⁹⁸ there is no guarantee that every communication received by the African Commission will be heard because communications are considered only if they get simple majority support from Commissioners.⁹⁹ Nevertheless, only NGOs that have acquired observer status with the African Commission can submit a communication to the Commission.¹⁰⁰ Since the interpretation of articles 55 and 56 are clear about individuals and NGOs, it follows that redress from individual and NGO communications remain one of the

⁹⁶ See the website of the African Commission and African Human Rights Case Law Analysis.

⁹⁷ *SERAC v Nigeria*, Communication 155/96, para 49.

⁹⁸ See article 44 of the American Convention.

⁹⁹ Article 55 (2) of the African Charter.

¹⁰⁰ Hence, as of March 2019, a total number of NGOs with Observer Status with the African Commission is 518.

main achievements of the Commission even with the legal hurdles in meeting some of the admissibility requirement under article 56.¹⁰¹

4.2.1.2.2.1 Admissibility requirement under individual communication procedure
Admissibility is the bedrock of the Commission's protective mandate for individuals and NGOs complaints, and is enshrined in article 56 of the African Charter.¹⁰² Admissibility sets the machinery of the African Commission in considering 'other communications' in motion.¹⁰³ It follows that the requirement under article 56 is a mandatory prerequisite for African Commission jurisdiction in communications before it.¹⁰⁴ In other words, it acts as a screening and filtering mechanism for the Commission while also emphasising the principles of sovereignty and regional supervision.¹⁰⁵ Indeed, admissibility mainly determines enforcement because, without it, the African Charter rights cannot be tested and interpreted by regional institutions.

4.2.1.2.2.1.1 Name of the author

The first admissibility requirement under article 56 (1) is that the name of the author must be indicated, even if they request anonymity. The name of the author in this circumstance is the name of the complainant and must not be the name of the victim.¹⁰⁶ In *World Organisation against Torture et al. v Zaire*, the Commission emphasised that the author need not be the victim of the violations complained

¹⁰¹ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7 *International Human Rights Law Review*, 1.

¹⁰² Rule 106 of the Rules of Procedure of the African Commission.

¹⁰³ Once the communication is declared admissible, the parties are notified of the outcome. See, Rule 107 of the Rules of Procedure of the African Commission. However, proceedings commence when the complainant submits observations on merit within 60 days and which the Commission transmits to the concerned state for its written observations. See, Rule 108 of the Rules of Procedure of the African Commission.

¹⁰⁴ Rule 106 of the Rules of Procedure of the African Commission. See, article 56 (1) – (7) of the African Charter; Communication 338/07 – *SERAP v Nigeria* (2010) ACHPR para 43, and Communication 284/03 - *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* (2009), para 81.

¹⁰⁵ Frans Viljoen, 'Admissibility under the African Charter' in Malcome Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge University Press, 2002) 62.

¹⁰⁶ *FIDH, National Human Rights Organisation (ONDH) and Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Senegal*, Communication 304/2005.

about nor their family or even person authorised by the victims.¹⁰⁷ In this regard, any individual or NGO with observer status before the Commission can submit a complaint on behalf of victims.¹⁰⁸ It follows that access to the Commission would be restricted if requirements concerning authorship are not met by a complainant irrespective of the manner of abuse suffered by such a victim. By this ruling, the Commission removes any iota of strict *locus standi* requirement.

The author must also not reside or operate within the continent. The underpinning idea is that international NGOs based outside Africa can submit communications to the Commission.¹⁰⁹ However, the Commission has encouraged authors to include their address, although this requirement is not expressly inserted under article 56 (1). This approach was highlighted in *Tanko Bariga v Nigeria*, where the Commission averred that even though article 56 (1) did not extend authorship to include the address, this has become necessary to ensure communication between the Commission and the complainant.¹¹⁰ This is in addition to the Commission agreeing that the author's address is crucial to maintaining a degree of specificity concerning the victim.¹¹¹ Ultimately, the inclusion of the address in authorship has the potential to promote effective monitoring and follow-up by the Commission. It gives the Commission requisite details to follow up on complainants in order to monitor state party compliance in line with Rule 118 of its Rules of Procedure.

4.2.1.2.2.1.2 Communication must be compatible with OAU Charter or African Charter

A complaint will be declared incoherent and inadmissible under article 56 (2) if it is not compatible with the African Charter or the OAU Charter.¹¹² In other words, it suggests that violations outside the purview of the African Charter or the OAU

¹⁰⁷ *World Organisation against Torture et al v Zaire*, Communication 25/89. See also, Rachel Murray, 'Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 420.

¹⁰⁸ Communication 31/89, *Maria Baez v Zaire*.

¹⁰⁹ For instance, *International PEN v Burkina Faso*, communication 22/88.

¹¹⁰ Communication 57/91 - *Tanko Bariga v Nigeria*.

¹¹¹ Communication 104/94-109/94_126/94 - *Centre of the Independence of Judges and Lawyers v Algeria*.

¹¹² Communication 57/91- *Tanko Bariga v Nigeria*.

Charter would not be heard. However, reading article 56 (2) together with article 60 which requires the Commission to draw inspiration from international human rights law, various African instruments including the OAU Charter, UDHR, other human rights instruments adopted by the African country before it, one would agree that article 56 (2) is limited in scope. This is because of the seeming conflicting scope with article 60, which allows the Commission to adopt a broader scope in the interpretation of the Charter rights.

In particular, article 56 (2) is an essential process for sifting out frivolous cases, and non-compliance with this provision could be fatal to a communication.¹¹³ For instance, while article 3 of the OAU Charter affirms member state adherence to the respect of the sovereignty and territory integrity of each state,¹¹⁴ a strict reliance on article 56 (2) somewhat conflicts with peoples' right to existence and self-determination under article 20 of the African Charter. This has been demonstrated in *Katangese Peoples' Congress v Zaire*. In this case, the Commission upheld the sovereignty and territorial integrity of Zaire, a member state of the OAU and African Charter state party in line with the OAU Charter while overlooking the right to self-determination under article 20 of the Charter.¹¹⁵ This position was reached because the Commission relied on the basis of article 56 (2) to rule that it is obligated to uphold the sovereignty and territorial integrity of Zaire, a member state of the OAU and a state party to the African Charter.

4.2.1.2.2.1.3 Communication must not contain insulting or disparaging language

The article 56 (3) provision empowers the Commission to declare a communication inadmissible if such communication is written in disparaging or insulting language directed against a state. The first observation in this requirement is that the

¹¹³ See Communication 162/97 – *Frederick Korvah v Liberia* where the complaint before the African Commission was on discipline and corruption in the respondent police force. The Commission ruled out the complaint as inadmissible citing that the issues raised did not meet article 56 (2) of the African Charter.

¹¹⁴ See communication 75/92, *Katangese Peoples' Congress v Zaire*. In this case, the Commission held that the communication has no merit and the incompatible as provided under article 56 (2) of the African Charter for seeking for the right to self-determination of the Katangese people.

¹¹⁵ *Ibid.*

Charter fails to explain what it would consider 'disparaging or insulting language'. However, the Commission has applied its understanding to determine what may amount to disparaging and insulting language in some communications.¹¹⁶ According to the Commission, the language used must not demonstrate the complainant's intention to disrepute the state and its institutions.¹¹⁷ Therefore, words such as 'regime of torturers' and 'government barbarism' in communication against Paul Biya, the President of Cameroon is deemed insulting and disparaging even though this communication alleges serious and massive violations of the African Charter.¹¹⁸

Article 56(3) is framed in language that makes it significantly subjective as to what the Commission considers disparaging or insulting language.¹¹⁹ The absence of an objective standard of what language is disparaging or insulting makes it more difficult for complainants. This is because a communication alleging a massive violation of human and peoples' rights may by its nature contain disparaging language against the violating state or any of its institutions.¹²⁰ This broadly explains why no other regional instrument provided for disparaging or insulting language compliance as an admissibility requirement. In this regard, Africa seems to be setting a dangerous precedent on admissibility conditions.

¹¹⁶ Instances where African Commission defined scope of what amounts to insulting or disparaging language are seen in Communication 306/05 - *Samuel T Muzerengwa and 11 others v Zimbabwe*; Communication 268/03 - *Ilesanmi v Nigeria*; and, Communication 65/19 - *Ligue Camerounaise des Droits de l'Homme v Cammeroon*. In Communication 295/04, para 51, *Zimbabwe Lawyers for Human Right v Zimbabwe*, the Commission stated that 'in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary or any other state institution, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation for integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute'.

¹¹⁷ Communication 435/12 - *Eyob B. Asemie v the Kingdom of Lesotho*.

¹¹⁸ Communication 65/19, *Ligue Camerounaise des Droits de l'Homme v Cameroon*.

¹¹⁹ Chidi Odinkalu and Camilla Christensen, 'The African Commission on Human and Peoples' Rights: The Development of Non-State Communication Procedures' (1998) 20 (2) *Human Rights Quarterly*, 235.

¹²⁰ Frans Viljoen, *International Human Rights in Africa* (2nd edn, Oxford University Press, 2012) 315.

4.2.1.2.2.1.4 Communications are not be based exclusively on news disseminated through the media

Emphatically, the article 56 (4) requirement is a unique feature in international human rights discourse. It, however, ensures proper investigation of facts ascertained by complainants before coming to the African Commission.¹²¹ Though this requirement is similar to article 35 (3) (a) of ECHR which allows inadmissibility where an application is manifestly ill-founded, it potentially can impact on the role of the media in the human rights corpus. For instance, the Commission declared *Jawara v The Gambia* inadmissible because part of it was based on information disseminated by the mass media.¹²² While this requirement is necessary in order to reduce communications based on unconfirmed media reports, it is suggested that the Commission needs verifiable information from the media given its shortage of personnel to cover human rights situations in the entire AU member states. To this extent, one would expect the guiding principle to be whether the media information is correct and obtaining possible confirmation of complaints through its special mechanisms.

4.2.1.2.2.1.5 Exhaustion of local remedies

One of the most crucial admissibility requirements for 'other communications' which is very much present in other regional human rights treaties¹²³ is the exhaustion of local remedies. This requirement gives a state first-hand opportunity to use their domestic laws and institutions to provide redress to victims of human rights abuse.¹²⁴ In addition, it reduces interference from international bodies while preventing these international institutions from being overburdened with complaints.¹²⁵ This provision indirectly reassures respondent states of their sovereignty and the international law principle of non-interference.

¹²¹ Vincent Nmeielle, *The African Human Rights System: Its Laws, Practices and Institutions* (n 22 above) 217.

¹²² Communication 147/95, *Jawara v The Gambia*.

¹²³ Article 35 of ECHR and article 46 (1) (a) of the American Convention.

¹²⁴ Chidi Odinkalu, 'The Role of Case and Complaints Procedures in the Reform of African Regional Human Rights System' (2002) 2 *African Human Rights Law Journal*, 227.

¹²⁵ Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90 of August 10, 1990, available at > http://www.corteidh.or.cr/docs/opiniones/seriea_11_ing.pdf< accessed 08 March 2019.

Ultimately, this provision demands that a complainant show that local remedies have been exhausted before approaching international enforcement bodies.¹²⁶ However, a complainant need not prove the exhaustion of local remedies if it is evident that this procedure is unduly prolonged, unavailable or impossible.¹²⁷ For instance, in *Louis Emegba Mekongo v Cameroon*, the Commission ruled that a matter pending at a domestic court for about 12 years is proof of an extremely prolonged case which may not guarantee justice.¹²⁸ While the Commission jurisprudence has shown that the Commission uses case by case circumstances to determine what amounts to unduly prolonged cases, it is noteworthy that neither the African Charter nor the African Commission has provided a concise definition of the phrase 'unduly prolonged'. One would, therefore, expect that the Commission make an appropriate order to suggest what duration may amount to unduly prolonged cases.

However, the requirement to exhaust local remedies includes, in appropriate cases, an indirect duty under article 26 to guarantee the independence of the courts and other national institutions for the protection of human and peoples' rights. This is because the independence of available local institutions is essential for victims to have confidence while seeking justice and redress. In this light, the Commission has ruled that it has jurisdiction when convinced that the local remedies or justice are incapable of giving effect to the provisions of the Charter.¹²⁹ In particular, a domestic remedy must be available, efficient and sufficient if the complainant is obliged to pursue it.¹³⁰ Nevertheless, the jurisprudence of the Commission has shown that exhaustion of local remedies is the most invoked ground by respondent states to challenge admissibility.¹³¹

¹²⁶ Rule 93 (2) (i) of African Commission Rules of Procedure provides that complainants must show steps taken to exhaust domestic remedies available or prove the impossibility or unavailability of domestic remedies.

¹²⁷ Article 56 (5) of the African Charter.

¹²⁸ See the case of *Louis Emegba Mekongo v Cameroon* – Communication 59/91. In this case, the Commission accepted jurisdiction 12 years after the final judgment from the national court.

¹²⁹ Communication 227/99, *Congo v Burundi, Rwanda, and Uganda*, para. 62-63.

¹³⁰ Communication 147/95 and 149/96 – *Jawara v The Gambia*.

¹³¹ Article 56 (5) of the African Charter. See the following cases: Communication 435/12 – *Eyob B. Asemie v the Kingdom of Lesotho*; Communication 477/14 - *Crawford Lindsay von Abo v. the Republic of Zimbabwe*; Communication 383/10 – *Mohammed Abdullah Saleh Al-Asad v. Republic of Djibouti*; Communication 322/2006

4.2.1.2.2.1.6 Communications are submitted within a reasonable time after exhaustion of local remedies

The African Charter requires an individual or NGO to submit a complainant within a reasonable time after the exhaustion of local remedies.¹³² This requirement is similar to both the European and American system except that they specifically require a complainant to submit such a case within six months of the date of final judgement.¹³³ The question posed by this requirement relates to what amounts to a reasonable time under the African Charter.

Article 56 (6) is not specific about what period may amount to a reasonable time. While this position may seem advantageous to complainants who are ignorant of the Commission's procedure, it leaves the Commission with discretionary power on the interpretation of what amounts to a reasonable time. Indeed, it is capable of encouraging complainants to sleep on their rights and has the potential to bring about confusion amongst Commissioners in agreeing on what constitutes a reasonable time. Consequently, the Commission has relied on a case by case basis for interpreting this requirement.¹³⁴ For instance, the Commission in *John Modise v Botswana*¹³⁵ admitted a complaint submitted 15 years after a final judgment from the domestic court.

4.2.1.2.2.1.7 Cases already settled by concerned states

To avoid re-trial of a concluded case and further protect parties from being found guilty twice, the Commission will not deal with cases settled in accordance with the principles of the UN Charter or the Charter of the OAU or the present Charter.¹³⁶ Although this is a principle of fair hearing, it is not out of place to have

- *Tsatsu Tsikata v. Republic of Ghana*; Communication 368/09 – *Abdel Hadi, Ali Radi & Others v Republic of Sudan*; Communication 335/2006- *Dabakorivhuwa Patriotic Front v the Republic of South Africa*.

¹³² Article 56 (6) of the African Charter.

¹³³ Article 35 of the ECHR and Article 46 (1) (b) of the American Convention.

¹³⁴ Frans Viljoen, 'Admissibility under the African Charter' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (n 105 above) 91.

¹³⁵ Communication 97/93.

¹³⁶ Rule 93 (2) (j) of the African Commission Rule of Procedure; Article 56 (7) of the African Charter. See also, Frans Viljoen, 'Admissibility under the African Charter' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (n 134 above) 91.

it as a pre-condition and admissibility requirement because it ensures that the Commission does not waste its time or sit as an appellate court.

4.2.1.3 Interpretative mandate of the African Commission

The interpretative mandate can be invoked at the request of a state party, OAU institution or an African organisation recognised by the OAU.¹³⁷ However, what is absent in this article is whether individuals can set the motion for the interpretation of the African Charter and whether this provision applies to the interstate procedure system. In relation to this provision, understanding the interpretative mandate of the Commission may pose a challenge because of its ambiguous wording; more especially, given that the consideration of communications allows the Commission to interpret the provisions of the African Charter and other relevant human rights instruments. Indeed, the Commission gives meaning to the literal language and intention of the Charter while at the same time handing down recommendations to violating bodies or countries.¹³⁸ This implies that whatever interpretation is given to the African Charter provision through adjudication of cases whether instituted by individuals, NGOs or state parties is how it will be enforced. Therefore, effective enforcement requires pragmatic and accurate interpretation of African Charter provisions.

4.2.2 Remedial authority of the African Commission

The concept of rights carries with it a duty to redress violations. This is because human rights are meaningless if they lack provisions for effective remedies and mechanisms for enforcement.¹³⁹ Remedy refers to 'the range of measures that may be taken in response to an actual or threatened violation of human rights.'¹⁴⁰

¹³⁷ Article 45 (3) of the African Charter.

¹³⁸ Rule 93 (5) of the African Commission Rule of Procedure.

¹³⁹ Godfrey Musila, 'The Right to Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal, 442; Frans Viljoen, 'Admissibility under the African Charter' in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (n 134 above) 61-99; Nsongurua Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 American Journal of International Law, 1.

¹⁴⁰ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2003) 1.

Remedies in the substantive context connote the relief afforded to complainants following the outcome of a proceeding such as compensation or declaration.

It is clear from the provisions of the African Charter that the concept of remedies for human rights victims is lacking. The absence of recognition of remedies in the African Charter is an aberration that needs to be corrected because it has the potential to reduce the impact of the African Commission enforcement in the region. In particular, the requirement under article 58 of the Charter which requires the Commission to draw the attention of the AHSG where cases of human rights are revealed and after that, make an accurate report, accompanied by its findings and recommendations, makes this absence more daunting. Suffice it to add at this juncture that the article 58 provision does not suggest the power of the AHSG to grant remedies after the Commission has made its findings. This is because the African Charter is unclear on what the AHSG must do after receiving such information from the Commission. However, while this shortcoming in the African Charter cannot be explained, the practice by the Commission has come to its rescue to measure up with the practice in the ECHR and the American Convention. It is essential to add that this was after several years of making declaratory judgments.

It is important to note that the Commission has evolved through the era of declaratory judgment to issuing reparation and compensation. However, in order to conform to the dictate of the African Charter, the early years of the Commission were marred mainly by declaratory judgments where the Commission stopped at merely finding a violation by a state party without making recommendations. Although this approach later changed, the Commission has over time made orders to violating state parties on compensation or amendment of local laws. For instance, the Commission in *Malawi African Association v Mauritania*¹⁴¹ ruled that Mauritania annul its domestic legislation that violates the Charter rights. Similarly, in *Civil Liberties Organisation v Nigeria*, the Commission ordered Nigeria to release

¹⁴¹ Communication 210/98.

detained prisoners.¹⁴² This implies that the Commission is now under an obligation to grant relief to victims as well as request state parties to carry out recommendations that obstruct effective enforcement of human rights.

It is clear from the preceding that the Commission has accepted that the right to a remedy is self-evident and need not be explicitly enshrined.¹⁴³ This is because one would expect the Commission to rely on the reference to remedies in articles 1, 7, 21 (2) and 26 of the African Charter to bolster its argument. For instance, in *Jawara v The Gambia*, the Commission set out three elements of a remedy to include: availability, effectiveness and sufficiency.¹⁴⁴ Having due regard to these elements, the Commission has over time granted relief to human rights victims on its own terms. Accordingly, the Commission has provided remedies to victims in the form of reparation, damages, injunction, apology, condemnation, declaration, and removal through repeal or enactment of the law.¹⁴⁵

Nonetheless, the Commission approach towards remedies lacks uniformity, thereby impacting on the African Commission mandate to effectively enforce the African Charter. For instance, in *Louis Emegba Mekongo v Cameroon*, the Commission ordered compensation to the complainants but in accordance with the domestic law of Sudan for the rights violated.¹⁴⁶ What this recommendation implies is that the responsibility to decide the compensation sum lies with the violating state. Contrasted with the decision in *Jean-Marie Atangana Mebara v Cameroon*, the African Commission, in this case, ruled that the respondent state should release the complainant from detention, and further ordered it to pay the sum of four hundred million (400,000,000) CFA francs as compensation for the material and non-material damages suffered as a result of the established

¹⁴² Communication 101/93.

¹⁴³ Communication 74/92, *Commission Nationale des droits de l'Homme et des libertes v Chad*.

¹⁴⁴ Communication 147/95-149/96, *Jawara v The Gambia*.

¹⁴⁵ Vincent Nmehielle, *The African Human Rights System: Its Laws, Practices and Institutions* (n 25 above) 226.

¹⁴⁶ See *Louis Emegba Mekongo v Cameroon* wherein the African Commission found that the complainant was entitled to compensation but instead of deciding the value to be awarded, it delegated that to be done by the violating state respondent. See also, Communication 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*.

violations.¹⁴⁷ The inconsistent manner to which a victim's financial compensation is decided illustrates the effect of this gap in the African Charter.

4.2.3 African Commission special mechanisms

This section examines the African Commission special mechanisms for the promotion and protection of human rights. It argues that though article 46 of the African Charter mandates the African Commission to employ any appropriate method of investigation in carrying out its responsibilities, the establishment of special rapporteurs and working groups have made tremendous contributions in promotional and investigative activities of the African Commission. It is, of course, essential to consider the uncertainties and challenges of the special mechanisms in order to determine whether their role has contributed to closing the institutional and normative gap in the enforcement of the African Charter.

Special mechanisms investigate human rights violations, undertake promotional activities and submit reports on member states situation, which sometimes form the basis of African Commission's resolutions.¹⁴⁸ However, this crucial role of special mechanisms focusing on human rights issues of specific concern to the African Commission is not without challenges. For instance, the Commissioners double as Special Rapporteurs, thus leaving several questions relating to the efficiency of their roles as Commissioners and Rapporteurs unanswered. One would agree that the protective, promotional and interpretative role of a Commissioner is tasking. However, any additional role such as this, which

¹⁴⁷ Communication 416/12.

¹⁴⁸ The African Commission currently has fourteen special mechanisms, that is, seven Working Groups, five Special Rapporteurs, two Committees, and one Advisory Committee. Some special mechanisms and their year of establishment include Prisons and conditions of detention (1996); Rights of women in Africa (1999); Refugees, asylum seekers and internally displaced persons (2004); Freedom of expression and access to information in Africa (2004); and, Human rights defenders (2004). Working groups include Committee for the prevention of Torture in Africa (2004); Death penalty (2005); Older persons and people with disability in Africa (2007) and, Study group on freedom of association in Africa (2011). Each special mechanism is headed by a serving Commissioner whose duty is on a part-time basis. Further, each Special Rapporteur has a mandate to present an Annual Report to the Commission at each Ordinary Session Special Mechanisms of the African Commission, available at > <http://www.achpr.org/mechanisms/>< accessed 13 June 2017. Examples of some special mechanism that monitor state enforcement of human rights decisions includes Working Group on Specific Issues Related to the work of the African Commission and Special Rapporteur on Human Rights Defenders.

also requires observation of human rights situations, country visits and report writing, would invariably affect their efficiency.

Special mechanisms have contributed immensely to the African Commission mandate. For instance, the role played by the Committee for the prevention of Torture in Africa (previously Robben Island Guidelines Committee) in drafting the Robben Island Guidelines cannot be ignored. However, resources have remained a key factor underpinning the functions of these special mechanisms.¹⁴⁹ To fulfil their missions, assessing state parties' human rights situations involve country visits and meetings with relevant parties which needs financial and other resources which are insufficient.

The African Commission special mechanism undertakes missions focusing on human rights violations within their mandates. This requires them to carry out an on-site mission or fact-finding mission to investigate facts or explore avenues for amicable settlement relating to communications. However, state consent is required for visits, but it is on many occasions, not given. For instance, out of many state visit requests, only six missions were granted and undertaken in 2018.¹⁵⁰ From this above observation, state consent denial to carry out a mission poses a challenge to the mandate of the African Commission and should be reported in the annual report to the AU Assembly. Consent to special mechanisms needs to be freely given as it enhances the mandate of the African Commission towards the realisation of the African Charter rights and freedoms.

4.3 The African Court on Human and Peoples' Rights

This section examines the African Court. The African Court is based in Arusha, Tanzania, and largely epitomises the advances made by the regional human rights system to enhance human rights protection through a judicial system.¹⁵¹

¹⁴⁹ Centre for Human Rights, *Celebrating the African Charter at 30: A Guide to the African Human Rights System* (Pretoria University Law Press, 2011) 45.

¹⁵⁰ The countries include Botswana, Guinea Bissau, South Africa, Tunisia, Nigeria, and Lesotho. See, 45th Activity Report of the African Charter on Human and Peoples Rights, pg 19.

¹⁵¹ Existing international courts prior to the emergence of the African Court include the European Court of Human Rights and the Inter-American Court.

Accordingly, the African Court complements the protective mandate of the African Commission.¹⁵² Following the inauguration of the first eleven judges on 2nd July 2006, the Court had its first session from 2nd July to 5th July 2006, in Banjul, The Gambia. As will be discussed hereinbelow, the Court has evolved to become an essential mechanism in African Charter enforcement, although it seems vulnerable when compared to its European and American counterparts.¹⁵³ Therefore, this section will argue that AU member states vaguely established a regional court with clauses that limit state party accountability by limiting individual access to the court.

4.3.1 The history and establishment of the African Court

The creation of an African Court was first suggested at the 1961 International Commission of Jurist Conference on the Rule of Law in Lagos, Nigeria, which consisted of 194 judges, practising lawyers and teachers of law from 23 African nations as well as nine countries of other continents.¹⁵⁴ Although this suggestion was turned down by the argument that Africa was not mature enough for a regional court at this time in its history,¹⁵⁵ the African governments further claimed that a regional court would interfere with and challenge their sovereignty, and would conflict with the preferred African culture of reconciliation with adjudication.¹⁵⁶ Several years after, this suggestion was also not implanted when the region adopted the African Charter with a Commission as its single implementing body in 1981.

¹⁵² Article 5 (1) (a), 6 (1) and (3), 8 and 33 of the Court Protocol.

¹⁵³ Tom Daly and Micha Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court' (2018) 14 (2) *International Journal of Law in Context*, 294.

¹⁵⁴ Charles Rhyne, 'Law in Africa: A Report on the Lagos Conference' (1961) 47 (7) *American Bar Association Journal* 685; International Commission of Jurists, *African Conference on the Rule of Law, Lagos, Nigeria ... 1961: A Report on the Proceedings of the Conference* (I.C.J., 1961)

¹⁵⁵ See also, Timothy Yerima, 'Comparative Evaluation of the Challenges of African Regional Human Rights Court' (2011) 4 (2) *Journal of Politics and Law*, 120.

¹⁵⁶ Adama Dieng, 'Introduction to the African Court on Human and Peoples' Rights' (2005) 15 *Interights Bulletin*, 3.

The omission of a regional court in the Africa Charter increased the pressure on the regional human rights system to enhance its efficiency and effectiveness.¹⁵⁷ During this time, several options suggested include replacing the Commission with the Court, strengthening the Commission or complementing it with a court. However, while the option of replacing it was not ideal because the Court would lack powers to promote the Charter rights, the idea of strengthening it was opposed because there were no signs of the Commission being independent of the AU.¹⁵⁸ Instead, a complementary dual system was most preferable.¹⁵⁹ However, in 1998, African governments adopted the Court Protocol establishing the African Court. While it is submitted that the process of establishing a regional Court was slow, its absence provided African states with the backing to circumvent regional accountability regarding human rights enforcement from a quasi-judicial African Commission.

The enforcement principle of the African human rights system was criticised prior to the emergence of the African Court due to the inability of the Commission to impose legally binding decisions and its dependence on its political parent, the AU.¹⁶⁰ These critiques demanded a more powerful institution to fill the gaps in realising effective enforcement of human rights, which later resulted in the adoption of the Court Protocol on 9 June 1998.¹⁶¹ Thereafter, the Court eventually entered into force on 25 January 2004 after meeting the 15 member states

¹⁵⁷ Gina Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (n 59 above).

¹⁵⁸ Van Der Mai, 'The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa' (2005) 18 *Leiden Journal of International Law*, 118.

¹⁵⁹ Gina Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (n 59 above).

¹⁶⁰ Nsongurua Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late than Never' (2014) 3 (2) *Yale Human Rights and Development Journal*, 45; Roger-Claude Liwanga, 'From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies' (2015) 41 (2) *Brooklyn Journal of International Law*, 99; Nsongurua Udombana, 'Can a Leopard can its Spots? The African Union treaty and human rights (n 38 above); Oji Umozuruike, 'The African Charter on Human and Peoples Rights' (n 16 above) 902; Carolyn Martorena, 'The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights' (n 35 above); Edward Kannayo, 'The OAU and Human Rights' in Yassin El-Ayouty and William Zartman (eds), *The OAU after twenty years* (Praeger, 1984) 157.

¹⁶¹ Protocol to the African Charter, available at ><http://www.achpr.org/instruments/court-establishment/>< accessed 18 March 2019.

ratification requirement.¹⁶² The drafting of this Protocol was inspired by the established international courts under the European and Inter-American Conventions as well as the Statute of the International Court of Justice.¹⁶³ The implication, therefore, is that one would expect the Court to adopt standards concerning access, composition and jurisdiction that enhance effective human rights enforcement.

However, the African Court consists of 11 judges elected for six years from Member States' jurists of high moral character and judicial or academic competence and experience in human and peoples' rights.¹⁶⁴ Unlike the Commission, the Court sits four times a year in two-week Ordinary Sessions and may also sit in Extraordinary Sessions. What this implies is that Africa once again adopted a part-time sitting arrangement for the Court; thereby, making it the only regional Court that sits on a part-time basis.¹⁶⁵ Nonetheless, all judges except the President of the African Court perform their function on a part-time basis.¹⁶⁶ The consequence of adopting a part-time sitting arrangement is the potential to affect the quality and quantity of the Court's output. In addition, such preferred sitting arrangements when all other existing courts enjoy a full-time sitting arrangement is indicative of how the AU member states view the African Court. One can argue that this arrangement would not guarantee the needed timeframe to carry out its contentious and advisory mandate optimally. For example, of the 203 applications received since it commenced operation in 2006, over 100 applications are pending

¹⁶² Presently, nine AU States allow individuals and NGOs to directly petition the African Court, namely: Burkina Faso (1998), Malawi (2008), Mali (2010), Tanzania (2010), Ghana (2011), Cote d'Ivoire (2013), Benin (2016), Tunisia (2017) and Gambia (2018). Rwanda had previously deposited a declaration in conformity with Article 34 (6) in 2013 but subsequently withdrew with effect from March 2017; See African Union List of Countries that have ratified the 1998 Protocol as at the end of 2018, available at > <http://www.achpr.org/instruments/court-establishment/ratification/>< accessed 18 March 2019. It is noteworthy that as of February 2019, 30 of the 55 AU member states have ratified the 1998 Protocol

¹⁶³ Explanatory Notes to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, 1, (6-12 September 1995), Cape Town South Africa.

¹⁶⁴ Article 11 and 15 of the 1998 Protocol.

¹⁶⁵ For example, following the amalgamation of the Court and Commission in 1998, the European Court started sitting on a full-time basis.

¹⁶⁶ Article 15 of the Court Protocol. The Assembly may change this sitting arrangement as it may deem appropriate. See article 15 (4) of the Court Protocol.

as of January 2019.¹⁶⁷ Another firsthand impact of this sitting arrangement can be seen in the three years delay experienced in arriving at the Court's first judgement in *Micholet Yogogombaye v Senegal*.¹⁶⁸

However, there are a number of reasons why the African Court was established. Firstly, the African Court was created with a clear mission of complementing and enhancing the protective mandate of the Commission.¹⁶⁹ This implies that the Court does not remove all protective mandates of the Commission; rather, to support its mandate to ensure effective enforcement. Secondly, the Court was established to cover the gap in effective enforcement of the Charter rights by providing an institution capable of rendering binding decisions against state parties. However, for the Court to render binding decisions, the Court must first acknowledge it has jurisdiction over the matter before it.

4.3.2 Mandate and jurisdiction of the African Court

The Court jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, its protocol and any other relevant human rights instruments ratified by the state concerned.¹⁷⁰ It follows from the Court Protocol that the Court has advisory,¹⁷¹ arbitral¹⁷² and contentious¹⁷³ jurisdiction. This implies that the Court would be called upon to interpret and adjudicate on complaints that fall within the broad material scope aforementioned. For instance, the advisory duties of the Court empower it to give opinions at the request of a member state, the OAU and any of its organs, or any African organisation recognised by the OAU, on any matter relating to the

¹⁶⁷ See generally, African Court Index, available at > <http://www.african-court.org/en/index.php/cases>< accessed 16 January 2019.

¹⁶⁸ App. No. 1/2008. The Court in this case declined jurisdiction citing Article 34(6) of the 1998 Protocol. That notwithstanding, the Court on December 15, 2009, three years after the selection of the first set of judges, gave its first judgment.

¹⁶⁹ Article 2 of the 1998 Protocol. African Court has adopted its Rules of Procedure also known as 'Interim Rules of Court' in June 2010, which replaced the Interim Rules of Procedure 2008.

¹⁷⁰ Article 3 of the 1998 Protocol.

¹⁷¹ Article 4 of the 1998 Protocol.

¹⁷² Article 9 of the 1998 Protocol. The arbitral jurisdiction of the Court empowers it to amicably settle cases and disputes brought before it by parties.

¹⁷³ Article 3 (1) of the 1998 Protocol.

protection of human rights and relevant human rights instruments.¹⁷⁴ Although this function is not peculiar to the African system, the difference is that under the European system, only the Committee of Ministers can request advisory opinion¹⁷⁵ whereas the American system grants just the Member States and the organs of the Organisation of American States the power to ask for an opinion.¹⁷⁶ In other words, one can argue that such broad jurisdiction is intended to ensure proper engagement with the African Court regarding the enforcement and interpretation of African rights and freedoms.

On the other hand, both arbitral and contentious jurisdiction involves adjudication of cases and disputes submitted by states, individuals and NGOs. It goes beyond giving an opinion at the request of state parties to rendering binding decisions on parties involved. For example, the contentious jurisdiction of the African Court permits it to interpret and apply the African Charter or other relevant human rights instruments. At the outset, the Court illustrated this position in *Michelot Yogogombaye v Senegal*¹⁷⁷ when it accepted that though there were violations of other international human rights instruments such as the UDHR and the ICCPR, it lacked jurisdiction to entertain this case because the respondent state had not made a declaration allowing individuals and NGOs to bring claims under article 34(6) of the Court Protocol. The thought in this decision may seem not to be coercive because it laid the foundation that the Court would never entertain cases where respondent states fail to make an article 34(6) declaration. However, the Court contentious jurisdiction has resulted in the fifty-two finalised applications.¹⁷⁸ Furthermore, the contentious jurisdiction of the Court creates a dual function similar to other regional human rights instruments.¹⁷⁹ Such dual

¹⁷⁴ Out of the 13 advisory opinions submitted to the Court since its operation in 2006, 12 have been finalised with one pending as at April 2019.

¹⁷⁵ Article 47 (1) of ECHR.

¹⁷⁶ Article 64 (1) of the American Convention.

¹⁷⁷ App. No. 001/2008.

¹⁷⁸ This information is as at June 1, 2019. An example of a finalised case is App. 004/2013. In this application, the Court found a violation of article 19 of the ICCPR and article 9 of the African Charter in *Konate v Burkina Faso*. The complaint in this case was instituted following a publication and prosecuting for defamation, public insult and contempt of court. See also, *Anudo Ochieng Anudo v Tanzania*, App. 012/2015, where the Court found a violation of article 15 of the UDHR and article 14 of the ICCPR.

¹⁷⁹ Article 32 of ECHR and article 62 of Inter-American Convention.

function requires the African Court to ascertain the extent to which the African Charter provision has been applied by state parties' and how state parties interpret these rights.¹⁸⁰

4.3.3 Access to the African Court

The Court Protocol took a different approach from the African Charter on the issue of access. However, access is crucial to human rights protection as well as the jurisdiction of the Court. Unlimited access to the Court is granted to the African Commission, state parties, and intergovernmental organisations.¹⁸¹ In addition, the Court Protocol provides that to have access to the Court, a country must have ratified the Court Protocol.¹⁸² This prerequisite requirement relating to access portrays a restriction to the protection of the Court because of the poor ratification history of human rights treaties in Africa. In other words, a state may intentionally avoid the jurisdiction of the Court by choosing not to ratify the Court Protocol, especially in the absence of regional or international pressure to ratify such a treaty. However, individuals and NGOs with observer status have direct access to the Court only when their states have accepted the declaration under article 34 (6). This implies that individual and NGO access is not automatic even after their country have ratified the Court Protocol. Notwithstanding, individuals and NGOs may indirectly approach the Court by instituting complaints before the Commission hoping the Commission will refer the matter to the Court in any case of non-compliance of the Commission's findings by the state party.¹⁸³

Africa's position on access to the Court is a true reflection of African leaders' reluctance to have an accountable and effective regional judicial system.¹⁸⁴ For

¹⁸⁰ For instance, after considering the admissibility requirement regarding exhaustion of local remedies, the Court in *Norbert Zongo and others v Burkina Faso* (App. 013/2011) ruled that the respondent state failed to take appropriate action to ensure that the rights of the applicants are respected.

¹⁸¹ Article 5 of the Court Protocol and Rule 33 of the Rules of African Court.

¹⁸² As of February 2019, only 30 African states have ratified the Court Protocol.

¹⁸³ Article 6 of the Court Protocol, Rule 118 and 120 of the Rules of Procedure of the African Commission. Notably, the Court has transferred 4 cases to the Commission.

¹⁸⁴ Ibrahim Ali Badawi El-Sheikh, 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory Note' (1997) 9 *African Journal of International and Comparative Law*, 943.

instance, the issue of allowing NGOs and individuals access to the Court stirred controversy at the drafting stage of the Court Protocol.¹⁸⁵ The draft submitted by African Experts to the Government Experts in the Cape Town Meeting provided that the Court may, on exceptional grounds, allow individuals, NGOs or groups of individuals to bring cases before it.¹⁸⁶ While this draft did not recognise separate acceptance by state parties regarding access by NGOs and individuals, the subsequent Nouakchott Meeting draft makes individual and NGOs access optional.¹⁸⁷ The Nouakchott Meeting proposed that NGOs and individuals can bring cases regarding urgent, serious systematic or massive violations of human rights.¹⁸⁸ This proposal was later elaborated in substance in article 5 and article 34 (6) of the final draft of the Court Protocol, which allows both automatic and optional access to the Court. However, one would have thought that since the Commission automatically applies to every state party of the African Charter, a similar approach should have been followed concerning the African Court.

The provision of article 34 (6) of the Court Protocol impacts on uniformed access and jurisdiction for individuals whose countries have ratified the Court Protocol. In particular, this provision reduces the extent to which individuals and NGOs can seek justice from the Court. While it is submitted that the purpose of article 34 (6) cannot optimally advance the complementary mandate of the Court, it presents an opportunity for state parties to avoid accountability. Indeed, with only nine states declaring to allow individuals and NGOs access to the African Court,¹⁸⁹ article 34 (6) compromises free and absolute access to the Court thereby

¹⁸⁵ *Ibid.*

¹⁸⁶ Article 5 of the Draft Protocol submitted by the OAU General-Secretariat to Governmental Legal Experts, 6-12 September 1995, Cape Town, South Africa. See generally, Report of Government Expert Meeting on the Establishment of an African Court of Human and Peoples' Rights.

¹⁸⁷ Article 6 (5) of Nouakchott Draft.

¹⁸⁸ Article 6 (1) of Nouakchott Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/PROT. (III) Rev. 1.

¹⁸⁹ The countries are Burkina Faso (1998), Malawi (2008), Mali (2010), Tanzania (2010), Ghana (2011), Cote d'Ivoire (2013), Benin (2016), Tunisia (2017), and The Gambia (2018). Rwanda had previously deposited a declaration in conformity with Article 34 (6) in 2013 but subsequently withdrew with effect from March 2017.

having an impact on victims of human rights abuses.¹⁹⁰ The logic of the foregoing is that cases instituted against non-compliant countries such as Nigeria,¹⁹¹ Senegal,¹⁹² Algeria,¹⁹³ South Africa,¹⁹⁴ and Tunisia,¹⁹⁵ will be declared inadmissible by the Court.

One could, however, question the purport of retaining this clause in the Court Protocol given that the majority of decided and pending cases before the African Court as well as the Commission, are instituted by individuals and NGOs. The numerous cases submitted by individuals and NGOs have provided the opportunity to make appropriate orders in line with articles 9 and 27 of the Court Protocol. Indeed, individual cases have resulted in some landmark decisions where the Court has ordered states to amend their domestic laws and constitutions to reflect the true intent and content of the African Charter.¹⁹⁶ For instance, in *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, the complainants alleged that the Eight Constitutional Amendment Act of 1992 which requires candidates to elective positions to be sponsored by a political party conflicted with the constitution of Tanzania and were therefore null and void for barring independent candidates from contesting. The Court, however, found a violation of the right to non-discrimination, equal right before the law, freedom of association, and right to participate freely in government. The Court, therefore, ordered the respondent state to take constitutional, legislative and other measures necessary to remedy violated the articles of the African Charter and ordered the applicant to file for reparations.¹⁹⁷ Nevertheless, individuals and NGOs have remained the highest

¹⁹⁰ Timothy Yerima, 'Comparative Evaluation of the Challenges of African Regional Human Rights Courts' (n 155 above) 120; Nsongurua Udombana, 'Towards the African Court on Human and Peoples' Rights: Better later than never' (n 160 above) 45.

¹⁹¹ App. 8/2011, *Ekollo v Cameroon and Nigeria*.

¹⁹² *Michelot Yogogombaye v Senegal*, App. 001/2008.

¹⁹³ App. 2/2011, *Soufianne Ababou v Algeria*.

¹⁹⁴ App. 4/2012, *Emmanuel Uko and others v South Africa*.

¹⁹⁵ App. 7/2012, *Baghdadi Ali Mahmoudi v Tunisia*. This decision was made before Tunisia made the declaration under article 34 (6) of the Court Protocol.

¹⁹⁶ See the judgments in the following cases: *Lohe Issa Konate v Burkina Faso (2015)*; *Rev. Christopher R. Mtikila v Tanzania (2013)*; *Action pour la protection des Droits de l'Homme (APDH) v Cote d'Ivoire (2014)*.

¹⁹⁷ App. Nos. 009 and 011/2011, and judgment on merit delivered 14 June 2013.

beneficiaries of the Court in terms of access while the Court continues to assert its mandate through its decisions similar to State Supreme Courts.¹⁹⁸ This is because final decisions of the Court impact on domestic laws of member states.

Access to the African Court is central to realising effective human rights. In particular, it ensures remedies are accorded to victims while the laws are interpreted to form part of case laws. As captured by the Nigeria Supreme Court in *Attorney General of Kaduna State v Hassan*, 'he who cannot reach the court cannot talk of justice from the courts'.¹⁹⁹ However, because access to the court is vital if we must talk about justice, the approach adopted in the Court Protocol has attracted criticisms.²⁰⁰ However, the African Court is not the only regional court that bars individuals' direct access.²⁰¹ For instance, the American system permits only state parties and the Inter-American Commission to submit cases directly to the Inter-American Court.²⁰² Conversely, article 34 of the ECHR allows the individual access to the ECtHR if they meet the requirement under article 35 (3) ECHR.²⁰³

4.3.4 Admissibility and the relationship between the African Court and the African Commission

Where an individual or NGO institute a claim at the African Court under article 5 (3) of the Court Protocol, the Court must first rule on its admissibility based on

¹⁹⁸ This submission is based on the involvement of individuals in the cases before the African Court, which shows that of the 34 cases that have been decided by the Court at its 44th Ordinary Session March 6-24, 2017, 29 of them are connected with individuals.

¹⁹⁹ (1985) Nigerian Weekly Law Report, Part 8, 483.

²⁰⁰ Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 International and Comparative Law Quarterly, 63; Nsongurua Udombana, 'Eyeing the Promised Land: The Wearisome Quest for an Effective Regional Human Rights Enforcement Mechanism in Africa' (2014) 1 Transnational Human Rights Review, 179.

²⁰¹ Article 44 of the American Convention requires individuals to institute complaints through the Inter-American Commission.

²⁰² Article 61 of the American Convention on Human Rights.

²⁰³ This article provides that the admissibility criteria for individual application to include incompatibility with the provisions of the ECHR, if the application is anonymous, substantially the same with a matter that has been submitted to another procedure for investigation, or where the applicant has not suffered a significant disadvantage. See also, Andrew Williams, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy' (2013) 24 (4) European Journal of International Law, 1157; Francesco Seatzu, 'The Experience of the European Court of Human Rights with the European Convention on Human Rights and Biomedicine' (2015) 31 (81) Utrecht Journal of International and European Law, 5.

article 56 of the African Charter. The admissibility criteria are so important to individual cases at the Court because they determine the Court's jurisdiction. They also determine what steps the Court may take concerning cases before it. For instance, the Court may assume jurisdiction and go ahead to consider the case or transfer it to the Commission.²⁰⁴ However, while the approach adopted in the Court Protocol is commendable for granting the Court power to transfer cases to the Commission where it lacks jurisdiction to the Commission, the number of cases declared inadmissible without such referral indicate the Court's insignificant use of the article 6 provision to enhance human rights enforcement.

Indeed, the relationship between the African Charter institutions set out in the Court Protocol, and the Rules of Procedure of the Commission²⁰⁵ includes the power of the Commission to transfer cases of massive human rights violations and non-compliance of its orders to the Court. In particular, these provisions have the potential to enhance the working relationship between the two institutions, at least on paper.²⁰⁶ At present, however, the Court has transferred four cases to the Commission while the Commission has demonstrated this relationship by transferring three cases to the Court, including *African Commission v Libya*²⁰⁷ and *African Commission v Kenya*.²⁰⁸ It is submitted that this number is insignificant given the number of cases declared inadmissible on the ground of article 34 (6) declaration. This insignificant number of cases illustrate the perceived reluctance to transfer cases to the Commission.

However, it is not particularly evident whether strict reliance on the admissibility criteria has enhanced the realisation of effective enforcement of civil and political rights. But in the case of *Diakite Couple v Mali*,²⁰⁹ the Court dismissed the case for failure to exhaust domestic remedies as requested under article 56

²⁰⁴ Article 6 of the Court Protocol.

²⁰⁵ Articles 2 and 6 of the Court Protocol, Rule 29 of Rules of Procedure of the Court and Part IV of the Rules of Procedure of the Commission 2010.

²⁰⁶ See also, Part IV, Rule and Procedures of the African Commission 2010.

²⁰⁷ App. 002/2013.

²⁰⁸ App. 006/2012.

²⁰⁹ App. 009/2016.

(5) of the African Charter. Similarly, although the Court accepted jurisdiction in *Jean-Claude Roger Gombert v Cote d'Ivoire*, it went ahead to uphold the inadmissibility objection raised by the respondent state that the dispute has been settled within the meaning of article 56 (7) of the African Charter.²¹⁰

4.3.5 Remedies authority under the Court Protocol and enforceability of African Court decisions

Where the Court finds a violation of the African Charter and proceeds to make a decision on its finding, it has the power to grant remedies in line with article 27 of the Court Protocol. Instances of such remedies include compensation or reparation. In addition, the Court can order provisional measures where a violation is found or in circumstances where necessary to avoid irreparable harm to persons.²¹¹ For instance, the Court applied provisional measures in *African Commission on Human and Peoples' Rights v Republic of Libya*.²¹² In this case, the Commission alleged that not only has the respondent state refused to comply with its decision but that the victim, Saif Al-Islam Gaddafi, is faced with the imminent threat of the death penalty, following a long period of arbitrary detention without access to a lawyer. This case further demonstrates the positive impact of the relationship between the two institutions and the need for the Commission to swiftly invoke its unlimited access to the Court against non-complying state parties. In its ruling, the Court held that Libya violated the African Charter, and ordered it to terminate the illegal criminal proceeding against the victim before the domestic court and allow the victim access to a lawyer immediately without delay'.²¹³ The essence of this order is to preserve or stop a state from further committing human rights violations while the Court goes ahead to adjudicate on the application before it.

²¹⁰ App. 038/2016, *Jean-Claude Roger Gombert v Cote d'Ivoire*.

²¹¹ The provision of provisional measures is similar to article 63 (2) of the Inter-American Human Rights Convention which empowers the Court to order this remedy in cases of extreme gravity and urgency in order to avoid irreparable harm to persons.

²¹² App. No. 002/2013.

²¹³ *Ibid*, para 97. It is noteworthy to mention that Libya did not comply with this decision.

In particular, it is noteworthy that the remedial authority of the African Court is similar to the ECtHR and the American Court.²¹⁴ However, under the European system, the decision of the Court becomes final in accordance with article 44 (2), one of which is three months after the date of judgment without any request to the Grand Chamber. On the other hand, the position under the African Court is that the decision of the Court shall be final, binding on state parties, and not subject to any appeal.²¹⁵ While this position guarantees the availability of binding and final remedies for victims, it also reinvigorates voluntary compliance with decisions under article 30 despite mandating the Executive Council of Ministers to assist the Assembly by monitoring the execution of the Court's judgment on its behalf.²¹⁶

The concept of involving an AU organ to monitor execution is not alien when compared with article 58 of the African Charter. On the other hand, while a similar text is evident in the ECHR²¹⁷ and Inter-American human rights,²¹⁸ the African Charter provision did not go further on what the Court could do if the Executive Council of Ministers fails to carry out its duty. While this needs to be addressed, it can be argued that such a gap may have contributed to poor compliance with decisions by state parties.²¹⁹ Nevertheless, the recognition of the Council of Ministers in the Court Protocol is a progressive step in the improvement of the African regional human rights system.²²⁰ What is therefore lacking is for the AU to ensure that the Executive Council of Ministers carries out its duty or alternatively, creates a new body that may focus on monitoring compliance with African Court decisions.

²¹⁴ Article 63 of the Inter-American Human Rights Convention and article 41 of the ECHR.

²¹⁵ Articles 28 (1) and (2), 29 and 30 of the Court Protocol; Rules 59 and 61 of the Rules of Court. However, such decision may be reviewed by the Court in the light of new evidences- article 28 (3) of the Court Protocol.

²¹⁶ Articles 29 (2) and 30 of the Court Protocol; Rule 64 of the Rules of Court.

²¹⁷ Article 46 (1) of ECHR.

²¹⁸ Article 68 (1) of the Inter-American Human Rights Convention.

²¹⁹ Activity Report of the African Court, available at > http://en.african-court.org/images/Activity%20Reports/AfCHPR_Activity_Report_2016_E.pdf< accessed 15 March 2019.

²²⁰ However, as of March 2019, no mission has been undertaken by the Council of Ministers to ascertain reasons for non-compliance with Court decisions.

However, the Court is mandated to submit a report to the Assembly specifying the cases in which a state has not complied with the Court's judgment.²²¹ Whether this provision is intended to notify the Assembly to act against non-complying state parties, Nsongurua opined that this provision acts as a robust shaming mechanism to strengthen the authority of the African Court.²²² One could, however, question whether the name and shame characteristic has enhanced the effective realisation of civil and political rights in Africa. This question is put forward because there is neither any record of the AU Assembly acting on the annual reports of the Court to demand state party compliance nor evidence of the use of sanctions against non-complying state parties to the Court decisions. In this light, one would suggest the use of sanctions against non-complying state parties or other measures such as negotiations, where necessary, to ensure state party compliance. Therefore, it is submitted that the AU Assembly has failed to invoke the information under article 31 to compel effective compliance despite having the power to impose sanctions or take other measures of a political or economic nature against AU member states.²²³

4.4 Conclusion

This chapter confirms that Africa's political and institutional framework for realising effective human rights protection is far from being complete. Firstly, it suggests that this journey is still in progress. In its practice, for instance, the African Union, African Commission and Court have moved between weakness and rigidity, perhaps explaining some of the growth recorded in the aspects of African human rights enforcement. Indeed, while the African Commission and African Court have developed meaningful jurisprudence in the course of carrying out their mandates, they are incapacitated due to reasons such as lack of capacity to ensure that state parties comply with their decisions and hindered access to the African Court. At present, the African Union is equally unprepared to deploy its organs

²²¹ Article 31 of the Court Protocol.

²²² Nsongurua Udombana, 'Towards the African Court on Human and Peoples' Rights: Better later than never' (n 160 above).

²²³ Article 23 (2) of the Constitutive Act empowers the AU Assembly to impose sanctions where necessary.

and disciplinary powers to advance effective enforcement of African Charter rights and freedoms. Secondly, one thing to reiterate here is that the protection of African Charter rights is not the sole obligation of the African Court and African Commission. The African Commission may cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.²²⁴ In other words, other AU institutions, as well as international bodies such as the United Nations Security Council, may put pressure or demand enforcement of findings of the Court or Commission. Until then, the use of sanctions against non-complying AU member states remains a good option for the AU. At the same time, the AU must learn to positively use the name and shame approach as a tool to realise more state party compliance with African Charter obligations because African countries have shown some discomfort when publicly identified as human rights abusers.²²⁵

Furthermore, this chapter has demonstrated that mere ratification of human rights treaties does not end human rights violations. While much more can be and should be done to advance enforcement on the continent, the regional institutions can draw a meaningful lesson from their counterparts' successes to improve its shortcomings. However, different strategies need to be embarked on and considered, especially where the strategies of the African Court and Commission have been unsuccessful in advancing enforcement of the African Charter or where the Executive Council of Ministers and the ASHG have shown lack of dedication. In this regard, a human rights department within the AU should be considered and established.

Altogether, the fact that the African Charter continues to receive criticism means that it is not successful in addressing human rights matters in the region. It is agreed that the emergence of the African Court has so far not sufficiently addressed the structural weaknesses of the African human rights system.

²²⁴ Article 45 (c) of the African Charter.

²²⁵ This accounts for the reason why many totalitarian African governments suppress free dissemination of information through the media. See also, Kofi Quashigah, 'The African Charter on Human and Peoples Rights: Towards a more effective Reporting Mechanism' (2002) 2 African Human Rights Journal, 261.

Nevertheless, the finding in this chapter is not merely asking for stronger realignment with the totality of Western human rights models; indeed, it is now more than ever before that Africa needs to borrow heavily from its civilisation to help chart a stronger and more durable human rights heritage.

CHAPTER FIVE: STATE PARTY OBLIGATIONS UNDER THE AFRICAN CHARTER: USING NIGERIA, TANZANIA, AND BENIN TO HIGHLIGHT DOMESTIC ENFORCEMENT OF CIVIL AND POLITICAL RIGHTS

5.0. Introduction

Having demonstrated that the African Charter norms are not entirely comprehensive, and having shown that the political and institutional framework for African Charter enforcement is problematic, this chapter will investigate state party obligations under the Charter. In particular, using Nigeria, the United Republic of Tanzania (Tanzania), and the Republic of Benin (Benin) as illustrations, it will analyse how these countries have incorporated the African Charter and the influence, if any, the African Charter may have on domestic protection of civil and political rights. Thus, this chapter will contribute to knowledge by examining the constitutional protection of civil and political rights, particularly how some state parties respond to the African Charter discourse with a view to suggesting how effective enforcement of civil and political rights can be realised.

This chapter is undertaken because responding to an array of civil and political rights violations requires multi-faceted efforts at international, regional and domestic levels. For this reason, the approach adopted in the African Charter and its Court Protocol is such that contracting state parties are assigned certain obligations to enhance the enforcement of African Charter rights and freedoms. For instance, article 1 of the African Charter mandates state parties to take legislative and other measures to give effect to human and peoples' rights enshrined therein. Accordingly, state parties to the African Charter are obliged to ensure the enjoyment of rights for the following reasons. First, state parties have a mandate to protect these rights through legislative or other measures. And secondly, state parties are obliged under the Charter to provide redress through domestic means such as the national courts. The above reasons are anticipated because state parties bear enormous responsibility for ensuring that the Charter rights

are respected within their jurisdiction, given that violations and firsthand enforcement are carried out at state levels. Indeed, human rights enforcement will be a remote and unattainable goal if the actual situation in states does not reflect the ideals of international human rights treaties.

5.1 Rationale and justification for the choice of countries

It is imperative to explain the rationale for the choice of countries in order to delineate the scope of this chapter. This is because the AU comprises fifty-five member states with diverse legal systems, of which fifty-four have signed, deposited and ratified the African Charter.¹ This number makes it practically impossible for this thesis to examine all fifty-four African Charter state parties. However, states are chosen on the rationale of the similarity and dissimilarity approach whereby selected states represent/reflect situations in other states. Thus, three countries would be examined having due consideration to the following justifications: legal system, engagement of the African Charter and regional institutions, and the scope of domestic protection and enforcement.

¹ African Charter on Human and Peoples' Rights ratification table, available at >https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf< accessed 23 September 2019.

Country	Engagement with the African Charter and regional institutions	Legal system ²	Scope of domestic protection
Nigeria African Charter ratification - 22/06/1983 African Court Protocol ratification - 20/05/2004 Article 34(6) of the Court Protocol Declaration – Not applicable.	Thirty-six finalised communications at the African Commission and one finalised case at the African Court.	Mixed law ³	1999 Constitution of the Federal Republic of Nigeria
Tanzania African Charter ratification - 18/02/1984 African Court Protocol ratification - 07/02/2006 Article 34(6) of the Court Protocol Declaration – 09/03/2010.	Nine communications at the African Commission. Twenty-seven finalised cases and 103 pending cases at the African Court.	Common law	1977 Constitution of the United Republic of Tanzania

² At present, the main legal systems found in Africa are common law, civil law, customary law, religious law such as Islamic law or Sharia law, and mixed law.

³ In practice, the law of Nigeria consists of three distinct legal systems, Sharia law, the customary law and the common law. For example, the 1999 Constitution of Nigeria recognises various courts across these three legal systems to ensure enforcement institutions are provided for the religious and cultural societies. To put it differently, Nigeria is a multi-religious and cultural country. See Chapter VII of 1999 Constitution of Nigeria.

Benin African Charter ratification - 20/01/1986 African Court Protocol ratification - 22/08/2004 Article 34(6) of the Court Protocol Declaration - 08/02/2016.	Six communications at the African Commission. One finalised case and four pending cases before the African Court.	Civil law	1990 Constitution of the Republic of Benin
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5.1.1 Legal system

Long before colonisation, the administration of justice in many African settlements was mainly based on customary law and values.⁴ However, everything changed when the colonialists came to Africa. The European influence over the traditional African practices, values and rights were made possible through the guise and promise of improving and bettering the lives of Africans.⁵ Hence, at the time of independence, the European political, social and economic structures dominated entirely and replaced the majority of the “traditional African structures and values”.⁶ While this position is correct according to Nmehielle, it is noteworthy to mention that the European system did not completely erase the “traditional African value system”.⁷ At present, the main legal systems found in Africa are common

⁴ Makau Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35 Virginia Journal of Int. Law, 339.

⁵ Kofi Busia, *Africa in search of Democracy* (Routledge and Kegan Paul PLC, 1969) 48.

⁶ Makau Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (n 4 above).

⁷ Vincent Nmehielle, *The African Human Rights System: Its Laws, Practices and Institutions* (Martinus Nijhoff Publishers, 2001) 27. At present, customary law system forms part of the recognised legal systems in many African states such as Nigeria.

law,⁸ civil law,⁹ customary law,¹⁰ religious law such as Islamic law or Sharia law,¹¹ and mixed law.¹² The legal system in many African countries reflect the systems of law and dispute resolution of the colonising country.¹³ Flowing from the foregoing, Tanzania is a common law country, Benin is a civil law country while Nigeria ordinarily should be a common law country, but in reality, Nigeria is a mixed law country.¹⁴ The different legal systems demonstrate that some African countries did not wholly accept the legal system of their colonising country after independence; indeed, some aspects of the traditional values were retained alongside the European system. Therefore, the choice of Tanzania, Benin and Nigeria offers an opportunity to assess African Charter civil and political rights enforcement from the perspective of different legal systems.

5.1.2 Scope of domestic protection of civil and political rights

Most African states regained their independence from the late 1950s. Independence from European colonialism changed the human rights perspective of these African countries because many newly independent African countries were under pressure to accept the UDHR through their

⁸ Common law is derived from English common law doctrine and passed on to British colonies following colonisation. See, Nicola Gennaioli and Andrei Shleifer, 'The Evolution of Common Law' (2007) 115 *Journal of Political Economy*, 43.

⁹ The civil law is derived from Roman law and is found in many in continental European countries, including France and its former colonies.

¹⁰ Customary law systems are found in Africa and is rooted in the customs and values of a community. See, Neil Duxbury, 'Custom as Law in English Law' (2017) 76 (2) *Cambridge Law Journal*, 337.

¹¹ This is based on religious belief or text and governs all aspects of public and private life. An example is Sharia law.

¹² Mixed law refers to a combination of any of the other legal systems in one jurisdiction or country. See, William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60 (3) *Louisiana Law Review*, 677.

¹³ Sandra Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 (4) *Journal of Modern African Studies*, 2. For instance, Nigeria was colonised by Britain, Benin was created in 1960 when the colony of French Dahomey gained independence from France, and Tanzania was a former colony of Germany until 1919, when, under the League of Nations, it became a British colony.

¹⁴ In practice, the law of Nigeria consists of three distinct legal systems, Sharia law, the customary law and the common law. For example, the 1999 Constitution of Nigeria recognises various courts across these three legal systems to ensure enforcement institutions are provided for the religious and cultural societies. To put it differently, Nigeria is a multi-religious and cultural country. See Chapter VII of 1999 Constitution of Nigeria.

membership of the UN.¹⁵ Consequently, state constitutions were drafted as the supreme law of countries, and some of them enshrined human rights provisions. However, soon after the independence of many countries, the African elites in a bid to consolidate power dismantled liberal constitutions, retreated to ethnic loyalties and resorted to totalitarian leadership.¹⁶ Although this trend lasted for decades in many African countries, some that later returned to constitutional democracy include Nigeria,¹⁷ Benin¹⁸ and Tanzania.¹⁹ Returning to constitutional democracy presents an opportunity to examine the legislative and other measures adopted for the enforcement of civil and political rights at national levels. This is because totalitarian governments either fail to respect human rights adequately or suspend state constitutions containing human rights.²⁰

However, it is imperative to mention that the extent of constitutional protection of civil and political rights varies from one country to another. For instance, Tanzania and Nigeria have some similarities concerning the constitutional enforcement of fundamental or basic human rights as opposed to socio-economic rights which are recognised as Fundamental Objectives and Directive Principles of State Policy, thus, non-justiciable rights.²¹ It follows that these human rights categories do not enjoy equal domestic enforcement at national levels, thereby violating the African Charter objective. On the other hand, the 1990 Constitution of Benin adopted a different approach. First, this constitution affirms the rights and

¹⁵ Osita Eze, *Human rights in Africa: Some selected problems* (Macmillan Nigeria Publishers, 1984) 23.

¹⁶ John Harbeson, 'Democracy, Autocracy and the Sub-Saharan African States' in John Harbeson and Donald Rothchild (eds) *Africa in World Politics: Reforming Political Order* (4th edition, Westview Press, 2008) 87.

¹⁷ Nigeria returned to democracy in 1999 after several years of military rule and its 1999 Constitution has been amended severally but no significant amendment has been made to its human rights provisions and judicial institutions.

¹⁸ Benin has a 1990 Constitution.

¹⁹ Tanzania 1977 Constitution contains human rights provisions and judicial institutions.

²⁰ For example, General Sani Abacha suspended the 1979 Constitution of Nigeria using Decree No. 12 of 1994 and Constitution (Suspension and Modification) Decree No. 107 to oust the jurisdiction of ordinary courts in Nigeria.

²¹ Part II of 1977 Constitution of Tanzania, and Chapter II of 1999 Constitution of Nigeria.

duties proclaimed in the African Charter as an integral part of the 1990 Constitution.²² Secondly, this constitution does not contain provisions on Fundamental Objectives and Directive Principles of State Policy, which makes its progressive coverage of human rights protection relevant. Therefore, the inclusion of Benin provides a different approach from many African countries concerning the constitutional protection of human rights and the domestic institutions for enforcement.

5.1.3 Engagement with the African Charter and its Court Protocol

Another significant reason for the choice of countries is their level of engagement with the African Charter institutions. The engagement depends on whether they have ratified the African Charter and its Protocol, and if they have made a declaration under article 34 (6) of the Court Protocol. For instance, while the three countries have ratified the African Charter and the Court Protocol, Tanzania and Benin have deposited the declaration under article 34 (6) of the Court protocol accepting the competence of individuals and NGOs to access the court. On the other hand, Nigeria is yet to make changes under article 34 (6). It is therefore submitted that the level of accountability differs especially in relation to the African Court jurisdiction of individual and NGOs cases. For instance, while Nigeria has the highest number of finalised cases at the African Commission,²³ Tanzania has the highest number of both finalised and pending cases at the African Court,²⁴ whereas Benin, has the least appearances at both the African Court and

²² Article 7 of 1990 Constitution of Benin.

²³ Nigeria, as of the 1st day of May 2019 has 36 finalised communications at the African Commission and only one finalised case at the African Court. See, African Court on Human and Peoples' Rights, 'Contentious Matters', available at > <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#statistical-summary>< accessed 11 October 2019; African Commission on Human and Peoples' Rights, 'Communications', available at > <https://www.achpr.org/communications>< accessed 11 October 2019.

²⁴ Tanzania, as of the 1st day of May 2019 has 27 finalised cases and 103 out of 146 pending cases before the African Court. In addition, Tanzania has 9 finalised communications at the African Commission. See, African Court on Human and Peoples' Rights, 'Contentious Matters', available at > <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#statistical-summary>< accessed 11 October 2019; African Commission on Human and Peoples' Rights, 'Communications', available at > <https://www.achpr.org/communications>< accessed 11 October 2019.

Commission.²⁵ Therefore, state party engagement would demonstrate the underpinning domestic normative and institutional challenges or otherwise, in the enforcement of civil and political rights as well as the level of compliance with African Charter obligations.

5.2 State party obligations under the African Charter and the Court Protocol

Having examined the rationale and justification for the choice of selected states in the previous section, this section will demonstrate that success of a regional human rights treaty is a reflection of the commitment of its contracting state parties. Before examining state parties' obligations under the African Charter, it is imperative to mention that state party obligations vary from one instrument to another, and these directly impact on national human rights enforcement. For instance, while both the American Convention and ECHR allow for state party reservation,²⁶ the African Charter adopts an approach that requires mandatory state party enforcement of the rights and freedom therein enshrined. This implies that a state party may, when signing the ECHR or when depositing its national instrument of ratification, make a reservation in respect of any particular provision that is not in conformity with the provisions of a law in force in its territory.

Articles 1 and 26 of the African Charter advance the suggestion that state parties' obligations under the Charter play a significant role in its success.²⁷ Obligations undertaken under international instruments upon becoming a state party carry with it an underlying commitment that must be respected by state parties. For instance, the actual and evident prospect

²⁵ As at the 1st day of May 2019, Benin has one decided case (*Sabastine Ajavon v Benin*, App. No. 013/2017) and only four pending cases at the African Court. In addition, Benin has 6 communications at the African Commission of which three were ruled inadmissible, two had their files closed, and one was decided on merit.

²⁶ Article 75 of the American Convention and article 57 of ECHR.

²⁷ Ultimately, article 1 requires the adoption of legislative or other measures of protection, while article 26 instructs the establishment of independent courts and other national institutions for the protection of Charter rights and freedoms.

of article 1 is that the enjoyment of the Charter rights and freedoms largely depend on the level of recognition given, and measures that are taken to give effect to them by state parties. It suggests that state parties have the primary responsibility for implementation. Thus, litigation at domestic courts and quasi-judicial bodies is a reliable method of realising rights recognised by state parties in any event where there is an alleged violation or risk of violation.²⁸ Not surprisingly, the Commission found a breach of article 26 in *Tsatsu Tsikata v Ghana* because the respondent state failed to guarantee the independence of courts through tactics such as the appointment of judicial officers.²⁹ According to the Commission, such acts would undermine both the independence of the courts and public confidence in them.³⁰ Therefore, the obligations reviewed in this section highlight the relationship between the African Charter and state parties as well as emphasising the significance of state parties in the enforcement of the African Charter.

5.2.1 Obligation to provide legislative or other measures of protection

When the member states of the AU ratify the African Charter, they voluntarily agree to be bound by the regional concepts and ideas of human rights enforcement.³¹ This undertaking in African human rights discourse demands a change of attitude by state parties. Clearly, it comes with various obligations. It mandates state parties to recognise the rights, duties and freedoms enshrined in the Charter and adopt legislative or other measures to give effect to them.³² Furthermore, it mandates state parties to guarantee the protection of the Charter rights to every individual without

²⁸ For African Charter right to be enforced at domestic level, state party implementation must be backed by independent court and other appropriate national institutions.

²⁹ Communication 332/2006, para. 163.

³⁰ *Ibid.*

³¹ Communication 48/90, 50/91, 52/91, 89/93 - *Amnesty International v Sudan*, para 40-42.

³² Article 1 of the African Charter. Article 1 enshrines that 'member states of the Organisation of African Unity parties to the present Charter will recognise the rights, duties and freedoms enshrined in the Charter and will undertake to adopt legislative or other measures to give effect to them'.

distinction of any kind.³³ However, the extent to which this reality can be achieved varies from state to state.³⁴ For example, the language 'other measures' as evident in article 1 seems broad. In other words, it gives a leeway for state parties to adopt approaches that suit them as long as they give effect to the Charter rights, duties and freedoms. What is implied by is that African countries may choose any means, not particularly legislative measures, as long as they give effect to African Charter rights and freedoms.

Contrary to the normative protection in other regional treaties, the African Charter protects a range of rights such as civil and political rights, socio-economic and cultural rights, and collective rights. At the international level, both civil and political rights and socio-economic and cultural rights enjoy international law recognition following re-enactments by the UN in ICCPR and ICSECR.³⁵ However, article 1 of the African Charter declares a fundamental obligation that state parties recognise the rights and duties in the Charter as well as committing to respect them and undertake measures to give effect to them.³⁶ Therefore, violation of any provision of the African Charter is a violation of article 1.³⁷ This implies that the numerous communications and cases alleging violations of various African Charter rights demonstrate the failures in domestic protection.

From the outset, article 1 demonstrates the state party mandate to provide domestic protection of human rights through legislative or other measures. However, it is clear that while some African states have laudable

³³ Article 2 of the African Charter stipulates that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.

³⁴ It is not out of place to assert that states face challenges that may affect their obligation and enforcement of civil and political rights and these challenges may include legal and political systems, armed conflict and unrest, weak domestic institutions, poor cooperation and relationship between states and regional enforcement mechanisms, and peculiar social and cultural challenges.

³⁵ Beth Simmons, 'Civil Rights in International Law: Compliance with Aspects of International Bill of Rights' (2009) 16 (2) *Indiana Journal of Global Legal Studies*, 437.

³⁶ Communication 319/06 – *Interights and Ditshwanelo v Botswana*, para 97.

³⁷ Communication 147/95 and 149/96 – *Dawda Jawara v The Gambia*.

and inspiring provisions for human rights protection, some constitutional provisions also limit and undermine human rights goals. This is because some AU state party constitutions bar the enforcement of some socio-economic rights by recognising this category of rights as Fundamental Objectives and Directive Principles of State Policy.³⁸ It is submitted that such constitutional limitation violates article 1 because it constitutes state party failure to respect, protect, promote and fulfil the rights guaranteed in the Charter.³⁹

This obligation shows the enormous responsibility of state parties. More specifically, it expects state parties to use their constitution to protect human rights according to contemporary human rights rules, directives, resolutions and treaties, as well as empower the national courts to interpret and adjudicate on a violation or threat of violation to human rights.⁴⁰ It follows that a state would be deemed to have violated article 1 if violations of other rights guaranteed in the Charter occurs due to failure to adopt adequate legislative or other measures to give effect to the Charter rights.⁴¹

5.2.2 State party obligation to guarantee the independence of the courts and establish appropriate national institutions

The duty to ensure the independence of the court is a pillar of the right to a fair trial and has implications for the actual and apparent impartiality of the court.⁴² This obligation has its foundation in article 26 of the African Charter. This is because the right to a fair trial by an independent and impartial court is an absolute right under article 7 of the African Charter. A court has the mandate to interpret the provisions of a piece of legislation

³⁸ Countries with such constitutional provisions include Nigeria (Chapter II of the 1999 Constitution) and Tanzania (Part II of the 1977 Constitution). See also, Jacob Dada, 'Impediments to Human Rights Protection in Nigeria' (2012) 18 (6) *Annual Survey of International and Comparative Law*, 67.

³⁹ See, communication 368/09 - *Abdel Hadi, Ali Radi and others v Sudan*, para 91 and 92.

⁴⁰ Benjamin Nwabueze, *Constitutional Democracy in Africa: The Pillars Support Constitutional Democracy* (Volume 3, Spectrum Book, 2003) 19.

⁴¹ Communication 290/2004 - *Open Society Justice Initiative (On behalf of Pius Njawe) v Republic of Cameroon*, para 202-205; Communication 147/95, 145/96 - *Jawara v The Gambia*, para 46.

⁴² Communication 322/2006 - *Tsatsu Tsikata v Ghana*, para 146.

and where necessary, grant redress to victims. The availability of independent courts gives one the needed platform to challenge legislation or acts likely to violate one's basic rights. Indeed, a person may challenge the customary law, legislation, executive orders and policies on the ground of its contradiction with constitutional safeguards on fundamental rights and the courts may overturn such laws or orders.

The obligation to provide independent court implies that the African Commission and the African Court would find a violation of this duty when there is government interference in the judicial process. The availability of remedies in national laws cannot guarantee full protection if the enforcement institutions are not independent of other arms of government.⁴³ There will be a violation of article 26 if the manner of appointments and the duration of the terms of office to the judiciary are made in contemplation of specific cases by the executive.⁴⁴ This implies that while mere appointments of judicial officers do not constitute a violation of this obligation, appointments viewed as targeted measures to achieve anticipated outcome is a violation of article 26. Thus, a reading of article 26 brings to the fore the relevance of having access to appropriate institutions for the enforcement of human rights.

Rights will be meaningless if appropriate institutions are lacking enforcement. The duty to guarantee independent and impartial courts and national institutions are essential to ensure that victims get redress within a reasonable time. It reassures state parties of the sovereignty which they exercise by first adjudicating on claims against them. Indeed, remedies from national courts must be exhausted before the African Court or African Commission can consider complaints submitted by an individual or NGO.⁴⁵ In particular, exhaustion of local remedies under article 56 (5) is a crucial

⁴³ David Gartner, 'Transformational Rights Enforcement' (2013) 31 (1) Berkeley Journal of International Law, 1.

⁴⁴ *Campbell and Fell v UK*, ECtHR App.7819/77; 7878/77, para 78.

⁴⁵ Article 56 (5) of the African Charter.

admissibility requirement.⁴⁶ Therefore, articles 26 and 56 (5) requirements come with other state party duties such as ensuring the availability of courts and other institutions, the independence of courts, non-interference with judicial proceedings, and ensuring a timely and fair trial in the courts. This is not unusual because the judiciary has often been vested with responsibilities for the dispensation of justice, interpretation of legislation and being the custodian of constitutional values.⁴⁷

The consequences of article 26 provision in realising the effective enforcement of civil and political rights has led to the establishment of appropriate national institutions.⁴⁸ For instance, there has been a remarkable increase in the number of National Human Rights Institutions (NHRIs) across the African continent. In particular, while forty-four African countries have established human rights institutions,⁴⁹ twenty-eight NHRIs have been granted Affiliate Status in accordance with the African Commission Resolution on the Granting of Affiliate Status to NHRIs.⁵⁰ According to the Office of the United Nations High Commissioner for Human Rights, NHRIs are state bodies 'established with a constitutional and legislative mandate to protect and promote human rights'.⁵¹ These bodies

⁴⁶ This precondition is also recognised in ECHR and the American Convention.

⁴⁷ Benedict Nchalla, 'Tanzania Experience with Constitutionalism, Constitution-Making and Constitutional Reforms' in Morris Mbondeyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspective from Sub-Saharan Africa* (Pretorian University Press, 2013) 35.

⁴⁸ For example, the following Nigerian institutions have been established by Acts of the National Assembly to support human rights protection and promotion; they include, the Nigerian Human Rights Commission, and the Independent National Electoral Commission established pursuant to section 153 (f) of the 1999 constitution of Nigeria.

⁴⁹ United Nations Development Programme, *Study on the State of National Human Rights Institutions (NHRIs) in Africa* (Blandford Consulting, 2016) 17-18; Christof Heyns and Morris Killander, *Compendium of Key Human Rights Documents of the African Union* (University of Pretoria Press, 2016) 343.

⁵⁰ Final Communique of the 62nd Ordinary Session of the African Commission, available at > http://www.achpr.org/files/sessions/62nd_os/info/communique62/en_final_communique_62os.pdf< accessed 30 July 2018. In addition, these institutions in Africa are organised into a network and meet frequently at its permanent Secretariat at Kenya to exchange experiences and make declarations.

⁵¹ Office of the United Nations High Commissioner for Human Rights, *National Human rights Institutions: History Principles, Roles and Responsibilities* (2010) Professional Training Series No. 4, Revision 1, 13.

form part of the domestic apparatus for the enhancement of human rights promotion and protection and are funded by states.⁵² Equally important, not only are they recognised as part of the cornerstone of domestic human rights protection systems, these entities often participate as relay mechanisms between state parties and international human rights mechanisms.⁵³ Suffice it to add that the term National Human rights Commissions and NHRIs are commonly used interchangeably in literature even though the UN Principles Relating to the Status of National Human Rights Institutions (Paris Principles) of 1993 referred to such entities as national institutions.⁵⁴

NHRIs are vital in the enforcement of human rights. Their responsibilities include encouraging state parties to ratify international treaties,⁵⁵ offering advice to state parties on the conformity or otherwise of any proposed legislation with international human rights principles or even recommending the enactment, amendment or adoption of legislation that will promote human rights.⁵⁶ Although most of the NHRIs are quasi-judicial entities, they may submit shadow reports,⁵⁷ cooperate with international bodies and agencies and NHRIs of other states to enhance human rights promotion and protection.⁵⁸ On the other hand, NHRIs provide amicable solutions to human rights protection in a manner different from the court

⁵² Paragraph 2 of Paris Principles; Bonolo Dinokopila and Igweta Rhoda, 'The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation' (2018) 26 (2) African Journal of International and Comparative Law, 205; Linda Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Springer Science, 2004) 84; Office of the United Nations High Commissioner for Human Rights, *National Human rights Institutions: History Principles, Roles and Responsibilities* (2010) Professional Training Series No. 4, Revision 1, 16.

⁵³ Bonolo Dinokopila and Igweta Rhoda, 'The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation' (n 52 above); Morten Kjaerum, *National Human Rights Institutions Implementing Human Rights* (Martinus Nijhoff, 2003) 6-7.

⁵⁴ Bonolo Dinokopila and Igweta Rhoda, 'The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation' (n 52 above); Mario Gomez, 'Sri Lanka's new Human Rights Commission' (1998) 20 Human Rights Quarterly, 281; Office of the United Nations High Commissioner for Human Rights, *National Human rights Institutions: History Principles, Roles and Responsibilities* (2010) Professional Training Series No. 4, Revision 1, 13.

⁵⁵ Paragraph 3 (c) of Paris Principles.

⁵⁶ Paragraph 3 (a) of Paris Principles.

⁵⁷ Paragraph 3 (d) of Paris Principles.

⁵⁸ Paragraph 3 (a) (i) of Paris Principles.

system. Nonetheless, the effectiveness of NHRIs in some AU state parties are limited by several factors such as inadequate knowledge and understanding of their functions by the majority of Africans; inadequate funding from government; and lack of independence.⁵⁹ Indeed, a country to a country analysis of NHRIs would signpost the extent to which the state party prioritises human rights promotion and protection.⁶⁰ For example, even with the constitutional recognition of independent judiciary in the constitutions of Nigeria and Tanzania, courts and NHRIs have remained inclined to pressure from other arms of government and influential individuals, leading to the constant influence of the judiciary.⁶¹

5.2.3 State party obligation to comply with findings of the African Court and African Commission

Compliance with findings of human rights is integral to the entire process of human rights protection because it ensures accountability and restores confidence to victims.⁶² However, compliance with findings is a critical challenge facing the international human rights system.⁶³ Particularly in Africa, part of the challenge to effective enforcement of human rights law include disobedience or non-enforcement of decisions, lack of independence of the courts and the small number of courts.⁶⁴ In order to comply with this

⁵⁹ Chris Peter, 'Human Rights Commissions in Africa- Lesson and Challenges' in Anton Bosl and Joseph Diescho (eds) *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (Macmillan Education, 2009) 370.

⁶⁰ Frans Viljoen, 'Exploring the Theory and Practice of the Relationship between International Human Rights Law and Domestic Actors' (2009) 22 *Leiden Journal of International Law*, 177.

⁶¹ In addition, there is widespread impunity in the police and other security forces and the police continue to act as prosecutors in some cases and sometimes, are able to manipulate evidence 2017 US Department Human Rights Report on Tanzania, available at > <https://www.state.gov/documents/organization/277299.pdf>< accessed 06 June 2018; 2017 US Department Human Rights Report on Nigeria, available at > <https://www.state.gov/documents/organization/277277.pdf>< accessed 06 June 2018.

⁶² It is for this reason that article 30 of the Court Protocol enshrines that 'state parties to the present Protocol undertake 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'. However, the African Charter does not contain such an express provision.

⁶³ Daniel Abebe, 'Does International Human Rights Law Make a Difference?' (2017) 56 (3) *Virginia Journal of International Law*, 527.

⁶⁴ *Ibid.*

obligation, the Commission has over time offered its assistance to states where they may have difficulties in the implementation of its recommendations. For example, in *Malawi Africa Association and others v Mauritania*, the Commission made elaborate recommendations and further offered its full cooperation and support in the application of its recommendations.⁶⁵ Although Mauritania has not complied with the recommendation in this communication, this approach by the Commission suggests its resilience to ensure victims enjoy the benefits of the African Commission's recommendations. It is argued, therefore, that noncompliance with findings of the Commission and Court amounts to an exercise in futility. It follows that the AU, the Court and the Commission need to do more to ensure state party compliance given the discouraging evidence of state compliance with findings.

5.2.3.1 Analysis of relevant landmark jurisprudence at the African Court and the African Commission on Nigeria, Tanzania and Benin⁶⁶

This section will examine some landmark decisions of the African Commission and African Court on Nigeria, Tanzania and Benin to illustrate state party obligation to comply with decisions. It demonstrates that the African Court and African Commission landmark decisions have the potential to influence state party legislation to meet African Charter ideals if properly enforced. However, an attempt is made to follow-up on the compliance of African Commission communications and African Court cases in the appendix to this thesis. The information contained in the appendix on the status of compliance will focus on decisions that urge countries to carry out specific actions such as legislative amendments or compensation.⁶⁷ The main reason for this emphasis is the difficulty in complying with declaratory

⁶⁵ Communication 54/91, 61/91, 98/93, 164/97 to 210/98.

⁶⁶ Detailed information on the African Court and the African Commission case law jurisprudence are found in appendix 1 and 2, on page 415.

⁶⁷ See appendix I and II. An attempt is made to gather information on the case parties, alleged violations and violations found, and, decisions by the African Charter institution. Those cases where violations were not found are not included given the obvious reason that there was nothing to comply with.

judgments earlier adopted by the Commission. Nevertheless, the information gathered here is from the State Reports, Annual Activity Reports, scholarly works on African Charter jurisprudence, and verifiable media reports,⁶⁸ and represents the first coordinated attempt from the Court and Commission.⁶⁹ Perhaps compliance with international human rights decisions forms part of the yardstick for measuring the effectiveness of such international human rights systems.⁷⁰ For instance, the African Court has been applauded for the number of cases completed within its first decade when compared to European and American regional courts.⁷¹

5.2.3.1.1 *Civil Liberty Organisation (in respect of the Nigeria Bar Association) v Nigeria*⁷²

Civil Liberty Organisation (in respect of the Nigeria Bar Association) v Nigeria is the first case in which the African Commission ordered that

⁶⁸ The information gathered in the appendix of this thesis represents the first coordinated attempt at gathering information on enforcement of civil and political rights under the African human rights system. The information cannot claim to be complete or a fully accurate account of implementation due to some difficulties related to gathering first-hand information of follow-up from key role players such as individual parties, relevant state authorities for enforcement, overt unwillingness to release information by African Commission and African Court secretariats on the grounds of confidentiality, inability to visit and interview African Commissioners and African Court secretariat due to their location in the Gambia and Arusha, Tanzania.

⁶⁹ See appendix to this thesis. From the available information, the 7th Annual Activity Report was the first to be published by the African Commission on its findings under article 55 of the African Charter. Before this time, the African Commission strictly relied on the interpretation of the article 59 confidentiality clause to justify non-publication of its findings. The information recorded in the appendix are gathered from the inception of both the African Commission and African Court up to February 2019. Besides, they reflect only cases with findings of violations of the African Charter. It does not include cases that were declared inadmissible or struck out by the Court and Commission such as: App. No. 006/2011 – *Association des Juristes d’Afrique pour la Bonne Gouvernance v. Republic of Cote d’Ivoire*; App. No. 005/2011 – *Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines*; App. No. 008/2011 – *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v. Republic of South Africa*; App. No. 004/2012 – *Emmanuel Joseph Uko and Others v. Republic of South Africa*; and App. No. 001/2012 – *Frank David Omary and Others v. United Republic of Tanzania*.

⁷⁰ Lutz Oette, ‘Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies’ (n 59 above).

⁷¹ Between 2006 and 2016 the African Court handed down merit decisions in 8 contentious cases, and declared 2 inadmissible; whereas, the European Court between 1959 and 1969 decided only 7 cases on their merit. On the other hand, the Inter-American decided only 3 contentions cases between 1979 and 1989. See generally, Frans Viljoen, ‘Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples’ Rights’ (2018) 67 (1) *International and Comparative Law Quarterly*, 63.

⁷² Communication 101/93.

domestic law is annulled for ousting recourse to a court and for having retrospective force. This landmark decision was made after the African Commission missed such an opportunity in *Constitutional Rights Project (in respect of Akamu, Adegga and others) v Nigeria*.⁷³ This case concerned the Legal Practitioners' Decree enacted by the government, which establishes a governing body called the Body of Benchers. Of the 128 members of this body, only 31 are nominees of the Bar Association while the rest are nominees of the government. Furthermore, the Decree is retrospective, excludes recourse to the court and further makes it an offence to commence or maintain any action or legal proceeding relating to or connected with or arising from the exercise and functions of the Body of Benchers.

The practical significance of this case is twofold: Firstly, the decision signifies that the African Commission can interfere by making final judgments instead of declaratory judgments. For example, this case is the first recommendation made to an African Charter state party demanding annulment of violating domestic law. Secondly, this case establishes that the subject matter of a complaint determines whether the communication falls within the scope of the African Commission irrespective of the type of government in place in African Charter state parties.⁷⁴

However, the case above shows the consequences of claw-back clauses in the normative provisions of the African Charter. However, this decision has demonstrated that national laws that oust the jurisdiction of the African Charter are resolved to be a violation of the African Charter. Similar to this case, the Commission in *Civil Liberties Organisation v Nigeria*⁷⁵ further held national laws that exclude recourse or jurisdiction of

⁷³ Communication 60/91. In this case, the complainant alleged impartial composition of the Robbery and Firearms Tribunal and exclusion of the right to appeal in Robbery and Firearms (Special Provision) Decree No. 5 of 1984. In its ruling, the African Commission recommended that Nigeria should free all the complainants tried and sentenced to death under this Decree. However, this recommendation was later commuted to various prison terms by a High Court in Nigeria.

⁷⁴ This observation is made because the Decree was enacted by a military regime under General Sani Abacha.

⁷⁵ Communication 129/94.

the court or suspend the Constitution constitute a serious irregularity and violation of provisions of the African Charter. However, Nigeria did not comply with this decision until the death of General Sani Abacha, which later led to Nigeria's transition to democracy and annulment of the Decree.

5.2.3.1.2 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*⁷⁶

This communication is the first in which the African Commission delivered a recommendation on the impact of the absence of a derogation clause in the African Charter. This case concerned the promulgation of decrees ousting court jurisdiction and suspension of the Nigeria Constitution, expunging of the Newspaper Act and promulgation of the Newspaper Decree No. 43 of 1993, proscription and seizures of several newspapers and magazine publishers, arrest and detention of editors and vendors, and a retroactive commencement of the Decree. The promulgation was enacted because the military regime under General Sani Abacha was not comfortable with the role of the press. At the African Commission, the complainant alleged a violation of the African Charter provisions, especially articles 6, 7, 9 and 14. In its response, the respondent argued that there was nothing wrong in ouster clauses under a military regime because litigations would be too cumbersome for a military government to carry out its mandates.⁷⁷

Looking at the communication on its merit, the African Commission re-emphasised that not only should governments refrain from enacting laws that oust or limit the powers of the courts or freedoms under the African Charter, they also should not override constitutional provisions or undermine fundamental rights.⁷⁸ It further asserts that no situation justifies the wholesale violation of the African Charter rights because it diminishes

⁷⁶ Communication 105/93, 128/94, 152/96.

⁷⁷ *Ibid*, para 13, 14 and 15

⁷⁸ *Ibid*, para 64. See also, Communication 101/93 - *Civil Liberty Organisation (in respect of the Nigeria Bar Association) v Nigeria*.

the public confidence in the rule of law.⁷⁹ Hence, the African Commission stated that the only legitimate reason for the limitation of the African Charter rights is found in article 27 because the African Charter does not contain a derogation clause.⁸⁰ Therefore, no limitation can be justified by emergencies or special circumstances. In its recommendation, the African Commission ruled that the Nigerian government should take necessary steps to bring its laws into conformity with the African Charter.

This case demonstrates the position of the African Commission on the impact of the absence of a derogation clause in the African Charter. The practical significance of this communication is that no derogation is allowed except as provided under article 27. State parties are justified when they limit enjoyment of the African Charter rights and freedoms on any or all of the grounds listed under article 27.⁸¹ The overall recommendation of the African Commission appears to be narrow given the extent of the issues raised before the Commission. In particular, the Commission limited the overall recommendation to a general request for Nigeria to bring its law into conformity with the Charter without making orders as to annulment of the decree, the release of prisoners, or even request for a change of government to a democratic government. In other words, the Commission should be seen as having the power to make recommendations relating to a change of government where there seems to be a violation of article 13 of the African Charter. Again, Nigeria did not comply with this decision until the death of General Sani Abacha and the subsequent transition to democracy.

⁷⁹ *Ibid*, para 65.

⁸⁰ *Ibid*, para 67 and 68.

⁸¹ Article 27 (2) enshrines that the rights of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

5.2.3.1.3 *Tanganyika Law Society and Legal and Human Rights Centre and Rev. Christopher Mtikila v Tanzania*⁸²

The first opportunity for the African Court to assert its authority over issues concerning conflicting state party's legislation presented itself in *Tanganyika Law Society and Legal and Human Rights Centre and Rev. Christopher Mtikila v Tanzania*. In this case, the African Court was asked to rule on the constitutionality and interpretation of provisions of national law which violated the citizens' right to association, the right to participate in public/government affairs and the right against discrimination of independent candidates to contest Presidential, Parliamentary and Local Government elections. On the other hand, the respondent argued that the prohibition of independent candidates was a way of avoiding absolute and uncontrolled liberty, which would lead to disorder and anarchy. The respondent further argued that the prohibition of independent candidates is necessary for national security, defence, public order, public peace and morality;⁸³ hence, qualifications for election are regulated by articles 39(1) and 67 (1) of 1977 Constitution of Tanzania and section 39 (f) of the Local Authorities (Election) Act, Cap 292, respectively.

The significance of this case on state party obligation to adopt legislative measures to give effect to the Charter rights are two-fold. First, the Court, in this case, agrees with the African Commission that limitation of rights is only permissible according to article 27 of the African Charter.⁸⁴ The Court further agrees that it has jurisdiction to interpret the alleged rights vide the ICCPR and UDHR in line with its jurisdiction under article 3 of the Court Protocol. The recognition given to the African Commission, the ICCPR and UDHR, in this case, signifies the broad extent to which its interpretative jurisdiction can go, and its ability to seek clarifications necessary for a decision in cases before it. Secondly, it clarifies the power

⁸² App. No. 009/2011 and 011/2011.

⁸³ *Ibid*, para 90.

⁸⁴ *Ibid*, para 107.1.

of the African Court to order an amendment to state parties' constitutional, legislative and other measures adopted to give effect to the Charter rights. From this decision, the African Court jurisdiction extends to cases where the subject matter of a complaint is national legislation, which violates the provisions of the African Charter.⁸⁵ Tanzania has declined to comply with this judgment.

5.2.3.1.4 *SERAC v Nigeria*⁸⁶

The next opportunity for the African Commission to clarify the unique normative feature of the African Charter recognition of all generations/categories of rights presented itself in *SERAC v Nigeria*. This communication concerns an allegation over the involvement of Nigeria's military government in oil production through the State oil company, the Nigeria National Petroleum Company and Shell Petroleum Development Corporation, and these operations have caused environmental degradation, health problems and other threats to the indigenous people and villages. The communication further alleged the physical attacks and burning of villages by Nigerian security forces, shooting and killing of unarmed villagers, invasion of privacy of suspected members and supporters of Movement of the survival of the Ogoni people, and destruction of food source through a variety of means such as the killing of animals and crops. Although there was a transmission of government from military to democratic rule following the death of General Sani Abacha before the final recommendation was made, the African Commission still found the violation of the African Charter provisions.

The significance of this case on the recognition of all generations/categories of rights in the African Charter is that it establishes the enforceability of all rights, and in particular, the justiciability of socio-

⁸⁵ Furthermore, in *Lohe Issa Konate v Burkina Faso* (App. No. 004/2013), the African Court ordered the respondent state to amend its legislation on defamation in order to make it complainant with article 9 of the African Charter.

⁸⁶ Communication 155/96.

economic rights.⁸⁷ The Commission averred that the African Charter must be responsive to the African circumstances and that all rights contained in the African Charter are essential human rights to be enjoyed in Africa. This case establishes that every right included in the African Charter can and should be made effective by state parties. It follows from the African Commission analysis that where state parties omit, bar enforcement or limit any African Charter right and freedom in their constitution, such an act is to the extent of this case, a violation of the African Charter. Nigeria did not comply with this recommendation; however, upon its transition to democracy, it established the Niger Delta Development Commission to take care of some of the complaints in the region. To date, socio-economic rights are not enforceable in Nigeria and Tanzania.

5.2.3.1.5 *Armand Guehi v Tanzania*⁸⁸

In this case, the African Court made an order for provisional measures against Tanzania regarding the execution of the death penalty against the applicant pending the determination of the application. In particular, Tanzania was asked to report to the Court within thirty days from the date of receipt of the order on measures taken to implement the order. Nonetheless, it is submitted that a systematic interpretation of the African Court order shows that the order is rooted in other international agreements on the abolition of the death penalty given that the African Charter does not specifically prohibit the death penalty.⁸⁹

In response, however, Tanzania notified the Court that it would not implement this order of the Court. It is pertinent to clarify that Tanzania has outrightly rejected orders from the African Court requesting it to refrain from executing the death penalty.⁹⁰ Moreover, Tanzania has always

⁸⁷ *Ibid*, para 68.

⁸⁸ App. No. 001/2015.

⁸⁹ Of course, the Court is aware of the existence of the African Commission Resolution Urging States to Envisage a Moratorium on Death Penalty.

⁹⁰ For instance, Tanzania has also notified the African Court that it will not refrain from executing the death penalty in the following cases- *Ally Rajabu v Tanzania* (App. No. 007/2015), *John Lazaro v*

objected to the African Court authority to make such orders in the absence of any risk of irreparable harm and without hearing the parties.⁹¹ Tanzania argues that the death penalty is recognised in its national statutes and that its national courts are right in invoking such national statutes where it applies. However, the outright refusal to obey African Court orders violates Tanzania's obligation under the African Charter, and such violation undermines the development and enforcement of civil and political rights at the national level.

5.2.3.1.6 *Sebastine Germain Ajavon v Benin*⁹²

An opportunity for the African Court to clarify the scope of disparaging or insulting language under article 56 (3) presented itself in this case. This case concerns an application against violation of the complainant's right to equal protection of the law, the dignity of the human person, freedom and security of his person, the right to be presumed innocent until proven guilty, the right to property and the duty to ensure the independence of the judiciary. The complainant alleged that these rights were violated through acts such as withdrawal of custom licenses, disruption of radio and television signals, and unfair trial. The respondent thereto objected to jurisdiction and admissibility of the case. However, in dismissing the admissibility objection on the use of disparaging language, the Court held that public figures, including those who hold high office, are legitimately subject to criticism.

This ruling to an extent settles the uncertainties in meeting the requirement under article 56 (3) in the African Commission decisions. Prior to this decision, previous decisions of the African Commission on the

Tanzania (App. No. 003/2016), *Evodius Rutachura v Tanzania* (App. No. 004/2016), *Habiyalimana Augustono and another v Tanzania* (App. No. 015/2016), *Deogratius Nicolas Jeshi v Tanzania* (App. No. 017/2016), *Cosma Faustine v Tanzania* (App. No. 018/2016), *Joseph Mukwano v Tanzania* (App. No. 021/2016), *Amini Juma v Tanzania* (App. No. 024/2016), *Dominick Domian v Tanzania* (App. No. 048/2016), *Chrisant v Tanzania* (App. No. 049/2016), *Gozbert Henrico v Tanzania* (App. No. 056/2016), *Mulokozi Anatory v Tanzania* (App. No. 057/2016).

⁹¹ *Ibid.*

⁹² App. No. 013/2017.

understanding of what constitutes disparaging language have seen almost all criticisms of a President or government as a violation of this requirement.⁹³ Although article 56 (3) language makes what amounts to disparaging or insulting language significantly subjective, this decision is a complete departure from the African Commission's understanding. The significance of this decision is that criticism of public officials on actions of government does not amount to disparaging or insulting language.

5.3 Analysis of the scope of domestic protection of civil and political rights

The previous section examined state party obligations under the African Charter and showed that state party commitment to these obligations determines the African Charter rights enjoyment at national level. This section will analyse whether there are national mechanisms that may be deployed to ensure effective realisation of human rights enforcement in selected countries in accordance with state obligations listed in previous sections. For instance, while article 1 ensures that state parties' legislative frameworks harmonise with the regional human rights standards provided in the African Charter, article 26 ensures independent national mechanisms are guaranteed. Indeed, it is through the action and inaction of state parties' courts, tribunals, and parliaments that the regional bodies assume jurisdiction. However, African Charter state parties have different legal and political systems;⁹⁴ a reality which the drafters may have considered given

⁹³ For instance, in Communication 295/04, para 51, *Zimbabwe Lawyers for Human Right v Zimbabwe*, the Commission stated that 'in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary or any other state institution, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation for integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute'. See also, Communication 306/05 - *Samuel T Muzerengwa and 11 others v Zimbabwe*; Communication 268/03 - *Ilesanmi v Nigeria*; and, Communication 65/19 - *Ligue Camerounaise des Droits de l'Homme v Cameroon*.

⁹⁴ While it is true that the majority of AU state parties are democratic, there are still evidence of Monarchy, Military governments. African state are most either civil or common law countries.

article 1 language 'legislative or other measures' in giving effect to the Charter rights.

This section examines selected countries constitutional provisions, enforcement mechanisms and challenges and prospects in order to ascertain national efforts towards meeting their obligations under the African Charter. The focus will extend to national institutions such as the courts and NHRIs. The NHRIs is considered because of the broad mandate which complements effective realisation of human rights at national levels. The overview of NHRIs shows that the optimal functioning of NHRIs can enhance protection of civil and political rights because they tend to be more flexible, accessible and less bureaucratic in terms of procedures and technicalities than the courts of law.⁹⁵

5.3.1 Nigeria

Nigeria, a West African country, gained its independence in 1960 and has undergone several political crises, including a civil war from 1967 to 1970 and several military regimes. However, Nigeria has been enjoying its longest uninterrupted democratic rule since 1999. Nigeria is also a signatory to many international human rights instruments, including the ICCPR. However, successive Nigerian constitutions since its independence in 1960 have included provisions on human rights protection. The origin of human rights in Nigeria statutes dates back to the various conferences held in preparation for Nigeria's independence, essentially to allay the fears of the minority tribes of being dominated by the majority tribes.⁹⁶

⁹⁵ Office of the United Nations High Commissioner for Human Rights, *National Human rights Institutions: History Principles, Roles and Responsibilities* (2010) Professional Training Series No. 4, Revision 1, 20-23; Chris Peter, 'Human Rights Commissions in Africa- Lesson and Challenges' in Anton Bosl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (n 59 above).

⁹⁶ Anthony Nwafor, 'Enforcing Fundamental Rights in Nigerian Courts: Prospects and Challenges' (2009) *African Journal of Legal Studies*, 1.

5.3.1.1 Constitutional protection of civil and political rights

The first constitutional protection of human rights in Nigeria was promulgated in chapter III of the 1960 Independence Constitution and subsequently in the 1963 Republican Constitution, consisting of 15 sections under the heading 'Fundamental Rights'.⁹⁷ After witnessing several years of military rule starting from 1966, and a civil war between 1967 and 1970, Nigeria returned to democratic government in 1979 with a brand new and unique constitution. Although the 1979 Constitution recognised human rights protection, certain rights were classified as Fundamental Objectives and Directive Principles of State Policy.⁹⁸ The legal implication of this is that the courts cannot enforce the rights classified as Fundamental Objectives and Directive Principles of State Policy. Despite this legal implication to effective human rights enforcement, the 1989 Constitution and the existing 1999 Constitution of Nigeria adopted this approach.⁹⁹ However, another common feature shared by the 1979 and 1999 constitutions is that military leaders promulgated them at different times in Nigerian history.

It is necessary to acknowledge that several attempts have been made by the Nigeria National Assembly to amend the provisions of the 1999 Constitution. Despite this, nothing significant has been done to the human rights chapter. At present, the Fundamental Objectives and Directive Principles of State Policy provisions cover mostly rights classified under social and economic rights such as the right to free education,¹⁰⁰ healthcare,¹⁰¹ housing, support for the elderly, unemployed and disabled,¹⁰² and the right to work.¹⁰³ To support this position, section 6 (6) (c) of the

⁹⁷ Nnamdi Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction* (CIDJAP Publishers, 1999) 33.

⁹⁸ Chapter IV of the 1979 Constitution of Nigeria.

⁹⁹ It is worth mentioning that the 1979 Constitution was nullified and replaced by a military decree after the 1984 military coup led by General Mohammad Buhari and the military continued to govern the country until 1999 when General Abdulsalami Abubakar handed over to a civilian government.

¹⁰⁰ Section 18 (3) of the 1999 Constitution of Nigeria.

¹⁰¹ Section 17 (3) (d) of the 1999 Constitution of Nigeria.

¹⁰² Section 16 (2) (d) of the 1999 Constitution of Nigeria.

¹⁰³ Section 17 (3) (a) of the 1999 Constitution of Nigeria.

1999 Constitution bars court jurisdiction to pronounce any decision on matters relating to the Fundamental Objectives and Directive Principles of State Policy.¹⁰⁴ Therefore, the Nigerian constitution contradicts Nigeria's obligation under article 1 of the African Charter.

However, Nigeria's constitution permits the legal enforcement of fundamental rights, which primarily are civil and political rights. This position on human rights implementation in Nigeria has been reinforced by the Supreme Court in *Federal Republic of Nigeria v Ifegwu* when it held that though fundamental rights are part of human rights, the trend in modern society where the rule of law operates is to protect fundamental rights for the enhancement of human dignity and liberty.¹⁰⁵ From this principle of law, human rights that are not recognised in the constitution cannot be regarded as fundamental rights. Furthermore, in *Mustapha v Governor of Lagos State*, the Nigeria Supreme Court similarly noted that human rights must encompass all humans and these rights must be clearly distinguished from civil rights, political rights, economic rights, and so on.¹⁰⁶ It then follows that Nigeria does not allow a blanket human rights entitlement to individuals.

In the Nigerian context, fundamental rights mean rights included in Chapter IV of the 1999 Constitution and consist of any of the rights stipulated in the African Charter on Human and Peoples Rights (Ratification

¹⁰⁴ This was obliterated in the case of *Okojie and others v Attorney General of Lagos State* (1981) Nigeria Constitutional Law Report, 218. See also, Taiwo Olaiya, 'Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria' (2015) 8 (3) Journal of Politics and Law, 23; Ajepe Shehu, 'The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience' (2013) 2 Afe Babalola University Journal of Sustainable Development Law and Policy, 101; Jacob Dada, 'Impediment to Human rights Protection in Nigeria' (n 38 above); Rhuks Ako, et al, 'Overcoming the (Non)justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Rights to a Healthy Environment in Nigeria' in Alice Diver and Jacinta Miller (eds), *Justiciability of Human Rights Law in Domestic Jurisdiction* (Springer, Cham, 2016) 124.

¹⁰⁵ According to Justice Uwaifo in the case of *Federal Republic of Nigeria v Ifegwu* (2003) Federal Weekly Law Report (Part 167) 703 at 758.

¹⁰⁶ (1987) 2 Nigeria Weekly Law Report (Part 58) 539 at 584. However, the court distinguish between human rights and fundamental rights by admitting that human rights are derived from the broader concept of natural rights which every society must accept as belonging to each person as a human being.

and Enforcement) Act of 1983.¹⁰⁷ Nigeria ratified the African Charter in 1983 in accordance with section 12 (1) of the then 1979 Constitution (now section 12 of 1999 Constitution) which concerns treaties and their implementation.¹⁰⁸ As a well-known international law principle of treaties, no state would be bound under a treaty to which it has not given its consent before being enjoined to institute domestic measures for implementation. Therefore, the Supreme Court in *Sani Abacha v Gani Fawehinmi* held that the re-enactment of international treaties into domestic law is what is referred to as the concept of domestication according to section 12(1) of the 1979 Constitution.¹⁰⁹ Therefore, having ratified the African Charter, this section implies that all rights recognised in African Charter on Human and Peoples Rights (Ratification and Enforcement) Act are enforceable rights in Nigeria, thereby expanding the scope of what human rights the courts can enforce.

However, the domestication of the African Charter has raised some fundamental constitutional issues in Nigeria. For clarity purposes, the constitution is the grundnorm and the supreme law of the land.¹¹⁰ First, the constitution ultimately draws a distinction between justiciable and non-justiciable rights, which the African Charter fails to do.¹¹¹ The issue here affects the domestication and enjoyment of the African Charter rights where there is a conflict between the constitution and the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act of 1983.

¹⁰⁷ See *El-Rufia v Senate of the National Assembly* (2016) 1 Nigeria Weekly Law Report (Part 1464) 506.

¹⁰⁸ Section 12 states that (i) 'no treaty between the Federation and any other country shall have force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. (ii) The National Assembly make laws for the Federation or for any part thereof with respect to matters not included in the Exclusive List for the purpose of implementing a treaty'.

¹⁰⁹ *Abacha v Fawehinmi*, (2000) 6 Nigeria Weekly Law Report, 228. In *Ohakosin v Commissioner of Police* (2009) 15 Nigeria Weekly Law Report (Part 1164) 229, the Supreme Court stated that the African Charter of Human and Peoples' Rights (Ratification and Enforcement) Act being part of Nigerian laws must be respected and upheld by all courts in the country.

¹¹⁰ Jacob Dada, 'Impediments to Human Rights Protection in Nigeria' (n 38 above).

¹¹¹ The justiciable rights are mainly civil and political rights under Chapter IV while the non-justiciable are mainly the socio-economic rights listed under chapter II fundamental objectives and directive principles of state policy.

Therefore, in *Sani Abacha v Gani Fawehinmi*, the Supreme Court unequivocally held that by virtue of the supremacy of the constitution, it has prominence over international law and other national laws in the event of conflicts, to the extent of such inconsistency.¹¹² The position of the court is clear in giving the constitution primacy over domestic legislation in Nigeria. Accordingly, fundamental rights remain in the realm of domestic law and include rights guaranteed by the fundamental law of the country, that is by the constitution.¹¹³ It is therefore submitted by virtue of these decisions that the socio-economic rights covered in the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act cannot still be enforced under section 6 (6) of 1999 Constitution.

The fundamental rights protected under the 1999 constitution are the right to life;¹¹⁴ the right to dignity of the human person;¹¹⁵ the right to personal liberty;¹¹⁶ the right to fair hearing;¹¹⁷ the right to private and family life;¹¹⁸ the right to freedom of thought, conscience and religion;¹¹⁹ the right to freedom of expression and the press;¹²⁰ the right to peaceful assembly and association;¹²¹ the right to freedom of movement;¹²² the right to freedom from discrimination;¹²³ and, the right to acquire and own property.¹²⁴ However, section 45 of this constitution further indicates that fundamental rights under the 1999 Constitution are not absolute in all

¹¹² (2000) 6 Nigeria Weekly Law Report, 255.

¹¹³ *Uzoukwu and others v Ezeonu II and others-* (1991) 6 Nigeria Weekly Law Report (Part 200) 708 at 763.

¹¹⁴ Section 33 of the 1999 Constitution of Nigeria.

¹¹⁵ Section 34 of the 1999 Constitution of Nigeria.

¹¹⁶ Section 35 of the 1999 Constitution of Nigeria.

¹¹⁷ Section 36 of the 1999 Constitution of Nigeria.

¹¹⁸ Section 37 of the 1999 Constitution of Nigeria.

¹¹⁹ Section 38 of the 1999 Constitution of Nigeria.

¹²⁰ Section 39 of the 1999 Constitution of Nigeria.

¹²¹ Section 40 of the 1999 Constitution of Nigeria.

¹²² Section 41 of the 1999 Constitution of Nigeria.

¹²³ Section 42 of the 1999 Constitution of Nigeria.

¹²⁴ Section 43 of the 1999 Constitution of Nigeria.

ramifications.¹²⁵ First, in *Badejo v Minister of Education*,¹²⁶ Justice Kutigi of the Nigeria Supreme Court while agreeing that a fundamental right is undoubtedly a right which stands above the ordinary laws of the land, however, added that no fundamental right should stand above the country, state or the people. This principle was further tested in *Dokubo-Asari v Federal Republic of Nigeria* where the Supreme Court reiterated that 'human rights must be suspended until national security can be protected; the corporate existence of Nigeria as a united harmonious, indivisible and indissoluble sovereignty nation is certainly greater than any citizen's liberty or right'.¹²⁷

From the preceding discussion, legislative protection of human rights in the 1999 Constitution of Nigeria violates the African Charter position on derogation and limitations. An instance on constitutional violation of its African Charter obligation is seen under the freedom of expression and the press provision which has come under assault in Nigeria. The foundation laid in sections 39 (3) and 45 of 1999 Constitution affirms the legality that domestic laws can restrict freedom of the press and access to information. For instance, Nigeria has enacted a Freedom of Information Act (FOIA) 2011, which confers broad powers to the executive arm of government to restrict state information on the grounds of national security. While it is undisputed that the essence of the FOIA is to guarantee the right of access to information held by public institutions, the same Act overwhelmingly gives power to public institutions to deny or refuse an application to certain restricted information. For instance, sections 11, 12, 14, 15, 16, 17 and 19 of FOIA fall under such exemptions or restriction where an application would be denied.¹²⁸ In that regard, one can conclusively agree that Nigeria

¹²⁵ Section 45 of the 1999 Constitution of Nigeria. This section enshrines restriction on and derogation from fundamental human rights.

¹²⁶ (1996) 8 Nigeria Weekly Law Report, (Part 464) 15.

¹²⁷ (2007) All Federation Weekly Law Report, (Part 375) 588.

¹²⁸ Section 11 prevents a public institution from disclosing which may be injurious to the conduct of international affairs and defence of the country. Section 12 restricts information of public institutions relating to administrative, investigative and enforcement proceedings. Section 14 restricts information

constitution shows a disposition towards meeting Nigeria's African Charter obligations under article 1.

5.3.1.2 National institutions for civil and political rights enforcement

The 1999 Constitution empowers certain institutions to interpret, protect and promote human rights in Nigeria. Primarily, section 46 enables the courts to grant redress in cases of fundamental rights abuses.¹²⁹ In the light of this observation, the analysis below focuses on whether the courts and the National Human Rights Commission (NHRC) are legally reinforced to enhance the effective realisation of civil and political rights enforcement and to meet the obligations under article 26.

5.3.1.2.1 The courts

The primary organ for the enforcement of civil and political rights in Nigeria is the State High Court or Federal High Court.¹³⁰ Section 46 of the Nigerian Constitution empowers the High Courts to provide redress to victims of human rights violations. This section gives the High Court an original jurisdiction to hear and determine any application made to it concerning the violation of fundamental rights and may make orders, issue writs and give directions as may be considered appropriate for the enforcement of any right entitled to the victim.¹³¹ It should be reemphasised that the court's jurisdiction under section 46 relates to fundamental rights and not the

relating to personal privacy. Section 15 related to trade secrets or commercial or financial information that are confidential. Section 16 relates to information relating to professional privileges or other privileges conferred by law. Section 17 relates to information, which concerns course or research materials.

¹²⁹ Section 46 provides that 'any person who alleges that any of the provision of this chapter has been, is being, or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress'.

¹³⁰ Order 1 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 2009. In Nigeria, the Fundamental Rights (Enforcement Procedure) Rules remains the method of safeguarding the fundamental rights of citizens.

¹³¹ Section 46 (2) of 1999 Constitution.

individual's ideas of rights or rights barred under section 6 (6) of the 1999 Constitution.¹³²

It must be stated that assigning jurisdiction to the High Court and Federal High Court does not in itself guarantee the effective realisation of civil and political rights enforcement. However, for implementation of fundamental rights to be actualised, section 45 (3) of the 1999 Constitution requires the Chief Justice to make rules concerning the practice and procedure of the High Court. The rules act as the crucial pedestal for human rights enforcement in Nigeria.¹³³ This implies that the court and parties before it must always adhere to the procedure explicitly provided for in the rules.¹³⁴ Therefore, a person may invoke the rules in the following three instances; where provisions of Chapter IV 'has been contravened', 'is being contravened' or 'is likely to be contravened'.¹³⁵ This portrays the rules as strict concerning *locus standi* for instituting an action in court.

At the outset, the Supreme Court decision in *Adesanya v President*¹³⁶ has interpreted the *locus standi* of an applicant in a fundamental human rights case as the actual person whose rights have been, is being or is likely to be contravened. This decision grants access to the court to victims of violations only. However, in subsequent decisions, the courts began to change this conservative application to accommodate public interest litigation. First, in *Fawehinmi v Akilu*,¹³⁷ the Supreme Court in applying the brotherhood concept that all human beings are brothers and an asset to one another went beyond the *Adesanya* case; and later in *Williams v Dawodu*, the Court of Appeal extended the concept of *locus standi* for public

¹³² However, with the original jurisdiction vested in the High Court, an appeal can lie to the Court of Appeal and further to the Supreme Court of Nigeria, in the event where parties are not satisfied with the outcome.

¹³³ Ikechukwu Uzo, *Guide to Fundamental Rights Litigation* (2nd edn, Law Digest Publishing Company, 2016) 90-91.

¹³⁴ *Abia State University v Anyaibe*, (1996) 1 Nigeria Weekly Law Report (Part 459) 646.

¹³⁵ *Gov. Bornu State v Gadangari* (2016) 1 Nigeria Weekly Law Report (Part 1493) 396.

¹³⁶ *Adesanya v President* (1981) 1 All Nigeria Law Report; (1981) 5 S. C. 69.

¹³⁷ *Fawehinmi v Akilu* (1987) 4 Nigeria Weekly Law Report (Part 67) 797.

good when it held that the objective of the rule of law is to ensure the observance of the law could best be achieved by permitting any person to put the judicial machinery in motion.¹³⁸ At present, the principles from the above cases have been incorporated into paragraph 3 (e) of the preamble to Fundamental Rights (Enforcement Procedure) Rules of 2009. It is therefore submitted in line with this provision that no human rights litigation would be struck out or dismissed for want of *locus standi* by the applicant. Suffice it to add that removing such a *locus standi* restriction empowers human rights activists, advocates, groups, and NGOs to institute human rights case on behalf of victims who may have died, disappeared or facing arbitrary detention.

Nevertheless, the enforcement of fundamental rights in Nigeria face a number of challenges. Firstly, there is an inadequate number of courts. This is due to other constitutional restraints such as conferring exclusive jurisdiction for claims affecting the federal government and its agencies on the Federal High Court.¹³⁹ For instance, only the Federal High Court has jurisdiction to adjudicate on human rights violations by federal agencies and institutions. However, the Federal High Courts in Nigeria are established one per state, and this poses a threat to litigants who may bear more financial burden in terms of logistics and delay in the trial due to an insufficient number of courts. Indeed, the economic factor involved can act as a deterrent to victims seeking redress.¹⁴⁰

In addition to the preceding challenge, lack of independence of the courts is another crucial issue facing fundamental rights enforcement in Nigeria. Being an undying attribute of the common law, independence of the judiciary forbids pressure on judicial officers by any person whatsoever,

¹³⁸ *Williams v Dawodu*, (1988) 4 Nigeria Weekly Law Report (Part 86) 189; see also, *Nwankwo v Ononeze-Madu* (2009) 1 Nigeria Weekly Law Report (Part 1123) 671.

¹³⁹ See section 251 of 1999 Constitution.

¹⁴⁰ In *NEPA v Edeghero*, (2002) 18 Nigeria Weekly Law Report (Part 798) 79, the Supreme Court made an explicit pronouncement on the exclusive jurisdiction of the Federal High Court to include matters contained in Decree No. 107 of 1993.

to decide any case in a particular way.¹⁴¹ At present, the appointment and removal of judges are sometimes marred by politics, nepotism, and ethnic and religious favouritism instead of merit and laid down guidelines of the National Judicial Council.¹⁴² It is therefore submitted that the lack of independence of the judiciary violates article 7 and 26 provisions of the African Charter and impacts negatively on the enforcement of constitutional rights in Nigeria.

Likewise, effective enforcement of human rights is compromised by widespread corruption. Corrupt practices in Nigeria's judicial system take the form of acceptance of bribes by judicial officials and investigating police officers to influence the outcome of court decisions.¹⁴³ For example, in October 2016, eight judges were arrested by a Nigerian security agency on allegation of various corrupt practices.¹⁴⁴ It is submitted that corrupt practices have somewhat characterised every stage of the court process and are sometimes encouraged by victims of human rights abuse who may want the speedy outcome of their claims. It is further submitted that corruption in the judiciary violates articles 7 and 26 of the African Charter, thereby limiting Nigeria's obligation.

5.3.1.2.2 Nigeria National Human Rights Commission

National Human Rights Commission (NHRC) is another relevant national institution for the enforcement of fundamental rights in Nigeria. The former

¹⁴¹ *Garba v University of Maiduguri*, (1986) 1 Nigeria Weekly Law Report, 550.

¹⁴² UN Human Rights Office of the High Commissioner, 'Nigeria: Judicial Independence under Threat', available at >

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24152&LangID=E><

accessed 24 January 2019; Ibrahim Abdullahi, 'Independence of the Judiciary in Nigeria: A Myth or a Reality?' (2014) 3 International Journal of Public Administration and Management Research, 2.

¹⁴³ United Nations Office of Drugs and Crime, *Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States: Technical Assessment Report* (January 2006) 33, available at >

https://www.unodc.org/documents/corruption/Publications/2006/Assessment_of_the_Integrity_and_Capacity_of_the_Justice_System_in_Three_Nigerian_States_TA_Report.pdf<

accessed 01 June 2018; Adedokun Adeyemi, 'The Impact of Corruption on the Administration of Justice in Nigeria' in Ignatius Ayua and Ameze Guobadia (eds), *Political Reform and Economic Recovery in Nigeria* (Nigerian Institute of Advanced Legal Studies, 2001) 678-681.

¹⁴⁴ BBC News, 'Nigeria Supreme Court judge charged with corruption' (21 November, 2016) available at > <http://www.bbc.co.uk/news/world-africa-38053755>< accessed 01 June 2018.

Nigerian Head of State, General Sani Abacha, promulgated the National Human Rights Decree No. 22 of 1995, which established the Human Rights Commission in compliance with article 26 of the African Charter. In line with the view that gross human rights violations characterised General Sani Abacha's regime, it has been argued that the establishment of this entity was to deflect international and domestic attention from human rights atrocities perpetrated by this regime.¹⁴⁵ Whatever reason may have prompted this promulgation, its establishment places Nigeria amongst African countries with a national quasi-judicial institution for human rights promotion and protection.

Nevertheless, the NHRC survived the military regime that established it and has subsequently undergone a legislative amendment under the present democratic dispensation.¹⁴⁶ The amendment became necessary to make it capable of enhancing government commitment to human rights obligations by strengthening its independence, composition and functions. For example, the amendment impacted on the independence of the conduct of the affairs of the NHRC; funding for the NHRC to be a direct charge on the Consolidated Revenue Fund of the Federation; recognition and enforcement of the awards and recommendations of the African Commission as decisions of the High Court, and the establishment of the Human Rights Fund of the Federation.¹⁴⁷ In addition, the NHRC is empowered to participate in international activities relating to human rights; cooperate with local and international organisations to advance human rights; publish and submit reports on the state of human rights; and assist the government in the formulation of appropriate policies on the guarantee of human rights.¹⁴⁸ The NHRC has additional powers to institute

¹⁴⁵ Obiora Okafor and Shadreck Agbakwa, 'On Legalism, Popular Agencies and 'Voices of Suffering': The Nigerian National Human Rights Commission in Context' (2002) 24 (3) Human Rights Quarterly, 662.

¹⁴⁶ Cap. 61. N46 Laws of the Federation of Nigeria 2004.

¹⁴⁷ Explanatory Memorandum to the National Human Rights Commission (Amendment) Act 2010.

¹⁴⁸ Section 5 of the National Human Rights Commission (Amendment) Act 2010. Under Section 5 (b) of the National Human Rights Commission (Amendment) Act 2010, the NHRC is also empowered to

civil actions, conduct investigations and inquiries, appoint a person as interpreter in matters before it, visit persons, police cells, prisons, or other places of detention to ascertain the conditions thereon, make determination as to damages or compensation payable to victims of human rights violations, cooperate with and consult other agencies, and do other things as incidental, necessary, conducive or expedient for the performance of its functions.¹⁴⁹

This amendment has on paper, improved several aspects capable of enhancing human rights protection in Nigeria, such as the independence of the NHRC, adequate funding, and domestic enforcement of African Commission recommendation through the High Court. What this means is that the NHRC, although a quasi-judicial body, is not under constraint to ensure human rights in Nigeria are realised. Because it places the NHRC in a position to investigate human rights violations, the NHRC has conducted several investigations concerning human rights abuses in Nigeria.¹⁵⁰ However, it is commonplace for the NHRC to make statements urging the Nigerian government to enforce human rights laws without invoking its powers such as summoning and interrogating persons suspected to have violated the human rights of others, issuing a warrant to compel the

receive and investigate complaints concerning human rights violations and make appropriate determination necessary; examine the existing legislation and proposed bills to ensure they are consistent with human rights; promote public discussions on human rights; undertake research and educational programmes for the advancement of human rights; report to government on actions that should be taken to enhance compliance with human rights instruments; refer matters of human rights violations to the Attorney General of the Federation; and, intervene when appropriate in proceedings involving human rights.

¹⁴⁹ Section 6 National Human Rights Commission (Amendment) Act 2010.

¹⁵⁰ At present, the NHRC is also carrying out several investigations against the atrocities of Boko Haram and the clashes and killings between farmers and herdsmen in some parts of Northern Nigeria. Likewise, some key pronouncements from the NHRC are seen in findings relating to the government use of force against protesters, electoral impunity, detention of Boko Haram suspects in military facilities, and the abduction and disappearances of girls in parts of Northern Nigeria. Following the suggestion by the Chief Justice of Nigeria on the need for prison decongestion, the NHRC in June 2018 commenced a nationwide audit of detention centres to review if these centres are run in accordance with the applicable Nigerian laws and other international standards for detention centres. See, National Human Rights Commission, 'NHRC Commences Nationwide Audit of Detention Centres', available at > https://www.nigeriarights.gov.ng/read_more_press_release.php?newsid=66<, accessed 30 July 2018.

attendance of persons or authority before it, or instituting civil legal actions in court.¹⁵¹

Notwithstanding, the NHRC can best be described as frivolous, as its human right responsibilities are rarely noticed.¹⁵² This is because, despite being well positioned to do significant and vital work in realising effective human rights enforcement, the NHRC is still confronted with difficulties in conducting its affairs.¹⁵³ In addition, provisions of some legal instruments limit corporation needed in the investigation of human rights abuses between the NHRC and security agencies.¹⁵⁴ After all, one can agree that tolerating legal and procedural defiance hardly ever commands obedience, particularly, improvement towards effective realisation of enforcement.

5.3.1.3 Challenges and prospects of civil and political rights protection in Nigeria

The challenges to the realisation of effective enforcement of human rights in Nigeria can be categorised as multifarious because it cuts across normative, institutional, cultural, economic and other weaknesses. However, significant challenges are normative shortcomings and post-adjudication challenges, which involve disobedience to court orders or non-compliance with judgments. Firstly, the constitutional rights contained in the 1999 Constitution are not absolute.¹⁵⁵ Nigeria's Supreme Court has so far interpreted section 45 intent in *Medical and Dental Practitioners Disciplinary Tribunal v Emewulu and Another* by holding that all fundamental rights are limited by state policy, overriding public interest or

¹⁵¹ Section 6 (2) of the National Human Rights Commission (Amendment) Act 2010.

¹⁵² Here the term frivolous is used because its findings are rarely implemented by violating state agents thereby, having little or no impact on human rights victims.

¹⁵³ Some difficulties experienced by the NHRC include inadequate funding, unskilled staff, lack of autonomy, etc. See, Nneka Amalu and Moyosore Adetu, 'The role of the National Human Rights Commission in Post Conflict Situation in Nigeria' (2019) 8 International Journal of Arts and Humanities, 1; Nlerum Okogbule, 'Access to Justice and Human Rights Protection in Nigeria' (2005) 3 International Journal on Human Rights, 1.

¹⁵⁴ For example, Section 1 (5) and 2 (4) of the National Security Agencies Act of 1986 which establishes the National Intelligence Agency and the State Security Service makes access to information considered to be a threat to national security difficult to obtain.

¹⁵⁵ Section 45 of 1999 Constitution of Nigeria.

other factors considered by the constitution in section 45.¹⁵⁶ It is therefore submitted in line with this decision that section 45 provision is a drawback to African Charter progress on state party mandatory obligation to respect and enforce human and peoples' rights.¹⁵⁷ For instance, such normative shortcomings in the constitution have been relied upon by security agents in Nigeria to violate fundamental rights in the course of suppressing peaceful demonstrations, effect arrest and detention, or defence of extra-judicial killings.¹⁵⁸

On the other hand, another significant challenge facing the realisation of fundamental rights enforcement in Nigeria is disobedience to court orders. This is mainly because the courts in Nigeria need the executive to enforce its orders and judgments,¹⁵⁹ despite the view that the executive and its agencies are the most significant human rights violators.¹⁶⁰ This view of the executive is correct in the Nigerian perspective despite having a democratic government. This has been demonstrated by the non-trial of security agents for serious human rights abuses despite court orders, and refusal to release persons under detention such as in the *Sambo Dasuki* and

¹⁵⁶ (2001) 3 Supreme Court of Nigeria Journal, 106. Nonetheless, the enforcement of court decisions in Nigeria is regulated under the Sheriff and Civil Process Act of 1990- Sheriff and Civil Process Act, Chapter 407, Laws of the Federation of Nigeria 1990. The provisions of this Act apply only to the High Courts and Magistrate courts in Nigeria. For instance, section 72 of this Act provides that any person who refuses or neglects to comply with an order made against him, other for the payment of money, the court may order that such a person be committed to prison and detained until such an order is obeyed. This section implies that once an order for committal for contempt is made, it is a conviction. However, this legislation is rarely invoked in Nigeria. For instance, the Nigeria Supreme Court in *Boyo v Attorney General of Mid-West* – (1971) 1 All Nigeria Law Report, 342, 352, posited that it is important for the court to bear in mind that its summary powers to punish for contempt must be used sparingly and that the court must always act with restraint at all times. See generally, the decisions in *Military Governor of Kwara State v Rufus Afolabi*, (1991) 6 Nigeria Weekly Law Report, (Part 196) 212; *Federal Capital Development Authority v Koripamo-Agary* (2010) 14 Nigeria Weekly Law Report, (Part 1213) 377.

¹⁵⁷ For instance, the right to life under article 33 (1) provides a long list of derogation such as execution of the sentence of the court, if a person dies as a result of the use of force that is reasonably necessary, for the defence of any person from unlawful violence or for defence of property, to effect legal arrest or prevent the escape of a person lawfully detained, for the purpose of suppressing a riot, insurrection or mutiny.

¹⁵⁸ Council on Foreign Relations, Nigeria Security Tracker, available at > <https://www.cfr.org/nigeria/nigeria-security-tracker/p29483>< accessed 22 April 2019.

¹⁵⁹ Section 5 (1) of 1999 Constitution.

¹⁶⁰ Chidi Odinkalu, 'Back to the Future: The Imperative of Prioritising for the Protection of Human Rights in Africa' (2003) 47 Journal of African Law, 1.

El-Zakzaky cases. For instance, El-Zakzaky was in detention without trial for over 27 months despite several Federal High Court ordering his release.¹⁶¹ Non-compliance with court orders reduces victims' confidence in the notion of justice and human rights in general. It demonstrates Nigeria's weak commitment to the realisation of effective human rights enforcement.

5.3.2 Tanzania

Tanzania is an East African country consisting of Tanzania Mainland (former Tanganyika) and Zanzibar.¹⁶² Tanzania's journey to constitutionally protect human rights differs between Tanzania Mainland and Zanzibar. For instance, while Tanzania Mainland did not have a bill of rights in its Independence Constitution of 1961, Zanzibar had a bill of rights entrenched in its 1963 Independence Constitution. However, these rights disappeared after the Zanzibar revolution of 12 January 1964 by the Afro-Shirazi Party, which ousted the Zanzibar Nationalist Party representing the Zanzibar Arabs from power and abolishing the Sultanate.¹⁶³ Remarkably, on April 26, 1964, Tanzania Mainland and Zanzibar united to become the United Republic of Tanzania under President Julius Nyerere, the then President of Tanzania Mainland leading to the adoption of the 1964 Constitution of United Republic of Tanzania and Zanzibar.¹⁶⁴ Moreover, while the 1965 Interim Constitution of Tanzania was adopted to establish a single party and the Ujamaa ideology

¹⁶¹ The Kaduna State in August eventually charged him with murder amongst other crimes and has also kept him in an undisclosed detention centre. In addition, there has been no trial or investigation by the government for the over 347 of his Shiite group, IMN, killed during the clash that led to his arrest. See also, Premium Time Newspaper of 11 June 2017, Evelyn Okakwu, 'Special Report: How Buhari Administration Serially Disobeys Court Orders', available at > <https://www.premiumtimesng.com/news/headlines/233665-special-report-how-buhari-administration-serially-disobeys-court-orders.html>< accessed 06 June 2018. This situation also applied to Sambo Dasuki's case. However, El-Zakzaky was only charged for murder and conspiracy in April 2018 by the Nigerian government.

¹⁶² Zanzibar became independent on 10 December 1963.

¹⁶³ Peter Hansen, 'Race, Revolution and the Struggle for Human Rights in Zanzibar: The Memoirs of Ali Sultan Issa and Seif Sharif Hamad' (2011) 110 *African Affairs*, Issue 440, 509.

¹⁶⁴ Issa Shivji, 'et al', *Constitutional and Legal Systems of Tanzania: A Civics Source Book* (Mkuki Na Nyoka Publishers, 2004) 47. This was Tanzania's third constitution after a short period of rule by presidential decree. In addition, Bill of rights was introduced in Zanzibar following the adoption of this constitution.

(socialist system),¹⁶⁵ the Constitution of the United Republic of Tanzania of 1977 was later enacted and became the permanent constitution of Tanzania.¹⁶⁶

Constitution-making involves both amending an existing constitution as well as making a new constitution.¹⁶⁷ In line with this submission, the 1977 Constitution has undergone several amendments because of its poor enactment.¹⁶⁸ For instance, the 1977 Constitution failed to include a bill of rights until when Fifth Amendment, Act No. 15 of 1984. This amendment is relevant because it set in motion Tanzania's human rights journey.¹⁶⁹ However, it did not solve all the human rights gaps in the constitution, thereby leading to more amendments. For instance, the Eighth Amendment, Act 4 of 1992, abolished the single-party system and introduced the multiparty political system in Tanzania. Likewise, the Thirteenth Amendment, Act 3 of 2000, introduced a change to the election of the President, a proportion of seats in the National Assembly to be reserved for women, declaration that the judiciary has the final say on issues concerning rights and duties according to law and dispensation of justice, and the establishment of a Human Rights and Good Governance Commission (HRGCC).¹⁷⁰ These amendments demonstrate Tanzania's efforts and evolution toward the effective realisation of human rights. For instance, prior to 1984, mention of human rights was only found in the

¹⁶⁵ *Ibid*, 48. This fourth constitution of Tanzania was adopted to centralise power and exclude people opposing this dominant ideology. See also, Robert Martin, *Personal Freedom and the law in Tanzania* (Oxford University Press, 1975) 5.

¹⁶⁶ Benedict Nchalla, 'Tanzania Experience with Constitutionalism, Constitution-Making and Constitutional Reforms' in Morris Mbondeyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspective from Sub-Saharan Africa* (n 47 above). The adoption of this constitution was a party matter rather than a public matter.

¹⁶⁷ Issa Shivji, 'et al', *Constitutional and Legal Systems of Tanzania: A Civics Source Book* (n 164 above) 47.

¹⁶⁸ *Ibid*, 56.

¹⁶⁹ Tulia Ackson, 'Justiciability of Socio-Economic Rights in Tanzania' (2015) 23 (3) *African journal of International and Comparative Law*, 359; Micheal Wambali, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (2009) 53 *Journal of African Law*, 34.

¹⁷⁰ Benedict Nchalla, 'Tanzania Experience with Constitutionalism, Constitution-Making and Constitutional Reforms' in Morris Mbondeyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspective from Sub-Saharan Africa* (n 47 above) 34-35.

preamble of the 1977 Constitution of Tanzania without any implementation mechanism or list of what these rights are.¹⁷¹ Nevertheless, the human rights situation in Tanzania before 1994 was worrisome,¹⁷² and the situation has not significantly changed to date.¹⁷³

5.3.1.1 Constitutional protection of civil and political rights

Tanzania is a signatory to several international and regional human rights treaties.¹⁷⁴ Accordingly, the 1977 Constitution of Tanzania enshrines a Bill of Rights in Part III and the Fundamental Objectives and Directive Principles of State Policy in Part II.¹⁷⁵ However, while the Fundamental Objectives and Directive Principles of State Policy in Part II are not enforceable in Tanzania courts, the key right in this part is the right to education.¹⁷⁶ For instance, this part urges the state to direct its policies towards the pursuit of human dignity; the eradication of injustice, intimidation, discrimination, oppression, favouritism, disease, poverty or corruption; and, ensuring that the country is governed according to principles of democracy and socialism.¹⁷⁷ However, listing some African

¹⁷¹ In the case of *Adamji v East African Post and Telecommunication Corporation* (1973) Law Report No. 6, the High Court of Tanzania held that the recognition given to human rights in the preamble are mere words on paper and lack the enforcement force of the law.

¹⁷² Maina Peter observed that the most violated human rights by government agencies during this time were perpetrated through extrajudicial killings, restrictions on freedom of movement, association, assembly, and political participation, inhuman and degrading treatment, and personal liberty. Mere mention of the bill of rights in the statute books of Tanzania did not have impact on the already battered human rights situation in Tanzania until the enactment of the Basic Rights and Duties Enforcement Act of 1994. See, Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials* (Rodiger Koppe, 1997) 2.

¹⁷³ Even in 2018, unlawful or arbitrary killings by state security forces, harsh and life-threatening prison conditions, arbitrary detention, unlawful interference with privacy, interference with rights of peaceful assembly and freedom of association, unlawful arrest and intimidation are a few of human rights issues commonly reported in Tanzania. See, United States Department of States, Tanzania 2018 Human Rights Report, available at > <https://www.state.gov/documents/organization/289263.pdf>< accessed 23 April 2019.

¹⁷⁴ For instance, Tanzania ratified ICCPR on 11 June 1976. However, Tanzania, as a dualist state, needs more than just ratification. Such ratified international treaty must be re-enacted by the National Assembly.

¹⁷⁵ Like Nigeria's constitution, the Fundamental Objectives and Directive Principles of State Policy in Part II are not enforceable by any court.

¹⁷⁶ Article 11 (2) 1977 Tanzania Constitution.

¹⁷⁷ See Articles 9 and 11 of the 1977 Constitution of Tanzania.

Charter rights in Part II, Tanzania has failed to wholly meet its article 1 of the African Charter obligation.¹⁷⁸

The basic rights enshrined in Part III include some socio-economic rights as fundamental rights.¹⁷⁹ Although this is different from the constitutional pattern adopted by 1999 Constitution of Nigeria, these rights are not privileges or available at the pleasure of the decision-making bodies as those under the Fundamental Objectives and Directive Principles of State Policy.¹⁸⁰ Therefore, Part III of the 1977 Constitution primarily recognises civil and political rights minimum standards such as the right to equality,¹⁸¹ the right to life,¹⁸² the right to personal freedom,¹⁸³ the right to privacy and personal security,¹⁸⁴ the right to freedom of movement,¹⁸⁵ the freedom of expression,¹⁸⁶ religion,¹⁸⁷ association,¹⁸⁸ and participation in public affairs,¹⁸⁹ and the right to own property.¹⁹⁰ The protection against abuse of fair trial, discrimination as well as the prohibition of torture and inhuman treatment are contained in article 13. However, the socio-economic rights are not so broadly covered in this part.¹⁹¹ Although listing the basic rights in the constitution meets African Charter article 1 obligation, this alone does not amount to effective enforcement.

In order to ensure that individuals enjoy these basic rights, the High Court is constitutionally granted original jurisdiction to entertain cases of

¹⁷⁸ See, communication 368/09 - *Abdel Hadi, Ali Radi and others v Sudan*, para 91 and 92.

¹⁷⁹ The socio-economic rights included as fundamental rights are the right to work and the right to just remuneration under articles 22 and 23.

¹⁸⁰ Micheal Wambali, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (2009) 53 *Journal of African Law*, 34.

¹⁸¹ Article 12 and 13 of the 1977 Constitution of Tanzania.

¹⁸² Article 14 of the 1977 Constitution of Tanzania.

¹⁸³ Article 15 of the 1977 Constitution of Tanzania.

¹⁸⁴ Article 16 of the 1977 Constitution of Tanzania.

¹⁸⁵ Article 17 of the 1977 Constitution of Tanzania.

¹⁸⁶ Article 18 of the 1977 Constitution of Tanzania.

¹⁸⁷ Article 19 of the 1977 Constitution of Tanzania.

¹⁸⁸ Article 20 of the 1977 Constitution of Tanzania.

¹⁸⁹ Article 21 of the 1977 Constitution of Tanzania.

¹⁹⁰ Article 24 of the 1977 Constitution of Tanzania.

¹⁹¹ For instance, the right to adequate food and housing were neither covered in Part II nor Part III of the Constitution.

human rights violations.¹⁹² However, concerning the procedure that the High Court shall adopt in enforcing these basic rights, article 30 (4) gives the state authority the power to enact legislation for regulating procedures required for instituting proceedings and for specifying the powers of the High Court.¹⁹³ Although this is different from section 46 (3) of Nigeria 1999 Constitution which permits the Chief Justice to make rules for the enforcement of the fundamental rights provisions, it is submitted that this provision is restricting, especially, concerning the independence of the judiciary. This is because the judiciary should be empowered with duties concerning the dispensation of justice; thereby, it should be responsible for enacting rules and procedures for its smooth operation and relationship with litigants.

Nevertheless, Tanzania had no proper mechanism for the implementation of the Bill of Rights until the promulgation of the Basic Rights and Duties Enforcement Act 1994 by the state authority.¹⁹⁴ Coming ten years after the recognition of the Basic Rights in the constitution had an impact on human rights enforcement. However, the absence of rules and procedure did not wholly deter the High Court from carrying out its constitutional administration of justice mandate. This is because of the judicial activism of Tanzanian courts. For example, the High Court ruled in *Chumchua s/o Marwa v Officer i/c of Musoma Prisons and the Attorney General*,¹⁹⁵ that it has inherent power to issue directions or orders or writs like habeas corpus, mandamus, prohibition, and certiorari. In this case, the complainant raised whether the absence of a court procedure and rules of court for the enforcement of basic rights would invalidate any outcome of

¹⁹² Article 30 (3) of 1977 Constitution of Tanzania.

¹⁹³ This is the position of Article 30 (4) (a) and (b) of the 1977 Constitution of Tanzania. This is different from the position under the Nigerian constitution which rather empowers the Chief Justice of Nigeria to make rules concerning the practice and procedure of the High Court for the enforcement of the fundamental rights under section 46 (3) of the 1999 Constitution of Nigeria.

¹⁹⁴ The Basic Rights and Duties Enforcement Act 1994 came into force on 17 January 1995.

¹⁹⁵ High Court Miscellaneous (Criminal Cause No. 2 of 1998), Mwanza Registry (unreported).

the High Court in the enforcement of the constitutional rights provisions.¹⁹⁶ Following this ruling, the Attorney General pursued a bill before the National Assembly to amend the nullified Deportation Ordinance which the High Court ruled against for violating the freedom of movement under article 17 of the 1977 Constitution. A similar ruling was given in *Rev Christopher Mtikila v AG* alleging the violation of freedom to participate in public affairs under article 21 of the constitution,¹⁹⁷ and in *Director of Prosecutions v Pete*, an appeal against the decision of the High Court that section 148 (4) and (5) of the Criminal Procedure Act, 1985, were unconstitutional. This case concerns the constitutionality of section 148 (4) and (5) of the Criminal Procedure Act, 1985, which prohibits bail in certain circumstances.¹⁹⁸

Another reason why it is important to examine human rights enforcement in Tanzania is the High Court constraint in realising effective enforcement of human rights under the 1977 Constitution of Tanzania under article 30 (5) provision. This article provides that in proceedings where it is alleged that any law enacted or action taken by the government or its authority is in violation of the basic rights, the court is mandatorily required not to declare such act or law void immediately; instead, the court should give the government, or other authority concerned an opportunity to rectify the defect found in law within a reasonable time as it may deem necessary. Although this procedure allows the parliament to undertake corrective measures on its laws and actions, one would admit that it not only limits the power of the judiciary to make pronouncements on illegality and non-conforming legislation, it also erodes the separation of powers, and checks and balances under article 4.

¹⁹⁶ The position was also taken by the High Court in the case of *Daudi s/o Pete v The United Republic of Tanzania*, (Criminal cause No. 80 of 1989) Mwanza Registry (unreported).

¹⁹⁷ (1995) Tanzania Law Report 31.

¹⁹⁸ *Director of Prosecutions v Pete*, (Criminal Appeal No. 28 of 1990). Under Article 30 (4), the state Parliament has the unfettered power to regulate the procedure for instituting proceedings at the High Court; specify the powers of the High Court in relation to the hearing of the proceedings instituted; ensure the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with the Constitution.

Despite the peculiarity of article 30 (5), Wambali has argued that the court has discretion whether to give such opportunity or declare such acts void following the ambiguity of the term 'if it deems fit, or if the circumstances or the public interest so requires' creates.¹⁹⁹ However, the High Court in *Christopher Mtikila v Attorney General* declared the legislation barring independent candidates unconstitutional in the spirit of article 21 and further ordered the state to put in place a mechanism that will regulate the activities of private candidates before the next general election.²⁰⁰ The petitioner instituted this case following a previous plea for court orders after successfully obtaining a previous order of the High Court to the same effect in 1993, that the constitutional provisions barring independent candidates in general elections is unconstitutional and a violation of political rights of Tanzanians in elections.²⁰¹ On appeal, however, the Justices of the Court of Appeal stated that the issue of independent candidates has to be settled by parliaments which have the jurisdiction to amend the Constitution and not the courts which do not have that jurisdiction. This decision of the Court of Appeal implies that the courts lack the power to keep all state organs within bounds.

5.3.1.2 National institutions for African Charter enforcement

As seen at the outset concerning the development of human rights under the 1977 Constitution of Tanzania, the vital constitutional entities for human rights protection are the courts and the HRGCC. The High Court of Tanzania enjoys a dignified and crucial status as chief guardian and trustee of the Constitution, and is enjoined to perform its function boldly, responsibly and innovatively.²⁰² However, these organs are not without challenges which will be discussed in the section below.

¹⁹⁹ Micheal Wambali, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (n 180 above).

²⁰⁰ Miscellaneous (Civil Cause No. 10 of 2005) at the Der Es Salam High Court (unreported).

²⁰¹ Ibid, at paragraph 47.

²⁰² Barnabas Samatta, 'Judicial Protection of Democratic Values' (2011) 17 East African Lawyer, 10.

5.3.1.2.1 The courts

Section 8 of the Basic Rights and Duties Enforcement Act and article 30 (3) of the 1977 Constitution of Tanzania encapsulate that the High Court has jurisdiction in matters of human rights, thereby demonstrating that the judiciary is the final authority in the dispensation of justice.²⁰³ This implies that the findings of the judicial arm have the potential to guide other arms of government to pass new laws or amend existing laws that violate the basic rights of the people. As custodian of constitutional values bearing some responsibility in the checks and balances of power, the courts can be vital in the law-making process. For instance, the government of Tanzania can request that the Parliament pass new laws or amend existing laws based on the finding of the courts as evident in *Chumchua s/o Marwa v Officer i/c of Musoma Prisons and the Attorney General*.²⁰⁴ Following the High Court decision in this case that deportation of Tanzanians from one place to another within the country was unconstitutional, void and in violation of their human rights, the Attorney General approached the National Assembly for the amendment and nullification of the Deportation Ordinance.

From the foregoing, it is essential to mention that while article 30 (3) gives the High Court full jurisdiction to determine human rights cases under the bill of rights, the constitution failed to empower the court to make its rules for the enforcement of these rights. One can argue that this has a potential to hinder effective enforcement because state authority may employ this opportunity to enact rules that conflict with justice, equity or expected performance of the court, thereby reducing the powers of the court to realise human rights enforcement effectively. For instance, one can argue that this may have caused the ten-year wait before state authority enacted the Basic Rights and Duties Enforcement Act in 1994. However, the

²⁰³ Article 107 of the 1977 Constitution of Tanzania.

²⁰⁴ High Court Miscellaneous (Criminal Cause No. 2 of 1998), Mwanza Registry (unreported).

Court of Appeal in *Director of Public Prosecutions v Pete*²⁰⁵ had earlier ruled that until Parliament legislates under article 30 (4), the court duties may be effected under the procedure and practice available in the exercise of the original jurisdiction of the High Court. Although this decision eliminated the impact of the absence of court rules prior to 1994, this ruling suggests that High Court use of ordinary jurisdiction ends the moment the Parliament makes this law.

The enactment of the Basic Rights and Duties Enforcement Act provides the procedural rules for effective enforcement of rights under the 1977 Constitution of Tanzania. According to Wambali, this Act was part of government reaction against the High Court independent and progressive interpretation following the several amendments to the 1977 Constitution of Tanzania.²⁰⁶ In particular, Shivji admitted that prior to the Eight Amendment, Act 4 of 1992, the High Court was perceived to be working against the Bill of Rights distortions by the executive, which informed the executive involvement to permanently deter the excessive judicial activism of some High Court judges.²⁰⁷ For instance, in *Judge i/c High Court, Arusha and Attorney General v NIN Munuo Ng'uni*, the Court of Appeal of Tanzania held that the court has power and discretion in appropriate cases to direct the relevant organ to correct the defect impugned in the violation of the basic rights of citizens.²⁰⁸

Indeed, it is submitted that the Act is limiting in terms of the powers of the court to enforce human rights effectively. For instance, while section

²⁰⁵ 1991 LRC (Const) 553 at 561.

²⁰⁶ Micheal Wambali, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (n 180 above).

²⁰⁷ Issa Shivji, 'The Changing State: From Extra-legal to an Intra-legal State in Tanzania' in Cornel Mtaki and Michael Okema (eds), *Constitutional Reform and Democratic Governance in Tanzania* (Friederich Foundation and Faculty of Law, University of Dar Es Salaam, 1994) 89; Micheal Wambali, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (n 180 above).

²⁰⁸ Court of Appeal of Tanzania at Arusha, High Court No. 45 of 1998 (unreported). This decision was given against the backdrop of the Tanzanian Constitution that requires the court to give state authority the opportunity to rectify its action and inactions.

8 (2) restricts the court's power where an application is merely vexatious or frivolous, section 8 (3) and (4) excludes the power of the High Court to issue prerogative orders and further compels it to dismiss applications seeking for injunctions against passing any legislative bill alleged to contravene the basic rights provisions of the constitution. These provisions conflict with the understanding of court jurisdiction under article 30 (3), thereby limiting the African Charter obligation to guarantee independent and impartial courts for human rights enforcement. To put it differently, Samatta opined that the limitations in the Basic Rights and Duties Enforcement Act limit the constitutional functions of the High Court, which includes keeping all state organs within bounds.²⁰⁹

5.3.1.2.2 Commission for Human Rights and Good Governance

Chapter 6 of the 1977 Tanzania Constitution establishes the Commission for Human Rights and Good Governance (CHRGG).²¹⁰ The CHRGG was established by the Thirteenth Amendment, Act 3 of 2000, and became operational in the year 2001 following the enactment of CHRGG Act, 2001.²¹¹ Upon coming into force, the CHRGG repealed and replaced Tanzania's existing Permanent Commission of Enquiry, which was acting as a human rights institution linked to the Bill of Rights in Tanzania.²¹² It is submitted that the demand for a CHRGG is in line with the state party obligation under article 26 of the African Charter. Accordingly, functions of the CHRGG include nationwide sensitisation about human rights preservation; receiving human rights complaints; conducting inquiries on human rights violations; human rights education; instituting court proceedings to prevent human rights violation or to restore a violated right; and, advising government, public and private institutions in respect of

²⁰⁹ Barnabas Samatta, 'Judicial Protection of Democratic Values' (n 202 above).

²¹⁰ Chapter 6, Part 1, articles 129-131 of the 1977 Constitution of Tanzania.

²¹¹ Commission for Human Rights and Good Governance Act of 2001 (Government Notice No.67 of 4th May 2001).

²¹² Chris Peter, 'Human Rights Commissions in Africa- Lesson and Challenges' in Anton Bosl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (n 59 above) 367.

human rights.²¹³ However, in exercising these functions, the constitution inserted that the CHRGG will be an autonomous entity and will not be bound to comply with orders and directives from persons, government departments, political party's opinion or that of public or private sector institutions.²¹⁴

There are limits to the function and powers of CHRGG despite the constitutional provisions of its broad functions and independence.²¹⁵ For instance, the findings of the Commission have the status of a mere recommendation and do not enjoy the binding force of law.²¹⁶ This limitation affects its usefulness and tantamount to a mere fact-finding exercise. For instance, following a complaint from Nyamuma village in Serengeti concerning the burning of houses and in which all parties, including the Office of the Attorney General, were involved, the District Police Chief and District Commissioner were found culpable of human rights violations by CHRGG. However, the Attorney General of Tanzania, in a letter to the Commission, explicitly notified it that it would not implement its decision to compensate victims of these violations. In this instance, however, the CHRGG requested that parties should approach the court for redress.²¹⁷ Although the situation in the above case highlights one of the extreme cases where the CHRGG has been humiliated, government agents and personnel ignore or refuse to cooperate in investigations conducted by the Commission, thereby frustrating the work of the CHRGG.²¹⁸ One can argue

²¹³ Article 130 of the 1977 Constitution of Tanzania.

²¹⁴ Article 130 (2) of the 1977 Constitution of Tanzania.

²¹⁵ Article 130 (3) excludes orders, directives or investigation from the President in respect of any matter or state of affair considered to be of public interest.

²¹⁶ Section 17 (1) of the Human Rights and Good Governance Act, 2001.

²¹⁷ *Ibrahimu Korosso and 134 others, Legal and Human Rights Centre v District Commissioner and the Police Officer in command of Serengeti District and Attorney General* (Case No. HBUB/S/1032/2002/2003/MARA), unreported.

²¹⁸ Chris Peter, 'Human Rights Commissions in Africa- Lesson and Challenges' in Anton Bosl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (n 59 above) 367.

that such reality increases the gradual public loss of confidence and faith in the CHRGG.

However, following the non-implementation of the Commission's ruling in the Serengeti case, the Court of Appeal held on 2nd January 2009, that the Legal and Human Rights Centre, a party before the Commission's investigation, has a right to bring an action before the High Court for the enforcement of the recommendations from the Commission. The Court of Appeal ordered the High Court to entertain the matter on its merit.²¹⁹ Although this decision seems to have legally cured the flaws concerning the enforcement of CHRGG recommendations, compliance with decisions remains a challenge in Tanzania.²²⁰

5.3.1.3 Challenges and prospects of civil and political rights protection in Tanzania

Despite using the court and CHRGG to ensure adequate human rights enforcement, there are widespread violations of civil and political rights such as unlawful or arbitrary killings by state security forces; torture; unlawful arrest; interference with the rights of peaceful assembly and freedom of association; restriction on political participation; arbitrary detention; and, harsh and life-threatening prison conditions in Tanzania.²²¹ What this means is that Tanzania cannot be seen as having effectively realised civil and political enforcement. Therefore, it is essential to examine crucial factors that hinder effective enforcement in this section.

²¹⁹ *Legal and Human Rights Centre v Thomas Sabaya and 4 others* (Civil Appeal No. 88 of 2006) Court of Appeal of Tanzania, unreported.

²²⁰ Again, on 6 September 2017, CHRGG had ordered an interim stop order on the eviction of people from Loliondo village in Ngorongoro District, Arusha following a complaint to it by severally affected villagers over the demolition and eviction since 2015. Furthermore, the Commission averred that this decision was reached in accordance with its powers under article 130(1) (f) and (h) of the Constitution and Article 25 (1) of the Human Rights and Good Governance Act, 2001. See, The Citizen, 'Human Rights Commission stops Evictions in Loliondo' available at > <http://www.thecitizen.co.tz/News/Human-Rights-Commission-stops-evictions-in-Loliondo/1840340-4083752-5nes8w/index.html>< accessed 26 May 2018.

²²¹ United States Department of States, *Tanzania 2018 Human Rights Report*, available at > <https://www.state.gov/documents/organization/289263.pdf>< accessed 26 April 2019.

First on this list is the substance and real objectives of the Basic Rights and Duties Act. Before the enactment of this Act, the judiciary was not deterred in the administration of justice given the absence of rules of procedure as evident in *Chumchua s/o Marwa v Officer i/c of Musoma Prisons and the Attorney General*,²²² and *Rev Christopher Mtikila v AG*.²²³ For instance, judges such as Justice James Mwalusanya, as he then was, gave judgments assumed as distorting the executive organ after the Eighth Amendment, Act 4 of 1992, which introduced the multiparty political system in Tanzania.²²⁴ Arguably, the Basic Rights and Duties Act was aimed at deterring and curbing the excessive judicial activism of some judges.²²⁵ For instance, section 8 (2) to (4) limits the powers of the High Court by excluding the power of the court to make orders against a bill that is yet to be passed by the Parliament as well as the power to issue prerogative orders in respect of all applications relating to the bill of rights. These limitations, in all ramifications, conflict with article 30 (3) of the constitution which gives the High Court original jurisdiction where the constitutional rights have been, is being or is likely to be violated by any person anywhere in the United Republic. In addition, restricting the High Court jurisdiction on the mere precondition that an application is vexatious and frivolous is detrimental to a meritorious determination of claims and the general development of human rights.

From the foregoing, it is submitted that state authority in enacting the Basic Rights and Duties Act failed to ensure the effective exercise of the powers of the High Court, the preservation and enforcement of rights, freedoms and duties in accordance with the Constitution.²²⁶ For instance,

²²² High Court Miscellaneous (Criminal Cause No. 2 of 1998), Mwanza Registry (unreported).

²²³ The ruling of the Court of Appeal was seen in this case to denounce the power of the High Court to nullify a legislation that is contrary to the basic rights of the citizens.

²²⁴ In *Daudi s/o Pete v R*, the Mwalusanya J, as he then was, declared provision of section 148 (5) (d) of the Criminal Procedure Act unconstitutional for conflicting with article 13 (6) of the constitution which provides for the presumption of innocence.

²²⁵ Micheal Wambali, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (n 180 above).

²²⁶ Section 10 of the Basic Rights and Duties Act conflicts with article 30 (4) (c) of 1977 Constitution.

the requirement for a panel of three judges is counterproductive and has the potential of possibly limiting human rights enforcement due to the inadequate number of judges in Tanzania.²²⁷ This implies that in the absence of a structured High Court which allows three judges to sit, it would be difficult to always set up such a panel as the need arises, amidst constant human rights violations and growing awareness of civil rights.

Secondly, the provisions of section 13 (2) of the Basic Rights and Duties Act are similar in content to article 30 (5) of the 1977 Constitution on the restriction of the award the High Court can grant. This crux in both provisions sets out to determine whether the High Court should have the power and discretion to allow the government to undertake corrective measures of its actions through parliament, instead of declaring such law or action void. Although the difference between section 13 (2) and article 30 (5) is semantic, the constitution allows more power in its wording 'if it deems fit, or if the circumstances or the public interest so requires'. Under section 13 (2) of Basic Rights and Duties Act, the wording 'shall, instead of declaring the law or action to be invalid' removes the possibility of High Court discretion as suggested in the constitution. Whether these provisions influenced the ruling of the Court of Appeal not to assume its dignified and crucial status under the constitution in *Rev Christopher Mtikila v AG*,²²⁸ it is suggested that the courts should turn these provisions into a foundation for judicial activism instead of invoking it to limit effective enforcement of rights.

Lastly, the government of Tanzania has shown great reluctance in enforcing court decisions. For example, twice the High Court has decided against Tanzania in *Rev Christopher Mtikila case* concerning independent

²²⁷ See, The Citizen, 'Chief Justice: We Need 150 Judges' (2019, 30 January), available at > <https://www.thecitizen.co.tz/News/Chief-Justice--We-need-150-judges/1840340-4957756-mn4m3pz/index.html>< accessed 26 April 2019.

²²⁸ The ruling of the Court of Appeal was seen in this case to denounce the power of the High Court to nullify a legislation that is contrary to the basic rights of the citizens.

candidates in general elections,²²⁹ and to date, Tanzania has not complied. Suffice to mention that government agencies and personnel display a similar attitude to the recommendations of CHRGG. While it is agreed that this attitude can reduce the individuals' confidence in these institutions, it demonstrates Tanzania's failure to meet its regional obligations under the African Charter.

5.3.3 Benin

Benin is a francophone constitutional democracy in the West African sub-region. Benin has had its share of eventful political and constitutional history.²³⁰ For instance, between 1960 independence and 1972, Benin witnessed alternate civilian and military regimes resulting in bans on freedoms and human rights abuses.²³¹ However, the lengthy ban on freedom and the obvious widespread human rights abuses powered discontent amongst Benin citizens, trade unions and groups, which resulted in industrial strikes and a nationwide protest in 1989 for regime change and the eventual demise of the regime.²³² Because of these events, the regime agreed to the idea of the first national conference and new constitutionalism in Benin.²³³

²²⁹ The first judgment was delivered in 1994 in the case of *Rev. Christopher Mtikila v Attorney General*, (1993) (Civil Case No. 5), (unreported), and secondly in 2006. However, the panel of judges in this case did not bother with the restrictions of section 13 when it declared the alleged amendment unconstitutional and contrary to international Covenants to which Tanzania is party and in true spirit of article 21 of the constitution. See Misc Civil Cause No. 10 of 2005, Dar Es Salaam High Court registry (unreported).

²³⁰ After independence in 1960 and between 1963 and 1972, Benin witnessed eight military coups, adopted ten constitutions and had ten Presidents. Some of these constitutions were adopted in the year 1959, 1960, 1964, 1966, 1968, 1970, 1974, 1977 and 1984.

²³¹ Anna Rotman, 'Benin Constitutional Court: An Introduction Model for Guaranteeing Human Rights' (2004) 17 *Harvard Human Rights Journal*, 283; Bruce Magnusson, 'Testing Democracy in Benin' in Richard Joseph (ed), *State, Conflict and Democracy in Africa* (Lynne Rienner Publishers, 1999) 221.

²³² Related to this, during General Mathieu Kerekou's 17-year reign as President of Benin from 1972, the country witnessed a total ban on civil and political rights and freedoms, and Benin was transformed into a police state. See, Charles Fombad and Nat Inegbedion, 'Presidential Term Limits and their Impact on Constitutionalism in Africa' in Charles Fombad and Christina Murray (ed) *Fostering Constitutionalism in Africa* (Pretoria University Law Press, 2010) 7-8.

²³³ The conference was held in February 1990 having human rights, constitutional democracy, and separation of power and rule of law as issues to be determined.

The new constitution of Benin emerged after the December 1990 referendum for a constitution capable of healing Benin's past political and constitutional instability, where human rights are paramount. This idea was addressed and adopted in the 1990 Constitution. The 1990 Constitution opted for a presidential system, separation of powers, the rule of law, human rights, and a constitutional court amongst other features of modern constitutionalism. For example, the preamble text to the 1990 Constitution of Benin sets forth the determination to establish a constitutional and pluralistic democratic state wherein fundamental rights, public freedoms, the dignity of the human being and justice are guaranteed, protected and espoused.

5.3.1.1 Constitutional protection of civil and political rights

In a bid to give effect to human rights, the provisions of the 1990 Constitution of Benin bear testimony to the commitment laid down in both the UDHR and the African Charter. Starting from the preamble of the 1990 Constitution, Benin reaffirmed its commitment to human rights principles as defined by the UDHR of 1948 and the African Charter of 1981 and further admitted that the values of these international instruments are superior to the internal law.²³⁴ By recognising these international instruments above domestic laws, Benin has put a check on the lurking dangers of authoritarian rule where human rights would be neglected and abused. It is, therefore, necessary to examine whether these constitutional provisions have effectively enhanced civil and political rights enforcement in Benin.

The first article under Title II Rights and Duties of the Individual recognise the rights and duties guaranteed by the African Charter as an integral part of the constitution and Beninese law.²³⁵ By making the African Charter part and parcel of the Benin Constitution, it implies that any right, whatsoever, missing or limited in the constitution, are made constitutional,

²³⁴ Paragraph 4 of the preamble and Article 40 of the 1990 Constitution of Benin.

²³⁵ Article 7 of the 1990 Constitution of Benin.

enforceable and fundamental rights if it is contained in the African Charter. For example, peoples' rights, although not recognised in the 1990 Constitution, are enforceable in Benin. Secondly, it suggests that the Beninese government must always ensure that its citizens have unlimited direct access to the African Commission and the African Court. Such direct access would entail the depositing of the declaration under article 34 (6) of the African Court Protocol which Benin has signed and deposited since 8 February 2016. Indeed, not only is this normative style unknown to both Nigerian and Tanzanian constitutions, it shows the importance of human rights in building a new nation as well as the relevance of strong normative protection to the citizens of Benin.

Despite article 7 recognising the African Charter rights as part of 1990 Constitution, articles 8-40 of the constitution further guarantees individual rights spread across socio-economic rights,²³⁶ civil and political rights,²³⁷ the right to development,²³⁸ and the right to a sound environment.²³⁹ However, the guaranteed civil and political rights include the right to life;²⁴⁰ the prohibition of arbitrary arrest;²⁴¹ the right to fair trial;²⁴² the prohibition of torture and cruel treatment;²⁴³ the right to privacy;²⁴⁴ right to own property;²⁴⁵ freedom of thought, conscience, opinion, expression and religion;²⁴⁶ freedom of the press;²⁴⁷ freedom of

²³⁶ Articles 8, 10-14, 30, and 31 of 1990 Constitution. In addition, unlike the Nigeria and Tanzania constitutions, Benin's 1990 Constitution does not distinguish between justiciable and non-justiciable rights in the form of Fundamental Objectives and Directive Principles of State Policy. The absence of Fundamental Objectives and Directive Principles of State Policy provisions implies that all rights enshrined in this constitution are enforceable in the court of law.

²³⁷ Articles 8, 15-26 of 1990 Constitution.

²³⁸ Article 9 of 1990 Constitution.

²³⁹ Articles 27-29 of 1990 Constitution. What is clearly not protected in this constitution is peoples' rights.

²⁴⁰ Article 15 of the 1990 Constitution of Benin.

²⁴¹ Article 16 of the 1990 Constitution of Benin.

²⁴² Article 17 of the 1990 Constitution of Benin.

²⁴³ Article 18 and 19 of the 1990 Constitution of Benin.

²⁴⁴ Article 20 of the 1990 Constitution of Benin.

²⁴⁵ Article 22 of the 1990 Constitution of Benin.

²⁴⁶ Article 23 of the 1990 Constitution of Benin.

²⁴⁷ Article 24 of the 1990 Constitution of Benin.

assembly;²⁴⁸ and, equality before the law.²⁴⁹ With 35 different articles covering various human rights protection, Benin's devotion to human rights cannot be matched by many African countries, especially Nigeria and Tanzania. One can agree that Benin's constitutional protection impacts on its exposure to the African Court and Commission. Moreso, it is essential to mention that Benin has the lowest number of cases and communications at the African Court and African Commission when compared to Nigeria and Tanzania.²⁵⁰

It is clear from the constitutional provisions of Benin that there is no derogation for breach.²⁵¹ What this means is that similar to the African Charter human rights ideology, human rights must be enforced despite the situation in the country. In the light of this consideration, the Constitutional Court in *DCC 06-060* and *DCC 06-062*, ruled that the activities of the police, who acted on behalf of the State, violated human rights and ordered compensation to victims. In the same way, the Constitutional Court has found judges,²⁵² domestic courts,²⁵³ and ministers²⁵⁴ in violation of constitutional human rights. In light of the above considerations, one can argue that the normative framework of Benin meets the African Charter standards.

²⁴⁸ Article 25 of the 1990 Constitution of Benin.

²⁴⁹ Article 26 of the 1990 Constitution of Benin.

²⁵⁰ As at on the 1st day of May 2019, Benin has one decided case (*Sabastine Ajavon v Benin*, App. No. 013/2017) and only four pending cases at the African Court. In addition, Benin has 6 communications at the African Commission of which three were ruled inadmissible, two had their files closed, and one was decided on merit.

²⁵¹ Article 118 and 119 of 1990 Constitution of Benin.

²⁵² DCC 03-125, the Constitutional Court finds the violation of the right to defence under article 7 (1) (d) of the African Charter and article 35 of the 1990 Constitution.

²⁵³ DCC 06-046, this ruling was against the Chief Registrar of the Supreme Court of Benin. Cases are not named as in Nigeria and Tanzania, rather they are numbered as DCC (*Decision de la Cour Constitutionnelle*) followed with the last two numbered of the year and the number of the case.

²⁵⁴ DCC 01-058, the Minister and his offices were found in violation of the right to equality before the law under article 26 of 1990 Constitution of Benin.

5.3.1.2 National institutions for African Charter enforcement

The courts and the Coimmission Beninoise des Droits de l'Homme remain two core institutions with authority to enforce human rights in Benin. However, the creation of a Constitutional Court has been cited as the most critical mechanism for constitutional enforcement in Benin.²⁵⁵ Aside from the Constitutional Court, judicial powers in Benin are exercised by the Supreme Court, and other courts and tribunals created by the Constitution.²⁵⁶ In spite of the constitutional role played by these courts, further efforts made by lawyers and jurists of the Benin Bar Association, and Benin National Assembly led to the enactment of Law 89-004 which established the Coimmission Beninoise des Droits de l'Homme (CBDH or Benin Human Rights Commission) of 1989.²⁵⁷ To ascertain the contribution of these institutions in realising effective enforcement of human rights, this section examines the provisions concerning the operation of the Constitutional Court and the CBDH.

5.3.1.2.1 The Constitutional Court of Benin

The Constitutional Court is the highest jurisdiction in constitutional matters, the judge of the constitutionality of the law, the regulatory body for the functioning of institutions as well as the body guaranteeing fundamental human rights and public liberties.²⁵⁸ The breadth of this mandate demonstrates Benin's resilience to human rights, bearing in mind the events that led to the enactment of the constitution. In this light, access to the Constitutional Court is granted to all individuals, the state and its agencies, and this has contributed to developing the jurisprudence of the Constitutional Court.²⁵⁹ However, indirect access is permitted for cases

²⁵⁵ Title V, Article 114-124 of the 1990 Constitution of Benin. Anna Rotman, 'Benin Constitutional Court: An Introduction Model for Guaranteeing Human Rights' (n 231 above).

²⁵⁶ Article 125-138 of the 1990 Constitution of Benin.

²⁵⁷ The CBDH became operational on 30 March 1990.

²⁵⁸ Article 114 of 1990 Constitution of Benin.

²⁵⁹ An analysis of cases on civil and political rights violations at the Constitutional Court of Benin have shown a good number of abuses against individuals by the police and armed forces in carrying out their state responsibilities. For instance, see *DDC 06-057*, *DCC 06-059* and *DCC 06-060* on the allegation of violation of article 5 of the African Charter (article 18 of the 1990 Constitution of Benin), *DCC 06-067*

suspended in ordinary courts pending the decision of the Constitutional Court on matters concerning the interpretation of the constitution and human rights.²⁶⁰ This implication is twofold: first, while ordinary courts, such as the High Court up to Supreme Court can adjudicate on constitutional matters, the Constitutional Court, and not the Supreme Court has the final say on issues of constitutional interpretation. Secondly, their jurisdiction is not absolute because they have a duty to refer all constitutionality questions to the Constitutional Court under article 114 of the 1990 Constitution. For instance, although the decisions of the Supreme Court are final, the Constitutional Court can call such decisions to scrutiny if they infringe human rights provisions or are inconsistent with the Constitution.²⁶¹ Therefore, to understand the scope of human rights enforcement in Benin, this section will emphasise the Constitutional Court because of its special and unique position in human rights enforcement.

The Constitutional Court of Benin performs more judicial functions concerning the governance and enforcement of constitutional provisions.²⁶² It enjoys a broad subject matter jurisdiction, especially in areas of human rights enforcement. This attribute gives the Constitutional Court an opportunity for a speedy and thorough interpretation of the constitutional provisions,²⁶³ thereby enjoying description as the cornerstone of liberal rule of law and the keystone of the entire politico-legal system.²⁶⁴ The

relating to the violation of article 6 of the African Charter (article 15 and 16 of 1990 Constitution of Benin), and *DCC 03-125* of 20 August 2003 on the violation of article 7 of the African Charter (Article 35 of the 1990 Constitution of Benin).

²⁶⁰ Article 122 of 1990 Constitution of Benin.

²⁶¹ Horace Adejohoun, 'Between Presidentialism and a Human Rights Approach to Constitutionalism: Twenty Years of Practice and the Dilemma of Revising the 1990 Constitution of Benin' in Morris Mbondeyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspective from Sub-Saharan Africa* (Pretoria University Law Press, 2013) 262.

²⁶² Article 117 of the 1990 Constitution of Benin; Kwasi Prempeh, 'Constitutionalism Revival: False Start or New Dawn?' in Eunice Sahle (eds), *Democracy, Constitutionalism, and Politics in Africa: Contemporary African Economy* (Palgrave Macmillan, New York, 2017) 12.

²⁶³ Horace Adejohoun, 'Between Presidentialism and a Human Rights Approach to Constitutionalism: Twenty Years of Practice and the Dilemma of Revising the 1990 Constitution of Benin' in Morris Mbondeyi and Tom Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspective from Sub-Saharan Africa* (n 261 above) 246.

²⁶⁴ See *DCC 33-94* of 24 November 1994.

uniqueness of Benin's human rights enforcement stems from the subject matter of the Constitutional Court, which is lacking in Nigeria and Tanzania. According to article 117 of the constitution, the wording 'shall rule obligatorily' implies that this court shall share its mandate at any time it is called upon to interpret the provisions of the constitution, including acts deemed to have infringed on fundamental rights and public liberties.

Article 146 further grants other human rights related jurisdiction to the Constitutional Court. For instance, it is expected that the Constitutional Court grants authorisation before members of the executive acquire or rent state-owned property or goods or declare a vacancy in the presidency. Further, article 146 requires the Constitutional Court to rule on the constitutionality of treaties and international agreements. Although the above jurisdiction concerns the right to own property and the right to participate in government, its broad influence has impacted on its competence in all aspects of human rights adjudication.²⁶⁵

Despite these characteristics of the Constitutional Court, however, it is not without flaws. For instance, the procedural view of the Constitutional Court indicates that it investigates human rights violations.²⁶⁶ The implication of having an investigative jurisdiction is that it may encounter difficulty in getting the necessary support from security and government agencies appropriate in deciding cases against these institutions. According to Rotman, the Constitutional Court sometimes enjoy immense influence, administrative cooperation and responsiveness from other institutions because these institutions want to be seen as favourable as well as to ensure that they retain their public trust.²⁶⁷ For example, between the year 2000 and 2006, the Constitutional Court passed 18 rulings against police

²⁶⁵ Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights' (n 231 above).

²⁶⁶ The Court assumed this position following the end of Commission Beninoise des Droits de l'Homme (CBDH), the National Human Rights Commission for Benin.

²⁶⁷ Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights' (n 231 above).

and gendarmerie officers for violations of article 19 of the 1990 Constitution of Benin following the cooperation offered by the police.²⁶⁸

Another reason why it is essential to examine the Constitutional Court relates to its rules of standing. A key contributory factor to the success of the Court is primarily attributed to the fact that individuals, NGOs and the government have *locus standi* before it.²⁶⁹ To enjoy this privilege, there is no further requirement such as exhausting other legal remedies; however, this jurisdiction is set in motion when individuals are fearless in taking state agents and authorities to court. This implies that the Constitutional Court may not have the opportunity to decide many human rights cases of abuse for fear of repercussion by state agents on the victim. For instance, not many cases have been instituted in the Constitutional Court since the political crises that erupted following the outcome of the April 2019 election and the subsequent killing of protesters; the crackdown on the press and the prohibition of constitutional rights such as freedoms of association and assembly. Such repressive tactics of government instil fear in victims and lessen the full potential of the Constitutional Court.

It is imperative to mention that article 121 (2) empowers the Constitutional Court to act on its own motion to determine the constitutionality of laws and regulations that threaten the fundamental rights of people. However, because this relates to laws and regulations, and not actual acts of abuses perpetrated by government agents, the court cannot substantially claim that dynamic government procedure in implementing laws are devoid of violating human rights and public liberties.²⁷⁰ This is because many human rights violations are carried out

²⁶⁸ 2008 Periodic Report of the Republic of Benin on the Implementation of the Rights and Freedoms Enshrined in the African Charter on Human and Peoples' Rights, page 6, available at >http://www.achpr.org/files/sessions/45th/state-reports/2nd-2000-2008/staterep2_benin_2008_eng.pdf< accessed 11 May 2018.

²⁶⁹ Law No. 91-009 of May 31, 2001, article 22.

²⁷⁰ For instance, prior to the 2019 Parliament elections, the internet access was restricted and social media was blocked. In addition, protest and unlawful gatherings were banned on the argument of forestalling

when applying a seemingly good law of the government. Thus, the authority of the Court should not only be focused on its capacity to initiate complaints on its own motion on laws and regulations but on ensuring that every individual whose right is abused brings a claim for redress. Thus, it is an important reason to have a promotional institution.

Furthermore, the constitution failed to expressly grant power to the Constitutional Court to provide remedies when it finds a violation of right. Because of this gap, the early years of the Benin Constitutional Court were characterised by a restrictive approach during which the Constitutional Court decisions were simply declaratory orders and finding of violations.²⁷¹ It is imperative to mention that the Constitutional Court later started granting clear reparation orders, including injunctions against public authorities and monetary compensation.²⁷² However, this judicial activism can be supported with the self-evident right to remedy in the jurisprudence of the African Commission, article 8 of UDHR and the African Court Protocol.

5.3.1.2.2 Coimmission Beninoise des Droits de l'Homme

Conversely, lawyers and jurists of the Benin Bar Association initiated the law creating a national human rights commission for Benin in their pursuit to ensure that the African Charter rights are actualised. This effort resulted in the Benin National Assembly enacting Law 89-004, which established the Coimmission Beninoise des Droits de l'Homme (CBDH or Benin Human Rights Commission) of 1989. Accordingly, the core function of the CBDH is enshrined under Article 4 and hinges on the promotion and safeguarding of human rights in Benin. The broad powers of the CBDH include receiving complaints about mediation between citizens and government; receiving

violence and breakdown of law and order. In addition, only two political parties participated while the major opposition party was not cleared to meet the requirement under the new electoral rules.

²⁷¹ Horace Adejohoun, 'Between Presidentialism and a Human Rights Approach to Constitutionalism: Twenty Years of Practice and the Dilemma of Revising the 1990 Constitution of Benin' in Morris Mbondeyi and Tom Ojienda (ed), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspective from Sub-Sahara Africa* (n 261 above) 255.

²⁷² For instance, in DCC 02-058 (*Favi v State*), the Court award monetary damages to the petitioner as compensation for degrading treatment.

complaints generally from citizens, groups and non-governmental organisations; conducting investigations into alleged complaints; order measures likely to resolve the reported case; finding just and equitable reparations by pursuing reconciliation; and to initiate a legal claim in court on behalf of complainants.²⁷³

From the foregoing, one would agree that CBDH functions can be invoked to effectively realise civil and political rights enforcement. This is because it has jurisdiction to order reparations which the Constitutional Courts lack, and power to institute legal actions in courts. In addition, it can recommend the ratification of international human rights treaties and make recommendation to government bodies for the enactment of deliberations from international, regional and non-governmental bodies which are capable of enhancing human rights protection and enforcement. However, despite these outlined functions, the powers of the CBDH and its role in Benin's transition to democracy, the CBDH was subsequently abolished in a bid to develop other institutional safeguards such as the Constitutional Court.²⁷⁴ At present, the CBDH has ceased functioning, and its functions are to date carried out by the Constitutional Court.

Nevertheless, Benin is not the only African state that currently pursues human rights without NHRI. For example, both Mali and Botswana do not have national human rights institutions. This development violates article 26 of the African Charter. Therefore, Benin cannot claim to meet the requirement for effective enforcement of civil and political rights because there are many functions of NHRI that cannot be performed by a court.²⁷⁵ For instance, some aspects of the investigation and promotional activities

²⁷³ Article 5 of Law 89-004 of Benin.

²⁷⁴ Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights' (n 231 above).

²⁷⁵ Peter Roseblum, 'Tainted Origins and Uncertain Outcomes' in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, 2012) 309.

such as conducting human rights education and publicity are typically not within the ambit of a court.

5.3.1.3 Challenges and prospects of civil and political rights protection in Benin

There are a number of reasons why it is essential to examine whether Benin has adequately realised effective enforcement of civil and political rights. Firstly, the absence of a national human rights commission implies that the Constitutional Court could be characterised as both a court and a quasi-human rights institution.²⁷⁶ One would agree that these two features in one institution may impede the effectiveness of the Constitutional Court. This is because it is practically difficult for the Constitutional Court, primarily as a court, to carry out mandates outside the interpretation and judicial application of the constitution. Therefore, it is submitted that the Constitutional Court is overburdened, and this potentially would impact its effectiveness to enforce human rights.

Secondly, the constitution expressly lacks provisions granting the Constitutional Court power to provide remedies or compensation when it finds a violation of human rights. Although the court adopted a restrictive approach by limiting its reparations to declaratory orders in its early years, the reparation jurisprudence of the Constitutional Court has also shown a significant attempt to offer remedies to petitioners. This implies that the Constitutional Court is not constitutionally equipped to provide a traditional form of redress because clear remedies and power to award compensation need to come in through constitutional amendment.

Suffice it to add that the only way to mitigate these shortcomings is through a constitutional amendment. However, attempts to amend and reform the constitution with the inclusion of the express right to remedy and reparation for human rights violations have failed on four occasions

²⁷⁶ Anna Rotman, 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights' (n 231 above).

with the last being in March 2017.²⁷⁷ In addition, the Constitutional Court has unilaterally dismissed such attempts with the argument that the legitimacy of the constitution was obtained through a national conference by the people and so shall be its amendment. Accordingly, in DCC 06-074 of 8 July 2006, the Constitutional Court noted that some principles of the constitution proceeded from the people and the National Conference; thus, no single entity had enough legitimacy to carry out amendment without the people.²⁷⁸ Because this decision makes it difficult to amend the constitution, the Constitutional Court realisation of effective enforcement of civil and political rights cannot be seen as effectively realised.

Another significant challenge to human rights protection in Benin is the apparent lack of judicial activism in the Constitutional Court. For instance, in *DCC 99-051 of 13 October 1999*, the Constitutional Court had to determine whether article 381 of Benin Criminal Code on the death sentence violated the right to life in articles 8 and 15 of the constitution. Answering in the negative, the Constitutional Court emphasised that there is no express or implicit abolition of the death penalty and further stated that the right to life does not render the death penalty provision in the national criminal code inconsistent with the constitution. Although the Constitutional Court failed to set a progressive precedent for other courts, it corrected itself in *DCC 12-153 of 4 August 2012*, when it declared that death penalty provisions of the Criminal Code of Procedure are in violation of article 147 of the constitution because Benin ratified the Second Optional Protocol to the ICCPR on 5 July 2012.

Nevertheless, regional jurisprudence at the African Court and African Commission concerning Benin is insignificant when compared to Nigeria and Tanzania. Whether the exposure to the regional institutions is due to the

²⁷⁷ The citizens have always voted against any amendment to the Constitution for fear of possible hijack by the politicians who may use the opportunity to limit their rights and freedoms under the Constitution.

²⁷⁸ This case developed the principle of national consensus concerning issues on constitutional amendment.

approach adopted by the constitution or the Constitutional Court depends on the effectiveness of the Constitutional Court ability to interpret and enforce constitutional rights. However, a few human rights waves of abuse recorded in 2018 include incidents of torture, harsh prison conditions, rape and violence against girls and women with inadequate government action to ensure prosecution.²⁷⁹ Despite these abuses, Benin stepped up its efforts to enhance human rights enforcement by implementing measures that strengthened its judicial system, reduced prison overcrowding, and combated violence.²⁸⁰ Therefore, more effective measures are thereby needed to realise effective enforcement of civil and political rights in Benin.

5.4 Conclusion

Actualising state party obligations under the African Charter has a direct link to effective regional enforcement of human rights. However, this chapter has demonstrated that African countries are in one way or another not adequately complying with these obligations, thereby impeding effective enforcement of human rights at national level. Subsequently, civil and political rights enforcement varies from one state to another. Even while many African countries can be seen as having constitutionally protected civil and political rights, some institutional structure has stifled their capacity to provide remedies to victims of abuse, thereby posing a threat to regional and international human rights discourse. For instance, human rights seem to be better protected and enforced under the Benin national arrangement for two main reasons: a constitution with a strong foundation for adequate normative protection, and a purposely empowered Constitutional Court. However, it is submitted that Benin needs a national

²⁷⁹ There was no report of arbitrary killings by government or its agencies. United States Department of State, Benin 2018 Human Rights Report, available at > <https://www.state.gov/documents/organization/289177.pdf>< accessed 24 April 2019.

²⁸⁰ United Nations General Assembly Human Rights Council, Benin National Report submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 on August 7, 2017, available at > <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/233/11/PDF/G1723311.pdf?OpenElement>< accessed 07 June 2018.

human rights commission to complement the judicial organs, thereby providing human rights victims with another institution for the protection and enforcement of constitutional rights.

It is demonstrated that normative protection of human rights in state party constitutions alone does not guarantee the realisation of effective enforcement insofar that institutions are riddled with legal obstacles. It is submitted that enjoyment of human rights in illustrative countries has been impeded by multidimensional and peculiar factors extending to constitutional protection and national institutions. For example, Nigeria and Tanzania may adopt Benin's normative and Constitutional Court approach while Benin adopts Nigeria NHRI's approach, which allows the establishment of a NHRI with broad functions, in addition to the power of the court to recognise African Commission recommendations. In particular, Tanzania should consider adopting a more human rights-friendly constitution born out of people's genuine participation and consensus. Therefore, effective domestic enforcement requires reforms in all facets of state party obligations to international human rights treaties. Such reform requires state parties to improve existing legislative and constitutional provisions as well as the judicial powers to eliminate any statutory and procedural obstacle.

CHAPTER SIX: ASSESSING THE ENFORCEMENT OF CIVIL AND POLITICAL RIGHTS UNDER THE AFRICAN CHARTER

6.0. Introduction

This chapter reviews the challenges and prospects to reinvigorate effective enforcement of the African Charter on Human and Peoples' Rights (African Charter) civil and political rights provisions. The previous chapters have observed that there is a gap between civil and political rights protected in the African Charter and other relevant human rights instruments, on the one side, and their enjoyment due to inadequate enforcement both at regional and national levels, on the other. As a result, suggesting new insights for reforms to the African Charter system invites a holistic assessment of the African Charter normative and institutional arrangements vis a vis state party obligations under the African Charter and present-day African regional organisation. This is intended to suggest possible insights that African Union (AU) policymakers can borrow, as well as refrain from, in order to make progress towards the realisation of effective enforcement of African Charter civil and political rights. However, this chapter does not deny some laudable contributions of the African Charter to international human rights growth. Instead, it presents a rigorous contemporary assessment of the real potential and actual performance of the African Charter and its institutional framework.

6.1 Assessing the African Charter political and institutional framework

The premise is that while the African Charter is enforced through the African Court and the African Commission, the African Union, through its organs, plays a crucial post-adjudication role. These organs can only do as much as their establishing instruments allow. As a result, it is imperative for this section to assess how these institutions have performed in carrying out their mandate towards realising effective enforcement of African Charter civil and political rights. This is contemplated because assessing the challenges faced

by the African Charter political and institutional framework provides the opportunity to make possible suggestions for reforms.

6.1.1 Assessing the African Commission

It is necessary to begin the analysis of accessing the African Charter political and institutional framework by acknowledging that the African Commission was the sole implementing institution for the African Charter enforcement until the adoption of the Court Protocol in 1998. As a result, the Commission single-handedly enforced the African Charter from 1987 when it became operational until 2004 when the African Court came in force. Since the African Commission is a quasi-judicial institution, it follows that enforcement of the African Charter rights and state party compliance with its decisions are common challenges expected within the African human rights system. Therefore, it is not surprising to have the volume of criticisms concerning the African Commission's weaknesses in the conduct of its affairs.¹ Nevertheless, it is essential to highlight the constraints the African Commission can act upon to enhance its mandate.

6.1.1.1 Publicity of the African Commission mandate

Substantively, article 45 of the African Charter imposes a broad mandate on the Commission. In particular, one would agree that seventeen years of having the African Commission as the single institution for the protection, promotion and interpretation of the African Charter requires a special relationship with Africans regarding its functions while also enhancing

¹ Nsongurua Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late than Never' (2014) 3 (2) Yale Human Rights and Development Journal, 45; Jean Boukongou, 'The Appeal of the African System for Protecting Human Rights' (2006) 6 African Human Rights Law Journal, 269; Timoty Yarima, 'Comparative Evaluation of the Challenges of African Regional Human Rights Courts' (2011) 4 (2) Journal of Politics and Law, 120; Christof Heyns, 'The African Human Rights System: In Need of Reform' (2001) 2 African Human Rights Journal, 155; Fatsah Onguergouz, *The African Charter on Human and Peoples' Rights: A comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers, 2003) 791; Oji Umozuruike, 'The African Charter on Human and Peoples' Rights' (1983) 77 American Journal of International Law, 902; Nsongurua Udombana, 'Can a Leopard change its Spots? The African Union Treaty and Human Rights' (2002) 17 American University International Law Review, 1177; Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 Virginia Journal of International Law, 339.

peoples' knowledge and confidence in the Commission. Publicity is key to the success of the Commission because if Africans are unaware of its existence and mandate, it is practically impossible for them to appreciate or utilise it.² This suggests that the African Commission may be underutilised. Ordinarily, one would expect numerous communications against the following respondent states due to rife human rights abuses - South Sudan, CAR, Mali, Ethiopia, Somalia, Zimbabwe and Cameroon; but in reality, it is not happening.

There is a correlation between publicity and enforcement of civil and political rights. The premise is that one needs to have a knowledge of something before it can be utilised or set on motion. One can establish this correlation by analysing the numerous communications instituted by NGOs on behalf of victims who often are members of rural communities. Therefore, there is a need for more publicity about the Commission which requires more than just visiting higher learning institutions to organising a village and town hall meeting and symposium for the many illiterate and rural dwelling Africans. In particular, the Commission may consider operating through a network of national, international and private organisations in sensitising these rural dwellers.

On the other hand, it is agreed that the Activity Reports of the Commission disseminate information about the duties and operation of the Commission. However, these reports must be disseminated widely to make more people aware of the findings of the Commission. One could, however, question whether posting Activity Reports on the Commission's website is enough publicity, especially in a continent where the majority are without internet access and electricity. Until many African countries adapt to modern technological realities, more cooperation with NGOs, media houses,

² Chidi Odinkalu, 'The Role of Case and Complaint Procedure in the Reform of the African Regional Human Rights System' (2001) 1 (2) African Human Rights Law Journal, 225; Frans Viljoen, 'Contemporary Challenges to International Human Rights Law and the Role of Human Rights Education' (2011) De Jure, 208.

and learning institutions is advised to disseminate information on the activities of the Commission and provide access to people who lack the financial capacity to institute an action.³

6.1.1.2 Composition, sitting pattern and structure of the African Commission

The aspects of composition and sitting pattern relate to the number of Commissioners, which cover the mode of election, independence and impartiality, and how it conducts its business. The mandate of the African Commission is broader than its counterpart under the American system. Because of this difference, one would have expected the composition, sitting pattern and structure of the Commission to reflect such a broad mandate; more so, given that the Commission was established when human rights violation in many AU countries were heightened. Instead, Africa adopted a Commission consisting of eleven members, which holds two ordinary sessions per year and may meet, if need be, in extraordinary sessions. At this point, it is imperative to question whether this arrangement impacts the Commission's capacity to effectively meet its mandate. In answering this question, it is imperative to mention that the AU consists of fifty-five countries with several legal, religious and cultural backgrounds. Therefore, adopting an eleven-member part-time sitting Commission, even when the Commission is the sole enforcement institution, illustrates regional failure to take human rights seriously. This structure makes it grossly impossible for the Commission to meet its tripartite mandate under article 45 of the Charter. For instance, this position under the African human rights system is in stark contrast with the abolished European Commission on Human Rights, which consisted of several Commissioners equal to that of member states.⁴

³ As at March 2019, the African Commission has registered 518 NGOs with observer status before it. See 45th Activity Report of the African Commission, page 12.

⁴ However, the Commission under the American Convention on Human Rights consists of seven members.

It has been suggested that the African Commission's mandate concerning human rights protection cannot be effectively realised by an eleven-member body sitting on a part-time basis.⁵ The impact of an eleven-member Commission with a part-time sitting pattern can only be measured in terms of its functions and output. Although the Inter-American Commission consists of seven members, the nature of its mandate is majorly promotional, unlike the African Commission that still enjoys protective and interpretative mandates in addition to the promotional mandate. Therefore, Africa may consider either narrowing the Commission's mandate to only promotional activities, allowing the Court to focus on the protective mandate,⁶ or increase both the number of sessions and members of the Commission.

The above position is supported following an examination of the Commission's output such as delay in concluding communications and its backlog of communications.⁷ Two core issues heighten such delay and the increasing number of backlog communications: firstly, these Commissioners double as special mechanism chair or rapporteurs, which requires state party visits amongst other promotional responsibilities. Secondly, the evident restricted access to the African Court by articles 5 (3) and 34 (6) of the Court Protocol makes the Commission a preferred institution for many individuals and NGOs whose countries have not made a declaration under 34 (6) of the Court Protocol. This observation,

⁵ Michelo Hansungule, 'African Court and the African Commission on Human and Peoples' Rights' in Anton Bosl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (Macmillan Education, 2009) 233.

⁶ This may imply adopting the European Convention on Human Rights (ECHR) approach that make state party acceptance of the European Court of Human Rights (ECtHR) automatic for ECHR contracting states.

⁷ In *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, it took the Commission over 5 years from 1993 to reach its final decision in 1999 - Communication 105/93-128/94-130/94-152/96. See also, Centre for Human Rights, *Celebrating the African Charter at 30: A Guide to the African Human Rights System* (Pretoria University Press, 2011) 28. See also, Isaac Nguema, 'Legal and Infrastructural Constraints on the Commission' (1991) June 24-26, Paper presented at the Fund for Peace Conference on the African Commission at New York.

therefore, makes it essential for the composition and sitting arrangement of the African Commission to be reformed.

On the other hand, it has been indicated that the Commission is largely under the control of the AHSG, thus, casting doubt on its independence and ability to enhance human rights protection.⁸ The following African Charter provisions attest to this fact: articles 30,⁹ 31,¹⁰ 33,¹¹ 58¹² and 59.¹³ It is clear from these provisions that the influence of the AHSG on the Commission is overbearing. For instance, while the practice of AHSG involvement in the election of Commissioners is similar to the European and American system, the language of article 30 of the African Charter raises a different dimension to AHSG influence over the Commission.¹⁴ The language suggests subordination and control by the AHSG, which indicate a lack of independence.

Another means of assessing such influence over the Commission is through election and appointments to the Commission. For instance, it is on record that the AU state parties have over time nominated as Commissioners former appointees of government such as Ministers, Attorney-Generals, and Ambassadors, based on their good relationship with

⁸ Nsongurua Udombana, 'The African Commission of Human and Peoples' Rights and the Development of Fair Trial Norms in Africa' (2006) 6 African Human Rights Law Journal, 311; Vincent Nmehele, *The African Human Rights System: Its Laws, Practice and Institutions* (Martinus Nijhoff, 2001) 172; Evelyn Ankumah, *The African Commission on Human and Peoples' Rights* (Martinus Nijhoff, 1996) 123.

⁹ Article 30 provides that 'the African Commission on Human and Peoples' Rights...shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa'.

¹⁰ The choice of 11-member body, sitting in part-time arrangement, in a continent with 55 countries and unpleasant human rights record has the potential to impact on human rights protection and protection.

¹¹ This article suggests that the Commissioners are political appointees of various states. It enshrines that Commissioners shall be elected from a list nominated by the state parties to the present Charter.

¹² This article instructs the African Commission to draw the attention of the AHSG in cases where it finds serious violation of the African Charter rights and freedoms.

¹³ This article empower the AHSG to make approval before the Commission can make public its findings, and based on this provisions, the Commission has failed to release some of its Annual Activity Reports.

¹⁴ What is not clearly enshrined both in the OAU Charter and AU Constitutive Act is whether the Commission can claim to be part of the regional organs as this is not expressly indicated.

governments and not based on article 31 requirements.¹⁵ Invariably, their partiality, inadequate human and peoples' rights knowledge, and incompetence directly undermine the independence of the Commission, which ordinarily should be the cornerstone of the institution.¹⁶ It is the position of this thesis that the lack of independence of the Commission will have a negative impact on the ability to interpret and protect the Charter rights and freedoms. Therefore, National Human Rights Institutions may step in to suggest to state governments persons who to the best of its understanding, meet article 31 requirements.

It is acknowledged that articles 58 and 59 of the Charter indicate further AHSB influence over the Commission. For instance, while article 59 requires the AHSB to authorise publication of African Commission reports, article 58 mandates the Commission to draw the attention of the AHSB when the Commission finds cases of serious or massive violation of human rights. The impact of article 59 is the suspension of the 17th Activity Report, deletion of part of the 19th Activity Report of the Commission at the instance of the AHSB,¹⁷ and the delay in releasing Activity Reports 45 and 46 of the African Commission. On the other hand, article 58 impedes the mandate of the Commission under article 45. For instance, the structure of the African Commission is aggravated by the fact that it cannot make binding decisions against state parties because of its quasi-judicial nature.¹⁸ However, what

¹⁵ Article 31 requires state parties to appoint persons of the highest reputation, morality, integrity, impartiality and competence in matters of human and peoples' rights. Racheal Murray, 'The African Charter on Human and Peoples' Rights 1987-2000: An Overview of its Progress and Problem' (2001) 1 African Human Rights Law Journal, 1.

¹⁶ This observation resonates an important development in the AU practice enshrined in the 2005 and 2011 Note Verbale Guidelines for the nomination which excluded senior civil servants and diplomatic representatives. See African Union Executive Council nineteenth Ordinary Session of 2011, 'Report on the Election of the African Commission on Human and Peoples' Rights' available at > <http://www.peaceau.org/uploads/ex-cl-683-xix-e.pdf> accessed 04 April 2018.

¹⁷ Although the 19th Activity Report was later adopted by the AHSB at its 2006 Summit in Sudan, the decision to suspend it was because Zimbabwe claimed that it did not contain part of its response to a fact-finding mission it embarked on.

¹⁸ This position is supported by article 58 language which expects the Commission to draw the attention of the AHSB to situations where it finds a serious or severe violation of human rights.

is not clear in this provision is what the AHSG is expected to do when its attention has been drawn to serious human rights violations.

The quasi-judicial position of the Commission makes it more of a toothless bulldog in the area of human rights protection.¹⁹ Bearing this in mind, Welch argued, and it is correct, that the Commission was not created to bite but act as a fact-finding or conciliatory body for the promotion and protection of human rights in Africa.²⁰ Whether article 58 aims to demonstrate the quasi-judicial nature of the Commission by removing its power to grant orders or reliefs after its findings, it is clear that control of the Commission's activities potentially affects its effectiveness to guarantee enforcement. Therefore, letting states have the final say in the Commission's work through the back door, seems counterproductive. In this light, the Commission needs to dialogue with the AHSG to address such interference and adopt more guidelines and resolutions specially targeted at improving its independence and improved capacity to enforce the Charter rights.

6.1.1.3 State reporting system

Article 62 of the African Charter mandates state parties to submit reports detailing legislative or other measures taken with a view to giving effect to the Charter rights. This system provides the forum for a constructive dialogue between the Commission and the state parties while enabling the Commission to monitor state party implementation of the Charter. Besides, it allows states and the African Commission to take stock of failures, challenges and achievements in the area of African Charter promotion and protection. However, state parties have not taken this requirement seriously.²¹ This unfortunate attitude by state parties makes it difficult for

¹⁹ Nsongurua Udombana, 'Towards the African Court of Human and Peoples' Rights: Better Late than Never' (n 1 above).

²⁰ Claude Welch, 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment' (1992) 14 Human Rights Quarterly, 43.

²¹ Several state parties have not submitted their Initial Report or are late in submitting their Periodic Reports. For instance, the following six state parties have not submitted their Initial Reports; Comoros,

the African Commission to assess the level of state party obligations with African Charter rights.

The assessment of state party reports is virtually the only means of monitoring domestic reality concerning human rights implementation. Therefore, late or non-submission of reports imply that the Commission will be hindered in assessing domestic protection as well as state party compliance with its recommendations. Accordingly, there may be a need for the establishment of a Special Unit or Committee to assist and liaise with state parties in gathering and analysing information needed for these reports. Such a special mechanism under the Commission must be pragmatic in ensuring that this obligation is complied with. Also, it is vital for the African Commission to collaborate with relevant AU organs in pressuring state parties to submit their reports and make recommendations in its Activity Report to the AHSG on action to be taken against non-complying state parties.

On the other hand, NGOs and National Human Rights Institutions could be made more visible in state reporting activities. These bodies can be required to submit independent, or shadow reports on their various states, which the Commission may act on in the absence of a state report. In events where state reports are submitted, such shadow reports can help the Commission to engage constructively with state parties on human rights protection. This suggestion has the potential to put pressure on state parties to submit their reports.

Equatorial Guinea, Guinea-Bissau, Sao Tome and Principe, South Sudan, and Somalia, whereas only twelve states are up to date with their reports. The following states are up to date with all their reports and they include Angola, Botswana, Cote d'Ivoire, Democratic Republic of Congo, Eritrea, Mali, Mauritius, Namibia, Niger, Nigeria, Rwanda and Togo. 43rd Activity Report of the African Commission on Human and Peoples' Rights, page 5-6, available at > http://www.achpr.org/files/activity-reports/43/43rd_activity_report_eng.pdf< accessed 19 March 2018. However, South Sudan has indicated interest in submitting its Initial Report in August 2018. Whereas a state party submits the initial report two years after ratification and accession, the periodic report is required to be submitted every two years after the initial report.

6.1.1.4 Restricted individual access to the African Commission

Within the African Commission mandate to protect human rights, it could be gleaned that 'other communications' and admissibility requirements in articles 55 and 56 are extensive when compared to article 35 ECHR. The first limitation observed under article 55 is that the consideration of communications is not automatic; whereas there is no knowledge of the criteria used in selecting communications. This is because article 55 empowers the members of the Commission, by a simple majority, to indicate which communications should be considered from the list sent to them by the Secretary of the Commission. In the absence of criteria for selecting communications, the chances of the Commission ignoring claims that may need urgent attention is possible. This procedure may contribute to the reason for consideration of communications several months and years after violations may have occurred. For instance, *Nnamdi Kalu and the Indigenous People of Biafra v Nigeria*²² was filed to challenge the complainant's detention by the Nigerian government but was never heard by the Commission until his release from detention more than one year after leading to the subsequent withdrawal of this communication.

Equally important, article 56 of the African Charter contains a list of admissibility requirements the Commission must consider before assuming jurisdiction over a complaint. While this practice is in tandem with other regional instruments, the African Charter requirement under article 56 is more extensive, demanding and somewhat superficial, which potentially impact on its protective mandate. However, two key requirements are of concern: communication must not be written in disparaging or insulting language, and communications must not be based exclusively on the news disseminated through the media. While it is agreed that the media play a vital role in exposing human rights violations in contracting states, such open-ended restriction would hinder effective enforcement by African

²² Communication 680/17.

Charter institutions. Therefore, it is correct to say that mandatory compliance with these provisions restricts unfettered access to the Commission while at the same time, weakening this form of evidence that may be presented to prove a violation. Although it is noteworthy that article 56 requirements do not apply to inter-state communications under article 47-54, the fact that state parties rarely invoke inter-state communications defeats whatever advantage it may have.

6.1.1.5 Enforceability and follow-up procedure

The Commission has to achieve a balance between interpreting the Charter provisions and ensuring compliance with its decisions. As part of the challenges facing the African Commission, non-compliance with decisions lowers the victim's confidence in the regional human rights system.²³ Although non-compliance of human rights decisions is not particular to Africa alone, it has been observed with disdain that in the case of Africa, the African Commission lacks the teeth with which to bite non-complying state parties.²⁴ In addition, the African Charter does not contain a provision on post-adjudication procedure except what is enshrined in article 58 requiring it to draw the attention of the AHSG. In this light, non-compliance with African Commission recommendations has led to a continuing situation where state party laws are at variance with African Charter provisions. For instance, apart from Benin that incorporated the African Charter into its constitution, many other African countries either contain derogation clauses or make socio-economic rights non-enforceable rights, hence complicating enforcement at the national level.

Furthermore, the African Commission lacks the power to sanction non-complying state parties.²⁵ This power resides in the AU Assembly but

²³ Michelo Hansungule, 'African Court and the African Commission on Human and Peoples' Rights' in Anton Bosl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (n 5 above) 233.

²⁴ *Ibid*, 233.

²⁵ Jeremy Sarkin, 'A Critique of the Decision of the African Commission on Human and Peoples' Rights Permitting the Demolition of SADC Tribunal: Politics versus Economic and Human Rights' (2016) 24

has rarely been used to enhance human rights enforcement in the region. For instance, Rule 112 of the Rules of Procedure of the African Commission requires state parties to report to the Commission within 180 days on measures taken to give effect its decision. However, state parties do not take this obligation seriously given the long period of multiple requests by the Commission to state parties to comply. In this light, therefore, the Commission needs an effective procedure that is realistic, reliable and coherent to translate into concrete action and results. For instance, cooperating with other African and international institutions concerned with the promotion and protection of human rights will give the Commission an extended lead in ensuring enforcement of African Charter rights and freedoms.

Moreover, African states are never comfortable when publicly exposed to issues concerning inadequate human rights commitment.²⁶ For instance, African countries are more worried when they are under investigation or prosecution by international human rights bodies such as the International Criminal Court. Under this circumstance, the Commission should readily invoke article 45 (1) (c) of the Charter to collaborate with relevant institutions if that will guarantee the smooth operation of its mandate.

(2) African Journal of International and Comparative Law, 215; Abadir Ibrahim, 'Evaluating a Decade of the African Union's Protection of Human Rights and Democracy: A Post-Tahrir Assessment' (2012) 12 African Human Rights Law Journal, 30; Zorola Motala, 'Human Rights in Africa: A Cultural, Ideological and Legal Examination' (1989) 12 Hastings International and Comparative Law Review, 373; Kofi Kufuor, 'Safeguarding Human Rights: A Critique of the African Commission on Human and Peoples' Rights' (1993) 18 (2) Africa Development, 65.

²⁶ Abadir Ibrahim, 'Evaluating a Decade of the African Union's Protection of Human Rights and Democracy: A Post-Tahrir Assessment' (n 25 above); Kofi Quanshigah, 'The African Charter on Human and Peoples' Rights: Towards a more effective Reporting Mechanism' (2002) 2 African Human Rights Law Journal, 273; George Wachira, 'A Critical Examination of the African Charter on Human and Peoples Rights: Towards Strengthening the African Human Rights System to enable it effectively to meet the needs of the African Population' (2006) 3 Judiciary Watch Report, 12.

6.1.1.6 Complementarity between the African Commission and the African Court

Rule 118 of the African Commission Rules of Procedure promotes complementarity between the Court and the Commission. This rule is a driving force in the enforcement of African Charter rights. However, to ensure that justice is served at all times, there should be an obligatory need for the Commission to make referrals to the Court. In the first instance, this will reduce the impact of the Commission's quasi-judicial nature in protecting human rights. On the side of the Court, it would circumvent the hindrances posed by non-ratification of the Court Protocol by state parties under articles 5 (3) and 34 (6). For this to happen, however, the language of Rule 118 of the African Commission Rules of Procedure must be made mandatory and not optional or discretionary since the Commission enjoys unfettered access to the Court under article 5 (1) (a) of the Court Protocol.²⁷ The effect of a discretionary wording of Rule 118 affects complementarity between the Commission and Court negatively and may have contributed to the scanty number of communications referred to the Court.²⁸

6.1.1.7 Lack of financial and human resources

The Commission needs adequate personnel and funds to carry out its mandate. Inadequate personnel, whether in the number of Commissioners or other administrative staff, has the potential to limit the effectiveness of the African Commission in terms of output. At present, what is obtainable is a situation where one Commissioner monitors three or more states and

²⁷ Rule 118 of the African Commission Rules of Procedure states that 'if the Commission has taken a decision with respect to a communication submitted under Articles 48, 49 or 55 of the Charter and considers that the state has not or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 112 (2), it may submit the communication to the Court pursuant to Article 5 (1) of the Protocol and inform the parties accordingly'. For instance, see Rule 45(1) of 2011 Rule of Procedure of the Inter-American Commission which mandates the Commission to refer matters to the Court where it considers that a state party has not complied with the recommendation of the report approved in accordance with article 50 of the American Convention.

²⁸ Joseph Isanga, 'The Constitutive Act of the African Union, African Courts and the Protection of Human Right: New Dispensation?' (2013) 11 (2) Santa Clara Journal of International Law. See also, Elise Nalbandian, 'The challenges facing African Court on Human and Peoples Rights' (2007) 1 MIZAN Law Review, 63.

at the same time chairs other special mechanisms, deliberates on communications, albeit working part-time. There is a need for an increase in human resources if the Commission is to be positioned to meet its African Charter mandate effectively. The same goes for the issue of funds. The question of poor funding appears in several African Commission Resolutions to the African Union and Session Communique.²⁹ Therefore, situations where money budgeted for the Commission in the AU budget is either reduced or not released must be discouraged.³⁰ This issue has over time forced the Commission in several instances to rely on foreign donors³¹ as well as slowing the pace of conducting its affairs.

6.1.2 Assessing the African Court

From its inception to date, the African Court has been flooded with cases, all alleging different violations of African Charter rights and freedoms. This development allows the Court to stamp its authority on the African domain and improve its case law jurisprudence. However, this aspiration seems not firmly attained. Even the African Court itself has admitted that it encounters peculiar challenges in carrying out its mandate under the Protocol.³² Problems affecting the Court include, but are not limited to non-compliance with decisions, lack of awareness of the Court, low-level ratification of Court Protocol, slow rate of deposit allowing individuals and NGOs direct access

²⁹ An instance can be seen in Part VII of the 2015-2019 Strategic Plan of the African Commission which explicitly requested an expanded budget vote by the AU and the elimination of all internal bureaucratic procedures that inhibit access to funding from the AU.

³⁰ For instance, the Commission admits that a substantial amount from its 2013 budget of US\$8.5 million in 2013 was never released. See, 35th Activity Report of the African Commission, para 31. See also, Magnus Killander and Bright Nkrumah, 'Human Rights in the African Union during 2012 and 2013' (2014) 14 African Human Rights Law Journal, 275. Furthermore, the Commission lamented in its 43rd Activity Report that it currently has a staffing deficit of twenty-five out of forty-six approved regular positions in its structure.

³¹ Centre for Human Rights, *Celebrating the African Charter at 30: A Guide to the African Human Rights System* (n 7 above) 58; Bience Gawanas, 'The African Union: Concepts and Implementation Mechanisms relating to Human Rights' in Anton Bosl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (Macmillan Education, 2009) 135.

³² Africa Union Executive Council, Report on the Activities of the African Court adopted January 2017, available at > <http://www.african-court.org/en/index.php/publications/activity-reports>< accessed 25 February 2018.

to the Court, part-time sitting arrangements, and insufficient human and material resources.³³ Therefore, this section analyses these factors with the view of making suggestions for improvement.

6.1.2.1 Restricted access to the African Court

It is to be noted that access to the Court is granted to the following; namely, the Commission, the state party which had lodged a complaint to the Commission, the state party against whom a complaint has been lodged, the state party whose citizen is a victim of human rights abuse, and the African Intergovernmental Organisations. The Court Protocol further grants access to individuals and NGOs if article 34 (6) precondition are met.³⁴ This implies that access to NGOs and individuals is not automatic, thereby undermining the usefulness of the Court to victims from countries unwilling to make an article 34 declaration. For instance, while only nine state parties to the African Charter have deposited the article 34 (6) declaration,³⁵ thirty state parties have ratified the Court Protocol.³⁶

On the other hand, only state parties that ratify the Court Protocol can be parties before it. Although this approach is similar to article 62 of the American Convention, it makes ratification a determining factor for African Court jurisdiction. Of course, this approach bars victims from non-ratifying countries. It is agreed that lack of access to the courts erodes justice from the courts.³⁷ It limits the African Court's objective in strengthening human rights and is a barrier to victims who ordinarily would

³³ *Ibid*, page 20.

³⁴ Article 34 (6) requires state parties to deposit a declaration that it permits individuals and NGOs to bring actions to the Court against it.

³⁵ The countries that have made this declaration are – Benin, Burkina Faso, Cote d'Ivoire, Ghana, Mali, Malawi, Tanzania, The Gambia and Tunisia.

³⁶ See Africa Union Executive Council, Report on the Activities of the African Court adopted January 2017 on the list of countries that have ratified/acceded to the Court Protocol. The following have ratified the Court Protocol- Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Republic of the Congo, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Niger, Uganda, Rwanda, Arab Saharawi Republic, Senegal, South Africa, Tanzania, Togo and Tunisia.

³⁷ *Attorney General Kaduna State v Mallam Umaru Hassan* (1985) Nigerian Weekly Law Report, Pt. 8, 483.

seek justice from a judicial institution.³⁸ Therefore, it is a denial of adequate legal protection to human rights victims in Africa. This impact has been demonstrated in *Michelot Yogogombaye v Senegal*,³⁹ where the Court declined jurisdiction because Senegal had not made a declaration under article 34 (6) irrespective of the apparent evidence of human rights violations.

6.1.2.2 Enforceability of African Court decisions and the role of the Council of Ministers

It is noteworthy that the Court makes appropriate orders when it is convinced that there has been a violation of human rights.⁴⁰ To ensure that these findings are complied with, state parties undertake to comply with the judgment in cases where they are parties, whereas the Executive Council of Ministers monitors execution on behalf of the AU Assembly.⁴¹ This post-adjudication approach is similar to the ECHR.⁴² However, this approach and state parties' voluntary compliance requirement under article 29 have not enhanced the African Court protection given the absence of political will by the AU and its member states.⁴³ This is submitted because many of the African Court decisions are not complied with by violating state parties. For

³⁸ Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights', (2018) 67 *International and Comparative Law Quarterly*, 63; Timothy Yerima, 'Comparative Evaluation of the Challenges of African Regional Human Rights Court' (n 1 above); Makau Mutua, 'The African Human Rights Court: A two-legged Stool?' (1999) 21 *Human Rights Quarterly*, 346; Sonya Sceats, 'Africa's New Human Rights Court: Whistling in the Wind?' (2009) Chatham House Briefing Paper, available at > <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp0309sceats.pdf> accessed 21 March 2018.

³⁹ App. No. 001/2008.

⁴⁰ Article 27 of the Court Protocol.

⁴¹ Article 30 and article 29 (2) of the Court Protocol.

⁴² This approach evidences some improvement in monitoring the enforcement of the Charter rights. See, Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (n 38 above); Frans Viljoen, *International Human Rights Law* (Oxford University Press, 2012) 414.

⁴³ Joseph Isanga, 'The Constitutive Act of the African Union, African Courts and the Protection of Human Right: New Dispensation?' (n 28 above); Timothy Yerima, 'Comparative Evaluation of the Challenges of African Regional Human Rights Court' (n 1 above); Julia Harrington, 'The African Court on Human and Peoples' Rights' in Evan Malcome and Racheal Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (Cambridge University Press, 2002) 320.

example, Tanzania has, in several instances, notified the Court that it is unable to implement its order.⁴⁴

In the context of post-adjudication approach, it is essential to note that the Council of Ministers has remained invisible in getting state parties to comply with Court decisions. However, it cannot be ascertained whether this contributes to state party relegation and neglect of African Court decisions cannot be ascertained. Thus, it is imperative that the AU and the African Court give more attention to the poor compliance of decisions. Therefore, the AU may require a human rights department within the AU, such as the Office of the Human Rights Commissioner, with responsibilities that include ensuring state parties abide by decisions and recommendations. This is necessary to preserve the purpose of the Court, and faith in its ability to enforce the African Charter rights. This suggestion is made to fill the absence of a human rights department within the AU.

6.1.2.3 Relationship with the African Commission and the AU

A good relationship between the Court, on the one hand, and the Commission and AU, on the other hand, is crucial for the realisation of effective enforcement of human rights. This relationship is key for two main reasons. First, individuals and NGOs can access the Court through the Commission under article 5 (1) (a) of the Court Protocol, where their state has not made declaration article 34 (6). This is because of the Commission's unfettered access to the Court. Besides, a good relationship between the Court and the Commission supports the idea of complementarity between the institutions which in its entirety enhances effective enforcement of African Charter rights.⁴⁵ The idea of complementarity has the potential to reduce legal interference while also promoting collaboration between the Court and the Commission. However, there is a poor relationship between

⁴⁴ See App.No. 021/2016 -*Joseph Mukwano v Tanzania*; App. No. 024/2016 -*Amini Juma v Tanzania*; App. No. -*Evodius Rutachura v Tanzania*; App. No. -003/2016 *John Lazaro v Tanzania*; App. No. -007/2015 *Ally Rajabu v Tanzania*; App.No.-*Armand Guehi v Tanzania*.

⁴⁵ See, articles 5, 6 (1) and (3), 8 and 33 of the Court Protocol, and Part 4, Rules 114, 115, 122 and 123 of the rules of procedure of the African Commission.

the Court and the Commission, particularly concerning the transfer of cases.⁴⁶ It is suggested that instead of the Court striking out cases or declaring them inadmissible based on article 34 (6) of the Court Protocol, such claims should automatically be transferred to the Commission for consideration. Therefore, the wording adopted in Rule 29 (5) of the Rules of the Court, which instead of making it mandatory, assume a discretionary approach on case transfer to the Commission should be amended.

On the other hand, the relationship between the Court and the AU is through the Executive Council of Ministers. This is crucial because it relates to one of the significant challenges facing the Court; that is, state party compliance with decisions. Although the Executive Council of Ministers has not adequately carried out its functions, its responsibility is crucial to the effective realisation of human rights in Africa.

6.1.2.4 Composition and sitting pattern of the African Court

The Court consists of eleven judges, nationals of member states of the OAU after due consideration is given to gender representation and coverage of the main regions of the continent.⁴⁷ The sitting pattern of the African Court is on a part-time basis, similar to the African Commission.⁴⁸ Undeniably, this has some consequences in the carrying out of its broad mandate and on effective enforcement. For instance, it can be directly linked to the numerous pending cases before the Court, thereby delaying justice to victims of human rights violations. Suffice to add that as of March 28, 2019, the African Court has 146 pending cases and 52 finalised cases. Therefore, there is a need for the AU to consider increasing the number of judges for

⁴⁶ For instance, while the Court has only transferred 4 cases to the Commission, the Commission has in turn transferred 3 cases to the Court. See, for example, App. No. 004/2011 –*African Commission v Libya*; App. No. 006/2012 –*African Commission v Kenya*; and, App. No. 002/2013 –*African Commission v Libya*.

⁴⁷ Articles 11, 12 and 14 of the Court Protocol.

⁴⁸ Article 15 (4) and 21 (2) of the Court Protocol. It is noteworthy that this part-time sitting pattern does not affect the President of the African Court.

the African Court as well as changing its sitting pattern to a full-time pattern in line with article 15 (4) of the Court Protocol.⁴⁹

6.1.3 Assessing the AU political role in African Charter enforcement

The African Charter and the Court Protocol impose human rights enforcement related duties on some AU organs; namely, the AHSJ and the Council of Ministers.⁵⁰ Both organs are involved in the monitoring of decisions from the African Charter institutions, but the AHSJ is assigned a significant privilege in the entire operation of the African Charter system.⁵¹ However, AHSJ has more responsibility under the African Charter.⁵² For instance, the AHSJ is involved in consideration of reports from the Commission on inter-state communication,⁵³ consideration of activity reports from the Commission,⁵⁴ activities related to the findings of the African Commission on serious or massive violations of human rights,⁵⁵ and publication of African Commission reports.⁵⁶ Furthermore, the AHSJ is involved in monitoring the execution of the African Court's judgment through the Council of Ministers.⁵⁷ Even more, the Court is mandated to submit to the Assembly a report of its annual activities which must contain the cases in which a state party has not complied with the Court's judgment.⁵⁸ The presumption is that where these duties are optimally carried out, AU would use its position as a major stakeholder in African

⁴⁹ Article 15 (4) of the Court Protocol empowers the AU Assembly to change the sitting pattern of the Court at any time it deems necessary.

⁵⁰ Article 58 of the African Charter and Article 29 of the Court protocol.

⁵¹ Fatsah Ouguergouz, 'The Reform of the African System of Human Rights Protection' (2007) 101 *American Society of International Law Proceedings*, 423.

⁵² See articles 52, 53, 54, 58, and 59 of the African Charter; Joseph Isanga, 'The Constitutive Act of the African Union, African Courts and the Protection of Human Right: New Dispensation?' (n 28 above).

⁵³ Article 52 and 53 of the African Charter.

⁵⁴ Article 54 of the African Charter.

⁵⁵ Article 58 of the African Charter.

⁵⁶ Article 59 of the African Charter.

⁵⁷ Article 29 (2) of the Court Protocol. This provision suggests that the Council of Ministers monitors execution on behalf of the Assembly.

⁵⁸ Article 31 of the Court Protocol.

regional human rights system to enhance the realisation of effective enforcement of the African Charter.

6.1.3.1 Role of AU organs in executing judgments and follow-up of decisions

From the privileges accorded AU organs, it is evident that the African human rights system leaves the bulk of monitoring and execution of findings of the AHSJ (now, AU Assembly), thereby making the role of the AU Assembly very significant. This role requires it to use all legal means to ensure the protection of human and peoples' rights, which is one of the principles and objectives of the AU. Of course, this involves state party compliance with findings of the Court and Commission. Yet, while it is correct to say that human rights violations are still prevalent in many AU countries, it is a fact that many AU member states either decline or fail to comply with decisions from the Court and Commission.⁵⁹

However, in contrast with the OAU Charter, the AU Constitutive Act imposes broader human rights responsibilities on the AU Assembly.⁶⁰ These responsibilities are carried out in its ordinary session.⁶¹ Arguably, increasing the ordinary session to twice a year presents more opportunity to carry out its mandates, especially those concerning human rights enforcement. However, this cannot be said to have optimally been achieved; maybe because no seriousness was attached to human rights from the outset

⁵⁹ Africa Union Executive Council, Report on the Activities of the African Court adopted January 2017 at Thirtieth Ordinary Session. See also, Joseph Isanga, 'The Constitutive Act of the African Union, African Courts and the Protection of Human Right: New Dispensation?' (n 28 above); Julia Harrington, 'The African Court on Human and Peoples' Rights' in Evan Malcom and Racheal Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (n 43 above) 320; Nsongurua Udombana, 'Can a Leopard Change its Spots? The African Union Treaty and Human Rights' (n 1 above).

⁶⁰ Article 6-8 of the Constitutive Act of the African Union. The AU Assembly, as the supreme organ of the Union comprising Member States Heads of State and Government, meet at least once a year. See article 6 (3) of the Constitutive Act.

⁶¹ At the 2004 Summit, the Assembly agreed to be meeting in Ordinary Session twice a year, in January and June/July. See, Assembly of the African Union, Decisions and Declaration (2004) Assembly/AU/Dec.53(III), available at https://au.int/sites/default/files/decisions/9550-assembly_en_30_31_january_2005_auc_third_ordinary_session.pdf accessed 17 April 2019.

under the auspices of the OAU. What this illustrates is that the AU Assembly still lacks the political will to task member states on their human rights obligations. Simply put, many member states do not abide by their obligations because of weakness or lack of pressure from the AU Assembly.⁶² There is a need to consider another method that can put pressure on state parties.

According to Odinkalu, AU member states' attitude giving rise to the AHS's inability to influence and protect human rights may be due to member states' unwillingness to crack down on others for violations that they may themselves commit or have committed.⁶³ This may be correct because African leaders may not want to call out other leaders for violations they commit. In a situation like this, it becomes challenging to separate the AU Assembly from African leaders or heads of government that commit these violations. This observation supports this thesis insight into the creation of an independent human rights organ within the AU. For instance, the creation of such a body will reduce AU member states conflicts of interest in human rights resolutions against violation member states. This is essential in contemporary Africa because the conflict of interest by AU member states should not be allowed to take priority over the general principle and objective of human rights.⁶⁴

⁶² Frans Viljoen, 'Contemporary Challenges to International Human Rights Law and the Role of Human Rights Education' (n 2 above); Robert Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 African Human Rights Law Journal, 223; Makau Mutua, 'The African Human Rights Court: A Two Legged Stool?' (n 38 above).

⁶³ Chidi Odinkalu, 'The Individual Compliant Procedure of the African Commission on Human and Peoples Rights: A Preliminary Assessment' (1998) 8 Transnational Law and Contemporary Problems, 359. See also, Arthur Anthony, 'Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa' (1997) 32 Texas International Law Journal, 511.

⁶⁴ Michelo Hansungule, 'African Courts and the African Commission on Human and Peoples Rights' in Anton Bosl and Joseph Diescho (eds), *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (n 5 above) 233; Carolyn Martorana, 'The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples Rights' (2009) 40 George Washington International Law Review 583; Mirna Adjami, 'African Court, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?' (2002) 24 (1) Michigan Journal of International Law, 103; Arthur Anthony, 'Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa' (n 63 above) 511.

6.1.3.1.1 Impact of neglect of AU organs' roles on human rights enforcement in Africa

From the foregoing, AU organs are essential to the realisation of effective enforcement of civil and political rights in Africa. The question is whether their human rights related roles have been optimally performed. To answer this question, it is imperative to evaluate the evident human rights violations across African Charter state parties and the alarming instances of non-compliance with African Court and African Commission findings. This reality may lead to questioning the veracity of voluntary ratification and consent to comply with decisions under the African Charter system.⁶⁵

A state party to an international human rights treaty is deemed to have fully complied with decisions when it takes steps to carry out the directives in such decisions.⁶⁶ This is because non-compliance with decisions is not only a source of frustration and injustice; it can cause further pain and suffering to victims who are at this point confused by uncertainty.⁶⁷ Non-compliance with decisions is likely to undermine the fulfilment derived from the recommendation or judgment. On the other hand, while non-compliance with decisions cannot be interpreted as overall non-adherence to African Charter obligations, timely and full compliance indicates seriousness in meeting state party obligations.⁶⁸ However, there are genuine circumstances that may prolong state compliance with decisions. For instance, it is reasonable that compliance may take a longer time in

⁶⁵ For example, article 30 of the Court Protocol enshrines that 'state parties undertake to comply with the decisions of the Court in any case in which they are parties within the time stipulated by the Court'.

⁶⁶ REDRESS, 'Enforcement of Awards for Victims of Torture and Other International Crimes' (The REDRESS Trust, London, 2006) available at > http://www.redress.org/downloads/publications/master_enforcement%2030%20May%202006.pdf accessed 04 August 2017; Frans Viljoen and Lurette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 (1) *American Journal of International Law*, 1.

⁶⁷ *Ibid.* The impact of late compliance or non-compliance is that victims may experience prolonged arbitrary detention, inhuman and degrading treatment, denial of equal protection of the law, or continuous placement in a financially disadvantaged position either through compensation or acts capable of affecting victims' source of livelihood.

⁶⁸ Frans Viljoen and Lurette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (n 66 above).

cases where the decision requires the enactment of new legislation or an amendment of an existing one⁶⁹ than where it relates to release of persons arbitrarily arrested and detained or payment of financial compensation.⁷⁰

For instance, the African Commission has over time noted that state compliance with its recommendations is relatively low.⁷¹ In addition, the Commission pointed out that the entire recommendations and provisional measures to states concluded in its 45th Activity Report were not complied with by affected countries.⁷² Suffice it to state at this juncture that prevalent non-compliance by state parties has a potential to make victims or those at risk losing confidence in the efficiency of the regional human rights system. Furthermore, it exposes the weakness of AU organs in monitoring execution and enforcement of human rights. For instance, to date, the African Court first judgement on merit delivered 14th June 2013, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*,⁷³ has not been complied with by Tanzania.⁷⁴

6.2 Assessing normative provisions of the African Charter

This section will assess the African Charter, an innovative human rights document with 68 articles, with a view to suggesting how its normative

⁶⁹ See for instance the duration it took Zambia to amend its constitution in 2016 after a recommendation was delivered 7th May 2001 in communication 211/98 between *Legal Resources Foundation v Zambia*.

⁷⁰ Reasons for non-compliance may include vague decisions, inadequate domestic legal frameworks, lack of institutional follow-up mechanisms, and lack of political will. See, Lutz Oette, 'Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies' (2010) 16 (2) *Interights Bulletin*, 51.

⁷¹ 45th Activity Report of the African Commission on Human and Peoples' Rights, para 25-27.

⁷² The following states are in violation of compliance under this Activity Report: Zimbabwe, Liberia, Ethiopia, Tanzania, Gambia, Zambia, South Sudan, Lesotho, and Burundi.

⁷³ App NO. 009 and 011/2011, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*. It was alleged in this case that Articles 39, 67 and 77 of the 1977 Constitution of Tanzania, and Section 39 of 1979 Local Authorities (Elections) Act violated provisions of the African Charter for barring independent candidates from contesting Presidential, Parliamentary and Local Government elections. The African Court, in this case, ordered Tanzania to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations and to inform the Court of the measures taken.

⁷⁴ Report of the Activity of the African Court, Executive Council Thirtieth Ordinary Session, 22-27 January 2017, available at > http://www.african-court.org/en/images/Activity%20Reports/AfCHPR_Activity_Report_2016_E.pdf< accessed 06 November 2018.

shortcomings can be reformed. It is agreed that the African Charter is universal in character and distinctively African in its scope and principle.⁷⁵ The African Charter norms comprise various human rights categories; however, its norms are not to be comprehensive when contrasted with other regional and relevant UN human rights instruments. This section, therefore, will assess how normative insufficiency has impeded realising effective enforcement within the region.

6.2.1 Assessing African Charter civil and political rights norms

Before the enactment of the African Charter, existing international and regional human rights instruments enshrined several civil and political rights norms. One would have thought that the African Charter emergence afterwards would make the African Charter norms more comprehensive. This is because the exclusion of rights denies individuals the benefits or protection accruable to them. However, the African Charter omitted several internationally recognised civil and political rights, which has over time contributed to the increasing human rights violations in AU member states. Take, for instance, the omission of the right to privacy.⁷⁶ A significant advantage of the right to privacy is the protection against unnecessary interference by others, including state agents. It protects against unwarranted searches of the home, one's property, or the seizure of one's possessions as well as protection against any unnecessary requirement of information about one's family or communications. Such omission is regrettable, more especially given that violation of this right is commonplace in many African states by state security agents.⁷⁷

⁷⁵ Moussa Samb, 'Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union' (2009) 15 (5) *Annual Survey of International and Comparative Law*, 61.

⁷⁶ Article 12 UDHR; article 8 ECHR; article 11 American Convention. It is necessary to acknowledge that some state parties to the Charter have gone ahead to recognise this right in the constitutions. See, Section 37 of the 1999 Constitution of Nigeria; Article 16 of 1977 Constitution of Tanzania; Section 76 of the 1963 Constitution of Kenya.

⁷⁷ Oji Umzurike, 'The Significance of the African Charter on Human and Peoples' Rights' in Awa Kalu and Yemi Osibanjo (eds), *Perspectives of Human Rights* (Federal Ministry of Justice Lagos, 1992) 45.

Another significant omission is the protection against forced labour.⁷⁸ The omission of forced labour exposes individuals to torture and cruel, inhuman treatment and would have offered regional protection against domestic laws containing criminal sentencing with hard labour.⁷⁹ The prohibition of forced labour could best fit into article 5 of the African Charter to complement the prohibition against cruel inhuman and degrading treatment, the slave trade, and torture. However, this is not the case in the African Charter.

It is correct to say that the right to liberty and security of the human person and the right to a fair hearing under articles 6 and 7 of the African Charter are inadequate and do not meet international standards.⁸⁰ For instance, article 7 omitted some rights of an accused person such as the right to be informed promptly, in a language one understands, of the reason for the arrest, and the right to remain silent and the consequences of not remaining silent. Another significant omission in article 7 is an accused person's right to bail and the right to be brought before a competent court or tribunal as soon as practically possible.⁸¹ Such oversights restrict a person's enjoyment of other civil and political rights such as arbitrary detention and the right to liberty. However, it is clear that the African Charter provides for trial within a reasonable time, but without suggesting what amounts to this reasonable time. This oversight, therefore, leaves the state party with the choice of deciding what amounts to a reasonable time in instances where bail is not granted. One would have agreed that since the rationale for trial within a reasonable time is to guarantee speedy proceedings, the Charter should have been more specific with the

⁷⁸ Article 4 ECHR; article 8 (3) ICCPR; article 6 (2) American Convention.

⁷⁹ See, section 34 (2) of 1999 Constitution of Nigeria; Morris Mbondenyi, 'Improving the Substance and Content of Civil and Political Rights under the African Human Rights System' (2008) 17 (2) *Lesotho Law Journal*, 1.

⁸⁰ Evelyn Ankumah, *The African Commission on Human and Peoples' Rights* (n 8 above) 123; Nsongurua Udombana, 'The African Commission of Human and Peoples' Rights and the Development of Fair Trial Norms in Africa' (n 8 above); Vincent Nmeielle, *The African Human Rights System: Its Laws, Practice and Institutions* (n 8 above) 98.

⁸¹ Article 7 of American Convention; article 9 ICCPR; article 5 ECHR.

suggestion that an accused person may be brought before a court or tribunal not later than 48 hours after being arrested or be granted bail pending commencement of trial or completion of the investigation.

Furthermore, article 7 (1) (c) of the African Charter acknowledges the right of an accused person to a legal representative of one's choice but fails to recognise state party obligation to ensure legal assistance and representation for indigent persons or persons facing criminal offences where a death sentence is a penalty.⁸² This oversight puts several poor Africans at risk of not having a legal representative unless the state party involved has enacted legal aid laws in accordance with other international treaties' obligations. At present, however, some African countries have established legal aid offices for the representation of indigent citizens in criminal matters.⁸³ Nevertheless, many African countries with legal aid programmes have their activities hindered by inadequate funding by the state authorities.⁸⁴

It is clear from the provisions of the African Charter that the protection of the right to association under article 10 fails to recognise the right to form and belong to trade unions.⁸⁵ Trade unions are a significant means of expressing the right to association and act as pressure groups against government policies. However, whether such oversight was intentional to avert pressure on African government cannot be ascertained. What is relevant is that the exclusion of the right to form and join trade unions can be relied upon by African governments to ban and interfere in trade union operations or even the proscription of such entities.

⁸² Article 6 (c) ECHR, and article 8 (f) American Convention.

⁸³ For example, the Legal Aid Act (No 56) 1976 of Nigeria.

⁸⁴ Vincent Nmehielle, *The African Human Rights System: Its Laws, Practice and Institutions* (n 8 above) 98.

⁸⁵ Article 11 ECHR and article 22 (1) ICCPR.

6.3 Assessing state party obligations under the African Charter

This section analyses state parties' obligations towards realising effective enforcement of African Charter civil and political rights. This section is relevant because realising effective enforcement of the African Charter rights depends on state party commitment to the African Charter as well as compliance with decisions from the Court and Commission. In addition, AU membership automatically comes with some human rights responsibility under the Constitutive Act.⁸⁶ However, this section will focus on the constitutional oversights in protecting civil and political rights in Nigeria, Tanzania, and Benin. Also, this section ascertains whether domestic recognition of the African Charter civil and political rights has adequately enhanced enforcement in focus states.

6.3.1 Constitutional protection of civil and political rights norms

In order to ensure implementation of the African Charter, state parties are mandated to adopt legislative or other measures to give effect to the Charter rights. However, the procedure for the adoption of international treaties in national legislation depends on whether the state is a dualist or monist state. For instance, in dualist states, such as Nigeria, the procedure for adoption requires re-enactment by the legislative organ of government.⁸⁷ On the other hand, the procedure in monist countries such as Benin is that international treaties come into effect upon the state signing up to such treaty.

6.3.1.1 Approach to state party constitutional protection of human rights

One visible constitutional pattern relating to human rights protection in African countries is the divide between fundamental rights and Fundamental

⁸⁶ Therefore, without being a state party to the African Charter, the AU has some level of control to interfere in cases of serious human rights violations in member states.

⁸⁷ Nigeria has domesticated the African Charter as African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1983, in line with the provision of section 12 of the 1999 Constitution. Section 12 of 1999 Constitution provides that 'no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. Similar provision is missing in 1977 Constitution of Tanzania.

Objectives and Directive Principles of State Policy. This divide impacts on state party enforcement of African Charter rights and freedoms. However, while the majority of civil and political rights fall under the enforceable fundamental or basic rights in the constitutions of Nigeria, Tanzania and Benin,⁸⁸ the non-justiciable Fundamental Objectives and Directive Principles of State Policy affect mainly socio-economic rights found in the ICESCR. Indeed, one would expect to have broader human rights protection in state party constitutions, particularly, where such country is a party to other international human rights treaties such as the ICCPR. However, some constitutions either vaguely protect rights or omit certain civil and political rights. For instance, both Tanzania and Nigeria Constitutions neither recognised the right to name and nationality nor abolish the death penalty and forced labour.⁸⁹

6.3.1.2 Use of derogations, limitations and claw-back clauses in state party constitutions

It is clear from the provisions of the African Charter that the majority of its rights are not absolute. Whether the African Charter drafters adopted this approach because having an absolute right will affect how a society functions,⁹⁰ it is also essential to mention that the ICCPR and ECHR contain some absolute rights. For instance, the Nigerian Supreme Court in *Okoro v State*⁹¹ and *Kalu v State*⁹² upheld that a person can not rely on the constitutional right to life where the individual is facing a death sentence. This decision upholds the death sentence as being part of the domestic law punishment for capital offences in Nigeria. Thus, it acts as one of the

⁸⁸ Article 7 (2) of 1977 Constitution of Tanzania and section 6 (6) (c) of 1999 Constitution of Nigeria. In all, the fundamental objectives and directive principles of state policy concerns mainly socio-economic rights mainly find under the ICESCR such as the right to work and the right to education.

⁸⁹ For forced labour, see section 34 (2) and for death penalty, see section 33 (1) of 1999 Constitution. See also article 15 (2) (b) of 1977 Constitution of Tanzania.

⁹⁰ For example, if the right to personal liberty and freedom of movement are absolute, every society would be violating human rights by lawfully restricting movement or imprisoning law offenders.

⁹¹ (1998) 12 Supreme Court of Nigeria Judgment, 84.

⁹² 12 Supreme Court of Nigeria Judgment, 1; *Odunlami v Nigeria Navy* (2013) 12 Nigeria Weekly Law Report (Part 1367) 20.

grounds for which the right to life may be deprived when issued by a competent court of justice. Similarly, the Nigerian Court of Appeal has held in *Udeh v Federal Republic of Nigeria*⁹³ that the right to personal liberty is not absolute, given that it may be interfered with in certain circumstances justified by law such as section 263 (3) of the Criminal Procedure Law.⁹⁴

Furthermore, except for Benin and DRC, other AU member states constitutions, including Tanzania and Nigeria, contain derogation provisions. It is surprising to have derogation clauses in state constitutions given the absence of a derogation clause in the African Charter.⁹⁵ For Benin, the implication is that all rights accruable under the African Charter are enforceable constitutional rights even in time of war or conflict, and bind all individuals, state and its agencies, private or social organisations and corporate entities.⁹⁶ However, this reality signposts the liberty as well as the confusion of African countries in their quest to provide domestic human rights amidst ratification of ICCPR and the African Charter.

Equally, the provisions of Nigerian and Tanzanian constitutions contain claw-back clauses. For instance, whereas the clause 'permitted by

⁹³ All Federation Weekly Law Report (Pt. 61).

⁹⁴ (2001) 5 Nigeria Weekly Law Report (Part 706) 312. Section 263 (3) of the Criminal Procedure Law empowers a Magistrate to grant bail or remand a person who has been arrested and brought before him pending the arraignment before an appropriate court in custody.

⁹⁵ For instance, section 45 of the Nigerian Constitution allows derogation in the interest of defence, public safety, public order, public morality or public health, protecting the rights and freedoms of others, and war through an act of the National Assembly or the proclamation of the state of emergency declared by the President pursuant to section 305. Whereas Article 30 (2) of the Tanzanian Constitution has all grounds for derogation as contained in the Nigerian Constitution, it further provided for a more robust ground for limitations as rural and urban development planning; the exploitation and utilisation of minerals or the increase and development of property for public benefit; imposing restrictions, supervising and controlling the formation, management and activities of private societies; and, enabling any other thing which promotes, or preserves the national interest. In addition to this provision, Article 31 permits any other law enacted by the Parliament, which enables measures to be taken during a period of emergency in Tanzania.

⁹⁶ For example, in DCC 06-062, DCC 06-060 and DCC 06-059 the Constitutional Court had found police and armed forces officers to be in violation of illegal arrest and degrading and inhuman treatment. Nonetheless, in *DCC 03-084 of 28 May 2003*, the Constitutional Court ruled that an investigation and trial that lasted for 15 years without judgment is a violation of article 7 (d) of the African Charter. Furthermore, in *DCC 03-125 of 20 August 2003* it was held that the investigation judge was in violation of Article 7 (c) of the African Charter and article 35 of the Constitution through acts that constitute delay to justice.

law' and 'established by law' were used in the right to life, the right to personal liberty, and the right to fair hearing under the Nigerian Constitution; the Tanzanian constitution applied the use of 'accordance with the law' in guaranteeing the right to own property, the right to participate in public affairs, and the right to life. However, while the issue of claw-back clauses has been settled at the African Commission to mean recourse to other international human rights instruments, domestic use of claw-back seem not to have a similar meaning. For instance, because the right to life and the right to privacy in 1990 Benin Constitution contains claw-back clauses, the court in determining whether article 381 of the Benin Criminal Code which authorises the death sentence violated the right to life under article 8 and 15 of the Constitution held that there is no express abolition of the death penalty given that a subsisting law still upholds it.⁹⁷ This implies that claw-back clauses in national laws refer to other related national legislation irrespective of whether they violate the African Charter objectives or not.

Another unique constitutional approach that limits the realisation of effective enforcement of fundamental rights at the state level is found in the Tanzanian constitution under article 30 (5) and article 13 (2) of the Basic Rights and Duties Act. These articles limit the power of the High Court to declare any law or action taken by the government invalid until the government or the relevant authority rectify the defect. This implies that a court may lose its jurisdiction where such acts or law have the potential to violate human rights despite the constitutional power to provide redress to human rights victims.⁹⁸ Thus, not all allegations of infringement of constitutional rights should be redressed through litigation in Tanzania courts. However, this position conflicts with the concept under the Nigerian

⁹⁷ *DCC 99-051 of 13 October 1999*. Although the Constitutional Court has abolished the death penalty in Benin following Benin's ratification of Protocol to the ICCPR abolishing same, the claw-back is still inserted in the 1990 Constitution pending amendment of the constitution.

⁹⁸ Article 30 (3) of 1977 Constitution of Tanzania.

constitution.⁹⁹ For instance, in *Andee Iheme v Chief of Defence State and others*, the Nigeria Court of Appeal considered this appeal on a sole issue for determination- 'whether the trial court was right in declining jurisdiction to entertain the appellant's case'. In its ruling, the Court of Appeal held that no citizen should be shut out from seeking redress for his fundamental rights and subsequently ordered the trial court to entertain this matter.¹⁰⁰ The principle reemphasised that every individual has a right to seek redress and that the state has a responsibility to ensure the institutions are available.¹⁰¹

6.4 Conclusion

So far, it can be seen that the successes of the African Court and the African Commission have not adequately reduced gross human rights abuses and weak enforcement at both regional and national levels. The analysis in this chapter is illustrative of the fact that the challenges to effective enforcement of civil and political rights in Africa are multifaceted due to normative and institutional shortcomings at regional and domestic levels. Of course, the journey towards realising effective enforcement of civil and political rights requires the AU to take steps in order to further close these gaps by removing remaining obstacles to both normative and institutional framework of the African Charter rights and freedoms. The member states of the AU equally need to eliminate obstacles at the national level by accepting good practice necessary to remedy the shortcomings.

However, one must commend both the AU and its member states on the progress made so far towards realising effective enforcement. There is much progress to be made, such as an amendment to the African Charter that will consider improving its norms as well as the enforcement institutions. Of course, this improvement will boost the African human rights

⁹⁹ Section 46 of 1999 Constitution of Nigeria and article 114 of 1990 Constitution of Benin.

¹⁰⁰ CA/J/264/2017.

¹⁰¹ The victims need to have unhindered access to the courts, in the first instance, before redress can be sought and obtained. Arguably, when access to court is not guaranteed, redress is denied.

system jurisprudence as well as enhance effective enforcement. to this effect, the call for amendment should not be the prerogative of state parties alone under 68 of the African Charter. One would expect that the enforcement institutions, because of their burden and mandate under the Charter, should also be allowed to submit proposals for amendment as is obtainable under articles 76 and 77 of American Convention.

It is necessary that regional constraints that hinder AU's organs from performing their human rights duties are eliminated. Whether this may entail creating a new department solely for human rights, one will agree that there is a greater need for AU to show more commitment to guaranteeing its human rights objectives. The importance of such a department would help the AU in articulating, promoting and following-up on state party implementation, compliance and other human rights obligations.

Nevertheless, the AU must be seen as more forceful and aggressive in pursuing its human rights goals under the Constitutive Act, and not merely seen as helpless due to the politics of member states. It becomes necessary that state parties do things differently in order to ensure effective enforcement. Notably, African Charter state parties must ensure the Charter rights are given effect to, without discrimination, within their jurisdiction. Consequently, it can be taken that state parties should also adopt best standards from ICCPR or good practices from other states to enhance the effective realisation of civil and political rights both at the regional and domestic levels.

CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

7.0 Introduction

This chapter reaffirms the central idea which guided the thesis and seeks to consolidate answers to research questions raised, and the justifications raised. Apart from the preceding, this thesis agrees that Africa's journey towards effective human rights enforcement is far from being completed. This observation is posited given the rife human rights violations in many African Charter state parties despite some positive efforts in the region to enhance human rights. This chapter seeks to highlight the limitations of the study, suggest directions for further research as well as make recommendations for potential reforms.

7.1 Limitations of the thesis

This thesis analyses the enforcement of civil and political rights from an African Charter perspective. First, because human rights comprise various categories, this thesis focuses primarily on civil and political rights. It is consequently impracticable for this thesis to claim a comprehensive analysis of all categories of human rights recognised under the African Charter. However, an attempt is made to recognise the African Charter's unique protection of various categories of human rights such as socio-economic, peoples' and environmental rights. The focus on the African Charter allows extensive analysis of its case law jurisprudence and normative protections while recognising the impact of other instruments in the subject area. Furthermore, the fact that all AU member states, except Morocco, have ratified the African Charter makes this thesis focus realistic.

Another limitation of this thesis concerns the analysis of African Charter state parties. The fulcrum of this thesis remains the African Charter enforcement in Africa, which is a continent of fifty-five independent states with different legal systems and cultural inclinations. In other words, this thesis does not exhaustively deal with all the possible issues relating to civil

and political rights in the fifty-five African countries; thus, the risk of over-generalisation. This thesis, in essence, limits its scope to state party obligations under the African Charter in three countries. In addition, this approach helped to eliminate the possibility of a dearth of case laws from regional institutions in some of these countries. Nevertheless, this thesis allowed an examination of the African Commission and the African Court communications and cases from all relevant African countries in order to emphasise the prospects and challenges by the regional institutions.

Generally, this thesis is not ignorant of the merger between the Court of Justice of the African Union¹ and the African Court on Human and Peoples' Rights² under the Protocol on the Statute of the African Court of Justice and Human Rights. The merger Protocol was adopted during the 11th African Union Summit in July 2008 and the Court, just as the African Court, is based in Arusha, Tanzania.³ While the new regional court is still awaiting fifteen member state ratification to come into effect, the following seven countries have ratified it: Libya 2009; Mali 2009; Burkina Faso 2010; Benin 2010; Congo 2011, Liberia 2014 and Gambia 2018.⁴ The limitation envisaged is that, while the new court has both human rights and international criminal jurisdiction, it replaces the African Court when it comes into force.⁵ In the main, relevant research on the incoming court is necessary, although not covered, because the focus of this thesis is on working institutions and not futuristic ones. However, it is noteworthy that the African Court of Justice

¹ Adopted at the Maputo Summit in July 2003.

² Article 1 and 2 of the Protocol on the Statute of the African Court of Justice and Human Rights 2008.

³ Known as the Protocol for the Establishment of African Court of Justice and Human Rights. According to article 3 of this Protocol, reference made to the Court of Justice under the Constitutive Act will be deemed to mean the African Court of Justice and Human Rights.

⁴ See article 9 of the Statute of the African Court of Justice and Human Rights. Information available as of April 2019. For the ratification of the Protocol on the Statute of the African Court of Justice and Human Rights, see > https://au.int/sites/default/files/treaties/36396-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf< accessed 29 April 2019.

⁵ Article 1, 2 and 3 of the Protocol on the Statute of the African Court of Justice and Human Rights.

and Human Rights has a broader competence in terms of jurisdiction⁶ and access than the African Court on Human and Peoples' Rights.⁷

One of the limitations of this thesis is the use of a library-based research method instead of conducting interviews for information gathering. The problem envisaged is that conducting interviews would have provided more information on whether victims are happy with redress granted by the institutions if victims encountered any procedural frustrations, efforts and private steps taken to ensure compliance with decisions and other relevant opinions regarding African Charter procedures and enforcement. However, because this could not have been feasible given the task of tracing every victim; reliance on academic literature, NGO reports and media information for information gathering seem to have been the most positive method of meeting the set objectives of this thesis.

The quest for Africa to have an Africanised human rights system is a limitation of the thesis. This idea, as demonstrated in paragraphs 5 and 8 of the African Charter preamble, suggests that post-colonial Africa would most likely welcome ideas underpinning African solutions to African problems. In this regard, the recognition of African history, values and tradition amidst the aspects of aspiration for African peoples upon which the African Charter is based indicates that if possible, Africa can adopt unique procedural models so long as it promotes the UDHR as well as not conflicting with African values and tradition. With this in mind, this thesis will not aim at transplanting from other pre-existing regional or international human rights instruments. This is because a legal transplant may involve a complete displacement of the African Charter and may simply be asking for stronger realignment with the Western model that both the

⁶ Article 28 of the Protocol included the interpretation and application of the Constitutive Act, other Union Treaties and instruments adopted within the framework of the AU or the OAU, the African Charter, the Charter on the Rights of the Welfare of the Child, the Protocol to the African Charter on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the State Parties.

⁷ Article 29 and 30 of the Protocol on the Statute of the African Court of Justice and Human Rights.

relativistic cultural scholars and the idea of an Africanised human rights system stand against. Instead, it is an investigation into what is in existence for the protection of civil and political rights within the African region with a view to suggesting how this category of rights can be effectively realised.

7.1.1 Common study limitations

Over and above the preceding limitations, the main contribution of this thesis shows the researchers' conscious efforts to suggest insights for the effective realisation of African Charter civil and political rights provisions. This thesis sought to devise analytically what ought to enhance the regional protection of human rights enshrined in the African Charter. It is through the framing of the African Charter and its Court Protocol that the thesis questions, aim and objectives are derived. This is because this thesis considers some norms enshrined in these regional frameworks an inherent limitation towards realising effective enforcement of civil and political rights.

This thesis imagines that the transformation of the African human rights system is a process that needs a progressive periodic review to ascertain whether they are registering any improvement. This will relate to ways of improving the effectiveness of the regional institutions because whatever suggestion is made in this study and elsewhere cannot be final and perfect. This thinking finds philosophical expression in the idea that human rights are dynamic and should be allowed to develop with the contemporary need of societies. This thesis agrees that while sustained scholarly debate and investigation are essential, it is not in dispute that a significant volume of literature exists concerning the African human rights system. This thesis has presupposed that the AU and its member states dedication to human rights protection would be amenable to rational thoughts regarding enhanced human rights protection and promotion. Nonetheless, the AU organs seem not to have changed their attitude to member states failing to meet human rights obligations. Thus, it seems

difficult to say that the existing structure of the AU might enhance member states human rights commitments.

Nevertheless, the thesis argument has been that the African human rights system is inadequate to meet contemporary enforcement need of ideal human and peoples' rights. Therefore, the AU should be at the forefront of canvassing member state ratification of the Court Protocol and other related human rights instruments. Where AU member states fail to ratify international human rights instruments, the ideas of international politics and diplomacy, and inter-state party politics become necessary tools to check excesses and limitations. This is because non-ratification of international treaties limits the international law's scope in terms of enforcement and accountability.

It is acknowledged that given the numerous international human rights treaties which many AU member states are a signatory to, it cannot then be maintained that the thesis is an encompassing discourse on international human rights realisation. In other words, this thesis has not presented conclusive arguments about realising international human rights for AU member states. Instead, its analysis is significantly directed to the effective realisation of the African Charter civil and political rights provisions. In brief, this thesis substantially delved into actual and potential challenges to the enforcement of the African Charter civil and political rights.

7.2 Summary of findings

This study was premised on the fact that the human rights enforcement under the African regional human rights system since the emergence of the OAU has been murky because both AU and its member states seem not to be committed to their human rights obligations.⁸ Generally, this thesis

⁸ Christof Heyns and Morris Killander, 'Africa' in Daniel Moeckli and Sangeeta Shah and Sandesh Sivakumaram (eds), *International Human Rights Law* (Oxford University Press, 2010) 441; George

analysed Africa's progress towards enhancing human rights protection as well as the regional prospects and challenges in the enforcement of the African Charter civil and political rights provisions.

This study agrees that, though the African Charter system is burdened with multifaceted challenges, it has, without doubt, made many strides as well as meaningful contributions to the international human rights discourse.⁹ Likewise, this thesis agrees that important reforms must be allowed for the African Charter to attain its prospects towards effective human rights realisation.¹⁰ On the other hand, this thesis agrees that the AU has over time shown lack of political will to hold state parties' accountable and the persuasiveness to carry out its regional human rights enforcement role.

Indeed, the above observation summarises the core findings of this thesis. Likewise, every chapter embodies some specific findings and a conclusion that sum up the general thesis aim and objectives. In this vein, chapter one laid the foundation for this thesis by outlining the aim and objectives, and the statement of the problem which this entire thesis seeks to resolve. Through discussions of research methodology, a literature review, and thesis argument, chapter one outlines the research questions and how the findings of this thesis will contribute to knowledge in the area of the African human rights system.

Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Brill Nijhoff, 2003) xv.

⁹ Jeremy Sarkin, 'The Need to Reform the Political Role of the African Union in Promoting Democracy and Human Rights in Domestic States: Making States more Accountable and less able to avoid Scrutiny at the United Nations, Using Swaziland to Spotlight the Issue' (2018) 26 *African Journal of International and Comparative Law*, 84; George Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (n 8 above) xv.

¹⁰ Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law*, 63; Nsongurua Udombana, 'Eyeing the Promised Land: The Wearisome Quest for an Effective Regional Human Rights Enforcement Mechanism in Africa' (2014) 1 *Transnational Human Rights Review*, 179; Christof Heyns, 'The African Human Rights System: In need of Reform' (2001) 2 *African Human Rights Law Journal*, 155; Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', (1995) 35 *Virginia Journal of International Law*, 342.

Chapter two discussed the historical, philosophical and contemporary backgrounds to international human rights with particular concern for the protection of civil and political rights. This chapter observed that contemporary human rights law has succeeded in its universal objective by converting natural rights into legal rights through codification of both national and international laws. However, this chapter argued that there is a need for international human rights institutions such as the HRC to have teeth and act as a safety net for countries and regions with weak enforcement mechanisms. In that way, more involvement of the UNSC or collaboration with ICC is suggested.

Chapter three examined the normative framework for civil and political rights protection under the African Charter. This chapter found that contrary to the fears of many writers, the African Charter institutions have developed enviable case law jurisprudence and have continued to use their interpretation mandate to correct some normative anomalies in the African Charter. For example, this chapter agrees that the decisions about the absence of a derogation clause¹¹ and the meaning of claw-back clauses¹² emphasised the intent of the drafters, which supports total state party obligation to the Charter at all times. While this chapter highlighted that many of the decisions of the African Commission and the African Court aligned and met universal human rights law goals, it is suggested that these decisions can act as a viable tool and direction for future reforms to the African Charter norms.

Furthermore, chapter three highlighted some normative features that distinguish the African Charter and other regional human rights instruments. In addition, by examining how these features have impacted on the enhancement or otherwise of the African Charter enforcement, this chapter supports some radical shifts in the African Charter normative

¹¹ Communication 70/92- *Commission Nationale des Droits de l'Homme et des Liberties V Chad*.

¹² Communication 101/93- *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*.

features given the region's human rights history and contemporary human rights violations in many African states.

Although the institutional framework of the African Charter is one aspect of the regional human rights system that has received crucial reforms because of the emergence of the African Court, chapter four reviewed the political and institutional framework for human rights protection of African Charter rights and freedoms and concluded that it is far from being complete. Although the analysis focused on the three crucial institutions for the African Charter enforcement; namely, the AU, the African Commission and the African Court, this chapter found that these institutions are hindered in ensuring the full realisation of the African Charter rights. For instance, it is agreed that the AU organs seem unprepared to advance human rights protection given their role under the African Charter and the Court Protocol. This chapter suggests the establishment of a human rights unit or department within the AU.

Consequently, this chapter found some gaps in the African Charter and the Court Protocol, which impact on the ability of the African Commission and the African Court to effectively guarantee African Charter enjoyment. While it is agreed that the shortcomings in these instruments form the bedrock for some state parties' unserious and bullish attitude to the African Court and African Commission, it suggested the use of pressure and collaboration with relevant regional and international organs.

The central position of state parties in the African Charter discourse makes it imperative for this thesis to conduct an analysis of domestic obligations in the enforcement of the African Charter civil and political rights provisions. This investigation became crucial because the African Court and African Commission assume jurisdiction from state party action and inaction. Therefore, chapter five analyses selected state parties' civil and political rights protection and the prospects and challenges thereto. This chapter found that state parties often fail to guarantee the independence of

the enforcement institutions or comply with decisions therefrom. Other shortcomings which were identified include inadequate or limited state party constitutional provisions and insignificant complementing institutions. It is suggested that the African Charter can only be as strong as the support from states; thus, there is a need for state parties to take their obligations seriously for the Charter rights and freedoms to be fully realised.

As shown in preceding chapters, the African Charter is besieged with both normative and institutional deficiencies. Therefore, the analysis in chapter six investigated the challenges and strategies that invigorate the enforcement of the African Charter civil and political rights provisions. The chapter assessed, *inter alia*, the prospects and challenges faced by the African Charter political and institutional enforcement framework, the extent of the African Charter normative shortcomings, state party commitment to African Charter obligations, and further suggested approaches for reform.

This chapter posited that the challenges facing the African regional system are not only related to the normative and institutional mechanisms of the African Charter. Suffice it to add that member states rarely comply with decisions from the African Court and the African Commission. This chapter reinforced the argument that the African Charter reforms should consider a direct relationship between the regional institutions and the national institutions in the area of post-adjudication procedure. Besides, this chapter found that African Charter enforcement could undoubtedly be improved through reforms that grant unhindered access, innovative interpretation, and implementation, and use sanctions against non-complying states parties.

The novel suggestions in this research would aid in the future reforms of the African Charter, its Court Protocol and the constitutions of the selected countries. It would if applied, contribute to reducing the research problem. Indeed, it is incumbent upon all role-players, stakeholders and

individuals to ensure that the African Charter rights are fully implemented. Of course, this will require broad and innovative interpretation by both regional and national institutions to correct the exposed inadequacies and flawed provisions of the African Charter. While this suggestion is against the backdrop of articles 60 and 61 that require the African Charter institutions to interpret the Charter in the light of general international law, articles 66 and 68 of the African Charter ensures that the Charter is not static by allowing the promulgation of an additional Protocol, or its amendment. For example, the adoption of the Court Protocol in 1998 indicates that further reforms to the African Charter system cannot be ruled out. What this adoption has proved is that the drafters of the African Charter did not envisage static treaty given their understanding that law, especially human rights, is dynamic and must be allowed to develop with the people.

7.3 Recommendations

This thesis has understudied the African Charter, and in particular, the enforcement of civil and political rights provisions. It is crucial to emphasise that this thesis does not intend to obliterate the African Charter and its Court Protocol. Instead, this thesis proffers explicit recommendations to enhance African Charter civil and political rights enforcement having considered contemporary regional human rights realities. To aid relevant decision-makers set a clear path for future reform, the characteristics of this thesis recommendations concern the amendment of the African Charter and the Court Protocol, and reforms to the political framework for the African Charter protection.

7.3.1 Establishment of a human rights department within the AU headed by the Commissioner for Human Rights

Contemporary efforts in protecting human rights in Africa must involve taking progressive steps that ensure the effective realisation of the African Charter rights and freedoms at national and regional levels. This is submitted against the background that the African human rights system

has faced difficulties with enforcement of the African Charter rights and freedoms since its inception. In order to try and strengthen human rights enforcement, the AU needs to establish unequivocal human rights unit or department.¹³ This suggestion will respond to the apparent slow pace and the insignificant role played by the Council of Ministers, the AHSB and also the AU Department of Political Affairs in carrying out their human rights duties.¹⁴ Unnoticed activities of these African human rights bodies, when compared to the UN Office of the High Commissioner for Human Rights (OHCHR), calls for reforms. Conversely, while the sole mandate of the OHCHR focuses on the promotion and protection of human rights for all, the Department of Political Affairs is entrusted with more mandate by the AU. Hence, it is recommended that a regional office, similar to the OHCHR, be established to solely ensure that the protection and enjoyment of the African Charter rights is a reality in peoples' lives across Africa.

It is suggested that the UN model on OHCHR be adopted. Like the UN OHCHR, such African department/office on human rights will strengthen AU expertise on human rights monitoring, reporting and prevention of violations by identifying, highlighting and developing responses to contemporary regional human rights challenges, and act as the principal human rights hub for public information, education, research and advocacy activities in the AU system. In addition, this model allows for such a regional

¹³ The eight departments/offices headed by various Commissioners that presently exist at the AU are: Peace and Security; Political Affairs; Trade and Industry; Infrastructure and Energy; Social Affairs; Rural Economy and Agriculture; Human Resources, Science and Technology; and Economic Affairs.

¹⁴ At present, the Department of Political Affairs of the AU is responsible for the promoting, facilitating, coordinating and encouraging democratic principles and the rule of law, respect for human rights, participation of civil society in the development process of the continent and the achievement of durable solutions for addressing humanitarian crisis. However, it is submitted also that the recommendation to establish a specific human rights department/office similar to the UN system would be more efficient and realistic because of its position within the AU organisation and the structure such department/office would establish in dealing with human rights concerns in the region. In addition, it will be more robust than the African Task Force on the Implementation of Court Decision, which was established by the African Court via Gazette Notice Number GN/10944/2017 as amended by Gazette Notice Number GN/2446/2018, dated 28 February 2018. Arguably, the establishment of the Task Force invariably supports this thesis argument that AU organs involved in the enforcement of the African Charter rights and freedoms are not adequately performing, which supports the call for innovations to meet contemporary challenges.

office to assist AU member states by providing expertise and technical training in the area of the electoral process, legislative reform, and administration of justice, to help implement international human rights standards at domestic levels. Specifically, the role covered by this department/office should include those performed by the Secretary of the OAU under articles 47, 49, and 52 of the African Charter, the role of the AHSJ under articles 58 and 59 of the African Charter, and article 29 (2) of the Court Protocol. In all, this department/office should be able to support and assist those with a responsibility to fulfil their human rights obligations and individuals to realise their rights in the face of human rights violations.

The AU department/office will be headed by a Commissioner for Human Rights. The Commissioner must endeavour to carry out human rights tasks with clear goals and speak objectively in the face of human rights violations across the African region. Such goals must include identifying and removing obstacles to effective implementation of the African Charter, improving cooperation and coordination of human rights activities between states and AU organs and within the AU, follow-up on state party implementation, and make suggestions during the amendment of the African Charter and its Court Protocol. The Commissioner for Human Rights will need to prioritise African Charter state parties' obligations and the strengthening of NHRIs. The Commissioner for Human Rights must spearhead the African Union's human rights efforts.

The creation of the office of the Commissioner for Human Right within the AU deduces the need to reform the African Commission special mechanisms. The tasks of the special mechanisms of the African Commission such as the special rapporteurs, committees and working groups would be merged into the AU human rights department/office. The need to merge the African Commission special procedures are twofold. First, it gives the African region the opportunity to reduce cost by not duplicating its workforce. Second, it provides a unified regional entity for a human

rights mandate for all people and all human rights institutions. Hence, the Commissioner for Human Rights would be empowered to establish specialised structure, if necessary, to support its regional mandate, in particular by supporting the work of the African Court and the African Commission in ensuring that human rights is a reality in the lives of all peoples across the African region. Generally, this proposed department/office will work to promote and protect the human rights that are guaranteed under the African Charter, other regional and international human rights treaties, as well as domestic human rights legislation.¹⁵

7.3 2 Participation of national judicial institutions in the enforcement of the African Charter institutions' decisions

The low rate of enforcement of African Court and Commission decisions is discouraging and unacceptable. As one of the crucial challenges facing the regional human rights system, another progressive approach to curb this anomaly is to allow participation of national institutions in the enforcement of regional judgments and recommendations. This recommendation builds on Liwanga's assertion that the low rate of enforcement may be partially due to the 'lack of involvement and/or competence of national courts in the post jurisdiction stage of international proceedings'.¹⁶ In further striking a balance created by the tension between the national courts' role and international judgments, Oppong asserted that while up-to-date national legislation is needed, regional research and careful deliberation should guide such national legislation to avert legal and policy issues.¹⁷ It follows that empowering national courts to have jurisdiction in the process of enforcing African Court and African Commission decisions is essential for two compelling reasons. First, it leaves the respondent state with the only

¹⁵ However, the establishment of this department requires amendment of the AU Constitutive Act under article 32.

¹⁶ Roger-Claude Liwanga, 'From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies' (2015) 41 (2) Brooklyn Journal of International Law, 99.

¹⁷ Richard Oppong and Lisa Niro, 'Enforcing Judgments of International Courts in National Courts' (2014) 5 Journal of International Dispute Settlement, 344.

option of enforcement since national courts recognise such decisions. In this instance, a national procedure for enforcement could be invoked to expedite compliance. It is submitted that this process would guarantee more likelihood of enforcement because of the local and international pressure that it invokes. Secondly, it would make a follow-up on compliance more straightforward for regional bodies, NGOs and AU organs charged with such mandate. For instance, it should be expressly stated as thus- 'a decision or recommendation from the African Charter institutions shall be recognised as binding and shall upon application in writing to the respondent state party court, be enforced by the court'. However, this can be supported by an AU resolution on the recognition and enforcement of regional judgments. The approach of having a regional resolution is necessary because it would provide more details on procedures and enforcement. For instance, it is essential to emphasise that domestic enforcement must be done in accordance with the national rules and procedures of the State of enforcement, using national courts and bailiffs, as may be applicable by national law of the state where enforcement is sought. In such an instance, the South African principle in the case of *Jones v Krok*¹⁸ is a good model to use. The South Africa Supreme Court of Appeal held in this case that conditions to be met before a foreign judgment is enforced include (a) that the judgment is final; (b) not contrary to public order; (c) not concerning revenue or the penal law of the foreign country. Thus, given that the African Court and African Commission decisions are not subject to appeal, the involvement of national courts in their enforcement remains a good strategy to be explored.

Participation of state party judicial institutions in the enforcement of African Court and Commission decisions would enhance human rights respect and state party obligations. This is because it would reduce the

¹⁸ See, *Jones v Krok*, 1995 (1) SA 677 (AD) (South Africa). See also, Code of Organisation and Judicial Competence of DRC. Under this Code, foreign judgments can be enforced in DRC upon meeting certain conditions, including, conformity of the judgment with local legislation and compliance with DRC public order.

politics of post-adjudication procedure that require the AHSB or the Council of Ministers to monitor enforcement. Already, while some African countries will not allow domestic enforcement of international decisions,¹⁹ some allow it only if conditions of a bilateral treaty between the countries or legislation to that effect are met.²⁰ This recommendation would increase domestic pressure on state parties to enforce international judgments. This would allow national institutions to have a direct relationship with African Charter institutions. By so doing, enforcement of the African Charter will become a matter of national and regional concern.

7.3.3 Empower NHRIs to monitor the enforcement of the African Court and African Commission decisions

The foundation for this recommendation stems from the Protocol on the Statute of the African Court of Justice and Human Rights. Article 25 of this Protocol grants NHRIs the competence to directly lodge complaints concerning violations committed in their countries.²¹ In the meantime, this thesis agrees that such an approach is laudable and progressive. However, the NHRIs as a national human rights stakeholder and a mandatory obligation under article 26 of the African Charter²² should also be allowed a role in monitoring state party compliance with the African Charter institutions' findings. Empowering NHRIs to monitor the enforcement of regional decisions can play a pivotal role in strengthening the post-

¹⁹ The Supreme Court of Ghana in *Republic v High Court, Accra, Ex parte Attorney General, NML Capital Ltd, and Republic of Argentina*, (Case J5/10/2013, 3) held that the orders of the International Tribunal of the Law of the Sea cannot be binding on Ghanaian courts, in the absence of a legislation making the order binding on Ghanaian courts.

²⁰ Ralf Micheals, 'Recognition and Enforcement of Foreign Judgments', in Max Planck Encyclopaedia of Public International Law, available at > https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship accessed 20 March 2019. For instance, South Africa.

²¹ Article 30 (f) of the Protocol on the Statute of the African Court of Justice and Human Rights. However, under the African Charter and the 1998 Protocol, NHRIs only enjoys access to the Court if state parties make a declaration under article 34 (6).

²² There is no explicit mention of NHRIs in the African Charter. However, article 26 infers 'the improvement of national institutions entrusted with the promotion and protection of the rights' have often been accepted as NHRIs by scholars.

adjudication procedures, and respond to an ever-increasing number of judgments from the African Court and the African Commission. This can be initiated through transmission to the NHRI of the findings, and the NHRIs shall invite the respondent state, through its Attorney General, to inform it on steps taken to enforce such decisions. According to the Paris Principles, NHRIs enjoy broad mandate to protect human rights, and this places it in a central position to monitor state party human rights activities, including implementation of decisions at the national level. Hence, until the State adopts adequate steps, the NHRIs continues to be a pressure institution and an informal link between relevant regional organs and the parties. As noted earlier, this procedure adds towards creating a smooth post-adjudication follow-up in the region. Besides, this provides an opportunity for NHRIs to engage directly with treaty bodies.²³ This idea has earlier been suggested in 2007 by NHRIs participating in the International Co-ordinating Committee meeting.²⁴ However, whether NHRIs take the lead in this aspect, the role of civil society in pressuring states to abide by their obligations cannot be overlooked. This is because funding and the independence of NHRIs can be issues in some countries. In this regard, empowering civil society remains an essential strategy for monitoring state party enforcement and general human rights obligations.

7.3.4 AU use of sanctions against defaulting state parties

Although the use of sanctions requires the strong political will of the member states to an international organisation against one of its own, its effectiveness has somewhat been a subject of controversy. Indeed, several mechanisms exist for enforcing regional judgments, and these include

²³ For instance, article 30 (e) of the Protocol on the Statute of the African Court of Justice and Human Rights empowers NHRIs to submit cases to the Court.

²⁴ At the end of this meeting in 2007, this Committee adopted 'The Harmonised approach/conclusions of NHRIs and Treaty Body interaction' to support this idea regarding follow-up and implementation of decisions by Human Rights Treaty Bodies. See, Lisa Sekaggya, *The Role of National Human Rights Institutions* (NHRIs), available at > <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/lisasekaggyapres.pdf> accessed 12 October 2019.

diplomatic negotiation, self-help, and the AU; however, some of these options, including the role of the AU, seem political. Their political inclination may sound discouraging, sometimes. While there is a need for the AU to readily use its power to sanction erring member states, especially when it involves human rights violations, it has to be careful to ensure that such sanction does not violate human rights or precipitate human-made humanitarian catastrophes. To arrive at a workable sanction that may not violate human rights such as the suspension from the AU to the use of peacekeeping military forces, the AU may consider using human rights goals as eligibility for specific regional programmes such as participation in summits, continental games, and trade such as membership of the African Continental Free Trade Agreement. Such methods would potentially intensify domestic clamour for proper human rights practices without further undermining the human rights of citizens. With the present challenges facing the African human rights system, stakeholders request that the AU adopts sanctions that work. Hence, the need for increased pressure on the AU, especially by civil society, to review its mode of sanctions in the Constitutive Act, and further use of such sanctions against member states to ensure the effective realisation of civil and political rights enforcement.

7.3.5 Composition and access to the African Court and African Commission

The African Court and the African Commission needs to undergo significant improvement concerning their composition, structure and access. First, on the issue of composition, expanded African Court and African Commission is suggested. This implies an increase in the number of judges/commissioners to at least half the number of AU member states. Why it is essential at this time to consider this is because it would avail the regional system of an opportunity to split the Commission/Court sittings into sessions, thereby increasing the number of

complaints/communications that are considered. With this suggestion, for instance, the formation of the court/commission in considering cases before it should be of seven judges, which entails having a minimum of three court divisions, sitting and adjudicating cases at every session. The core advantages of this include quick adjudication of claims, enhancement of regional integration by allowing more state parties' participation/representation, and promotion of the rule of law, and access to justice. Also, it is in the best interest of the region to have the sitting arrangement of these institutions changed to a full-time basis. However, this implies an increase in the financial burden of the AU amidst its current funding challenges. To this effect, the UN model which allows substantial funding from the leading intergovernmental body and voluntary contributions from donors, including member states, should be adopted and incorporated. The obligatory state party budget formula must be approved after due consideration of the size and strength of AU member states' national economies. This is necessary to avoid the current situation where member states fail to pay the regional mandatory financial contribution.

Secondly, this legal obstacle relating to limited access to the African Court should be removed. This recommendation builds on Viljoen's assertion²⁵ relating to the impact of restricted access through the admissibility requirement or direct and indirect access under article 5 of the Court Protocol. However, when the highlighted limitation on African Court access is removed and its composition and structure reviewed, the mandate of the African Commission may be streamlined to core promotional and purely fact-finding activities. This recommendation eliminates the legal challenges that come with requesting state parties to implement recommendations from the quasi-judicial African Commission. In the meantime, however, the African Commission must step up in exercising its indirect access to the African Court under article 5 (1) (a) of the Court

²⁵ Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (n 10 above).

Protocol to enhance NGO and individual access where article 34 (6) barrier applies. This recommendation circumvents state party refusal to make the declaration that gives individuals and NGOs the opportunity to get a binding decision against them at the African Court. That notwithstanding, enhanced access to justice through the African Court creates a regional need for an improved legal aid system for victims who do not have sufficient financial resources to meet the cost of a court case and legal representation. Although legal aid exists in the domestic law of some member states of the AU, its non-recognition in the African Charter is a gap that must be closed to expressly indicate support for access to justice, both domestically and at the regional levels. In the meanwhile, civil society should be encouraged, more than ever before, to continue their support in ensuring that indigent victims access the African Court.

7.3.6 Publicity of African Court and African Commission activities

A clear picture of the position of the state's obligation concerning assurance of human rights cannot be the duty for state parties alone in the 21st century. This thesis holds that inadequate enlightenment persists in the African region concerning the African Court and the African Commission activities. Such inadequacy is a serious human right concern despite the contemporary observation that communication and knowledge are crucial to the progressive actions of such human rights institutions. Therefore, enhanced wide publicity would improve understanding of the activities of these institutions. This is because publicity has the potential to strengthen protection, thereby putting pressure on states and the AU regarding the enforcement of human rights. Thus, human rights NGOs have a considerable role both at the national and regional levels. There is a need for more active involvement of NGOs in the African human rights system. Active participation of NGOs have played a tremendous role in the activities of the UN and can do the same for the African human rights system. For instance, NGOs should be seen as leading in the activities and strategies

which foster the enforcement of human rights in Africa such as human education, monitoring, standard-setting and procedure, investigating and documenting human rights, advocacy and lobbying. This assertion is made against the backdrop that states generally detest negative publicity, especially about human rights violations. NGO activities in human rights publicity in Africa should be rooted primarily in their desire to put issues on the public agenda that would otherwise not be noticed by the public. By this core agenda, NGO strategies in Africa will make a significant contribution beside the efforts of the AU and its member states in advancing an effective human rights regime in the African region and encourage a culture of human rights enforcement both at national and regional levels. In this regard, it is imperative to use international and local media publicity to highlight the findings of human rights violations against state parties.

7.4 Challenges in achieving the above recommendations

Overall, this research admits that sound laws are critical to a successful governance foundation, but it is only part of the path to success without adequate enforcement mechanisms, which is often more challenging. On the African regional system, this assertion is evident by the apparent lack of political will and interest by the AU in meeting its human rights goals and objectives under the AU Constitutive Act. Hence, there is a need for a change in attitude by both the AU and its member states concerning human rights protection on the continent.

In spite of the recommendations above, a question that remains is whether the AU is ready for change through amendment of the African Charter and its Court Protocol. Given that these recommendations would realistically enhance human rights protection, particularly, the civil and political rights category, one of the difficulties with the amendment or promulgating new instruments is getting state parties to ratify. This difficulty is not strange to Africa going by the lack of interest in ratifying the Court Protocol, Statute of the African Court of Justice and Human Rights

and other regional instruments. However, this calls for a change of strategy in increasing the political will of the state party and the AU. Such modifications may include integrating and enhancing the role of civil society in the entire human rights corpus in the region. This strategy will create a vibrant civil society that continually puts pressure on governments and regional institutions in ensuring that concerned parties meet treaty obligations.

7.5 Conclusion

This thesis sets out the findings in realising effective enforcement of civil and political rights in Africa and contributes to knowledge by advancing the academic debate on this subject area. In particular, it considers the extent to which the African Charter normative and institutional framework has enhanced civil and political rights enforcement in the African region. It assesses the African Charter and other relevant international and regional treaties as well as the constitutional frameworks of selected African countries. Accordingly, this thesis agrees that the African Charter text need not wholly reflect the American Convention or the ECHR because of the diverse events that led to their adoption. However, considering the complete eradication of some underpinning ideas leading to the African Charter adoption such as colonisation, this thesis submits that it is imperative for the AU to update its primary regional human rights instrument in order to meet contemporary human rights challenges in the region. It is submitted that this reform is now essential given that the African Charter was drafted at a time when African leaders viewed some ideologies such as human rights as foreign and neo-colonial, as well as when the OAU had a low interest in human rights protection in its member states.

Furthermore, this thesis has demonstrated that the causes of contemporary enforcement gaps in the African Charter can be a combination of legal, political, cultural, economic and social factors or any of these factors independently. The analysis of this thesis is largely based

on the realisation of the effective enforcement of African Charter civil and political rights, which has been impacted by some or all these factors. Indeed, the enjoyment of some civil and political rights remain unwelcome in many African countries due to its scope. Increasingly, there are several cases relating to the violation of civil and political rights provisions in many African countries despite state parties' obligations in international, regional and national laws. One thing the situation in contemporary African countries indicates is Africa's need to improve the quality of laws and enhance the entities that have the mandate of enforcement. Therefore, realising effective enforcement of civil and political rights in Africa entails reforms to the scope, functions and operation of vital entities both at the regional and national levels, such as the African Charter institutions and the AU.

Hence, the significance of this thesis is to support the debate for reform to the regional human rights system. It is an added voice to the call for reform and an improvement on what has already been said in the reforms debate. Indeed, its findings, conclusion, and recommendations cannot be a conclusion to the discussion of the African human rights system because human rights are dynamic. Accordingly, this thesis establishes that future reform to the normative framework of the African Charter presents an opportunity for Africa to borrow heavily from its own civilisation through the African Court and African Commission jurisprudence, as well as, positive international and domestic human rights practice and state party constitutional and legislative approaches.

Table of Cases

African Commission

Communication 222/98, 229/99, <i>Law Office of Ghazi Suleiman v. Sudan</i>
Communication 101/93, <i>Civil Liberties Organisation (in respect of Bar Association) v. Nigeria</i>
Communication 102/93v, <i>Constitutional Rights Project v. Nigeria</i>
Communication 103/93, <i>Alhassan Abubakar v. Ghana</i>
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Communication 159/96, <i>African Commission Union Inter Africaine des Droits de l'Homme and others v. Angola</i>
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Appendices

Appendix I - Information about member states' compliance with the African Commission decisions between 1987 and 2018

Communication Details	Alleged violations	Violations found	Decision/Recommendation	State Implementation
1 st Annual Activity Report - 6 th Annual Activity Report (1987-1992) ²⁶				
7 th Annual Activity Report (December 1993-April 1994) ²⁷				

²⁶ Communications received between the 1st and 6th Annual Activity Reports were treated and kept confidential based on the African Commission's strict reliance on article 59 of the Charter. However, under the 1st Annual Activity Report (1987-1988), the Commission acknowledged receipt of communication even before the installation of the Commission but failed to disclose the number of communications received. Under the 2nd Annual Activity Report (1988-1989), the Commission settled 10 communications whereas the Commission admitted having received 105 communications since its beginning of which 16 are directed against State Parties to the Charter in its 3rd Annual Activity Report (1989-1990). 16 communications against state parties were considered of which 6 were new under the 4th Annual Activity Report (1990-1991) and another 16 communications and a follow-up on the old communications were highlighted in 5th Annual Activity Report (1991-1992). The Commission reported a receipt of 14 communications in its 6th Annual Activity Report (1992-1993) and further followed up on 41 communications.

²⁷ 1993-1994 - the African Commission received 33 communications and have so far completed 78 communications with 58 pending communications. It is noteworthy to mention that it was with the publication of the 7th Annual Activity Report that the African Commission for the first time published its findings on communications decided under article 55 of the African Charter. This new procedure ended an era of strict reliance on article 59 confidentiality clause interpretation of the African Charter. However, majority of the communications reported in the annexed 7th Annual Activity Report were found

<p>Comm. 64/92 Krishna Achuthan v Malawi; Comm. 68/92 Amnesty International v Malawi; Comm. 78/92 Amnesty International v Malawi</p>	<p>Wrongful detentions and denial of rights</p>	<p>Articles 4, 5, and 7.</p>	<p>No specific recommendation but referred the situation to the AHSG under article 58(1) of the Charter.</p>	<p>The AHSG took no specific action and the AHSG further failed to act under article 58 (2).</p>
<p>Comm. 47/90 Lawyers Committee for Human Rights v Zaire</p>	<p>Arbitrary arrest, detention, and torture.</p>	<p>Undisclosed.</p>	<p>Undisclosed but admitted evidence of the existence of a serious or massive human rights violation and referred the situation to the AHSG under article 58(1) of the Charter.</p>	<p>The AHSG took no specific action and the AHSG did not act under article 58 (2).</p>
<p>8th Annual Activity Report (October 1994 – March 1995)²⁸</p>				

inadmissible for the following reasons: non-exhaustion of local remedies, amicable settlement, withdrawal of communications, and communications directed against non-state parties to the African Charter.

²⁸ The African Commission during the period under review received 6 new communications and concluded work on 23 communications.

Comm. 59/91 Embga Mekongo Louis v Cameroon	False imprisonment and miscarriage of justice.	Article 7	Finds that the complainant had been denied due process and subsequently suffered damages. It recommended that quantum of damages accruable to the complainant be determined under the law of Cameroon.	No record of implementation by Cameroon.
Comm. 60/91 Constitution Rights Project v Nigeria (In respect of Akamu, Adega, and others)	Alleged that the composition of the Robbery and Firearms Tribunal does not guarantee impartiality. Further alleged that the Robbery and Firearms (Special	Article 7 (a), (c), and (d)	Recommended that Nigeria should free the complainants.	Nigeria did not release complainants, but they later had death sentences commuted to various prison terms by a High Court in Nigeria. ²⁹

²⁹ See the unreported judgement in the case of *Registered Trustees of the Constitutional Rights Projects v The President, Federal Republic of Nigeria and 2 ors*, Suit No. m/102/93. See also, Evelyn Ankumah, *The African Commission on Human and Peoples' Rights- Practice and Procedure* (Martinus Nijhoff, Netherlands, 1996) 72.

	Provision) Decree No. 5 of 1984 excluded the right to appeal against decisions of the Tribunal.			
Comm. 64/92 Krischna Achutan (On behalf of Aleke Banda) Comm. 68/92 Amnesty International (on behalf of Orton and Chirwa) Comm. 78/92 Amnesty International (On behalf of Orton and Chirwa) v Malawi	Alleged conditions of overcrowding, beating and torture, excessive solitary confinement, shackling within a prison cell, extremely poor-quality food and denial of access to medical care in Malawi prison, and arbitrary	Articles 4,5,6,7 (1) (a), (c) and (d).	The Commission made no recommendation rather referred the situation to AHSG under article 58.1.	The AHSG did not take any specific action. ³⁰ However, the new government of Malawi later compensated Chirwa with the sum of 5.5 million Mluzi and amended its legislation to outlaw the traditional courts such as the Southern Region Traditional Court, that tried

³⁰ Paragraph 11 and 12 of the communication contained in the 8th Annual Activity Report, the Commission admitted that although Malawi has undergone important political change resulting in a new government since the submission of this communication, principles of international law stipulate that a new government inherits the previous government's obligation and liabilities.

	detention of Banda.			Vera and Orton Chirwa. ³¹ Vera Chirwa later became a Special Rapporteur on Prisons and Detention Conditions in Africa. ³²
Comm. 87/93 The Constitutional Rights Project (in respect of Zamani Lakwot and others) v Nigeria	Alleged that the Civil Disobedience (Special Tribunal) Decree No. 2 of 1987 excluded judicial appeal and review against tribunal decisions, constant harassment	Article 7 (a), (c) and (d)	Recommended that Nigeria should free the complainants	Complainants sentenced to death by hanging were later commuted to prison terms and years afterwards released from prison. ³³

³¹ Sarai Chisala-Tempelhoff and Seun Bakara, 'Malawi' in Victor Ayeni (ed) *The Impact of the African Charter and the MAPUTO Protocol in Malawi* (Pretoria University Law Press, 2016) 149.

³² 31st Ordinary Session of the African Commission (May 2002).

³³ Racheal Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, Oxford, 2000) 56.

	and intimidation of accused persons' legal representatives leading to their withdrawal from the case.			
Comm. 101/93 Civil Liberties Organisation (in respect of the Nigeria Bar Association) v Nigeria	Alleged that the Legal Practitioners (Amendment) Decree 1993 excluded recourse to a court and was given a retrospective force.	Articles 6, 7 and 10.	Recommended that the Decree be annulled.	The Decree was not annulled until the emergence of a democratic era in 1999 and subsequent amendment in 2004.
9 th Annual Activity Report (October 1995- April 1996)				
Comm. 25/89, 47/90, 56/91, 100/93 (joint). Free Legal Assistance	Alleged torture, arrest and arbitrary detention, extra-judicial executions, unfair trials,	Articles 4,5,6,7, and 8.	Held that the acts constituted serious and massive violations of the Charter and referred to AHSG.	No implementation. The AHSG did not act under article 58(2).

Group, Lawyers' Committee for Human Rights, Uion Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire	restrictions on the right to association and peaceful assembly, suppression of freedom of the press, prosecution of Jehovah witness members and their exclusion from access to education.			
Comm. 74/92 Commission Nationale des Droits de l'Homme et des Libertes v Chad	Arbitrary arrest, detention without trial, extra-judicial executions, disappearance , assassinations , harassment of journalists.	Articles 4, 5, 6, and 7.	Finds serious and massive violations of human rights.	The AHSB did not act under article 58 (2).
Comm. 129/94 Civil	Alleged that the	Article 7	Finds the act of Nigerian	No implementation.

<p>Liberties Organisation v Nigeria</p>	<p>Constitution (Suspension and Modification) Decree No. 107 of 1993 suspends the constitution and powers of the Nigerian court; Political Parties (Dissolution) Decree No. 114 of 1993 also oust the jurisdiction of the courts and nullifies any domestic effect of the African Charter.</p>		<p>government as constituting a serious irregularity.</p>	<p>Nigeria evolved into a democratic state in 1999.</p>
<p>10th Annual Activity Report (October 1996- April 1997)</p>				
<p>Comm. 27/89, 46/91, 49/91, 99/93 Organisation Mondiale</p>	<p>Alleged expulsion of Burundi nationals from Rwanda</p>	<p>Articles 4,5,6,7, 12 (3) and (5).</p>	<p>Held that facts constituted a serious and massive violation of human rights.</p>	<p>No implementation and the AHSG</p>

Contre La Torture and Association Internationale des juristes Democrates Commission, Commission Intenationale des jurists, Union Interafricaine des Driots de l'Homme v Rwanda	because of their ethnic origin and without the opportunity to defend themselves before a competent court, arrest and extra-judicial executions, arbitrary detention.		Urged Rwanda to adopt measures in conformity with its decision.	did not act under article 58 (2). ³⁴
Comm. 39/90 Annette Pgnoulle (on behalf of Abdoulaye Mazou) v Cameroon	Alleged imprisonment for five years by a military tribunal without the right to defence and witnesses, continuous detention after serving a 5-	Articles 6,7 (1) (b), (d)	Recommended that Cameroon draw all necessary legal conclusions to reinstate the victim in his rights.	No evidence showing that Cameroon reinstated mr Mazou in its state reports.

³⁴ The situation in Rwanda subsequently advanced into a genocidal war where many Rwandans were killed along ethnic lines in 1994.

	year prison term, non-reinstatement to his former position as Magistrate after state Amnesty was granted and others reinstated.			
Comm. 71/92 rencontre Africaine pour la defence des Droits de l'Homme v Zambia	Expulsion of 517 West Africans from Zambia, detention, denial of the right to access to court	Articles 2, 7 (1)(a) and 12 (5)	Commission resolves to pursue an amicable resolution to this case.	No specific action was taken to remedy violations to victims. Thus victims were not compensated, and Zambia did not report back to the Commission on measures taken.
Comm. 103/93 Alhassan	Alleged detention for seven years without charge	Article 6, 7 (1)(d)	Urged the government of Ghana to take	No specific information can be obtained. ³⁵

³⁵ There was no mention of steps taken by Ghana in its State Reports to the African Commission.

Abubakar v Ghana			steps to repair the prejudice suffered.	
11 th Annual Activity Report (June 1997- April 1998)				
Comm. 159/96 Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au	Alleged expulsion of West African nationals from Angola	Articles 2, 7 (1) (a), 12 (4) and (5), and 14.	Urged the Angola government and the complainants to draw all the legal consequences arising from the present decisions.	No steps were taken by Angola to implement the recommendation . ³⁶

³⁶ Equally important, it is worthy of note that non-compliance of this recommendation by the Angola government may be the cause of continuous mass expulsion recorded over time in Angola. For example, whereas another incident of mass expulsions of West Africans was witnessed in May 2004, another involving the rape and assault of over 650 women and girls in November 2010 during their mass expulsion from Angola to DRC by Angolan security forces. See, Gina Bekker, 'Mass Expulsion of Foreign Nationals: A Special Violation of Human Rights' – Communication 292/2004 *Institute of Human Rights and Development in Africa v Republic of Angola*' (2009) 9 African Human Rights Law Journal, 262; Human Rights Brief, 'Reciprocal Violence: Mass expulsions Between Angola and DRC' Available at > <http://hrbrief.org/2011/02/reciprocal-violence-mass-expulsions-between-angola-and-the-drc/> accessed 06 March 2018.

Senegal and Association Maliennne des Droits de l'Homme au Angola				
12 th Annual Activity Report (June 1998- April 1999)				
Comm. 102/93 Constitutional Rights Project and Civil Liberties Organisations v Nigeria	Alleged annulment of 1993 general elections; the promulgation of several Decrees ousting the jurisdiction of the court; arrest and detention of activists and journalists who protested the annulment; seizure of copies of	Articles 1, 6, 9, and 13.	Appealed to the Nigerian government to release all persons detained for protesting the annulment of the elections; to preserve the traditional functions of the court by not curtailing its jurisdiction.	Nigeria did not comply with this recommendation . However, some of the detained persons were released following national court decisions whereas some remained in custody until the death of the then Head of State, Sani Abacha. ³⁷

³⁷ Bukola Akintola, 'The Perils of Protest: State Repression and Student Mobilisation in Nigeria' in Wale Adebani and Ebenezer Obadere (ed) *Encountering the Nigerian State* (Palgrave Macmillan, 2010) 111; Human Rights Watch Africa, 'Nigeria' available at > https://www.africa.upenn.edu/Urgent_Action/apic_52396.html accessed 06 March 2018.

	magazines and eventual proscription of the 'The News Magazine'.			
Comm. 105/93, 128/94, 152/96 Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria	Proscription and seizures of several newspaper and magazine publishers; arrest and detention of vendors and editors of such magazines and newspapers; promulgation of decrees ousting court jurisdiction and suspension of the constitution; expunged the Newspaper Act and	Articles 6, 9(1) and (2), 7 (2), and 14.	Requested that the Nigerian government take necessary steps to bring its law into conformity with the Charter	This recommendation was never complied with. However, by October 31 st , 1998 when the Commission ruled on this communication, the newspaper and magazines publishers have become functional following the death of the then Head of State, Sani Abacha on 8 th June 1998. Also, persons

	promulgated the Newspaper Decree No. 43 of 1993 and given a retroactive commencement.			detained were released. ³⁸
Comm. 137/94, 154/96, 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa Jr. and Civil Liberties Organisation v Nigeria	Alleged detention and trial of Ken Saro Wiwa and others; denial of access to a lawyer, medicine; inadequate time to prepare a defence; denied the right of appeal; torture of detained persons; discontinuance of the	Articles 1, 4, 5, 6, 7(1) (a), (b), (c) and (d), 9 (2), 10 (1) and 11.	Commission found violation of articles 5 in relation to detention and treatment in detention in 1993, 1994 and 1995; article 6 in relation to detention of victims under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree No. 14 of 1984 and further	Nigeria did not comply with the decision to annul the decrees until its return to democracy following the death of Sani Abacha. Interim provisional measure issued by the Commission not to execute the victims pending its determination of the case was not respected.

³⁸ Linus Malu, *Media Law and Policy in Nigeria* (Malthouse Press, 2016) 298.

	execution of Ken Sara Wiwa and others.		obliged the government to annul these decrees; violation of article 7 with regard to the establishment of the Civil Disturbances Tribunal; violation of articles 4 and 7 in relation to the conduct of the trial and the execution of the victims.	
Comm. 212/98 Amnesty International (on behalf of Banda and Chinula) v Zambia	Unlawful deportation of Banda and Chinula to Malawi; Chinula was denied access to Zambia courts for redress and was prevented from returning	Alleged violation of articles 2, 5, 7 (1) (a), 8, 9, 10, 12(2), and 13(1).	Commission holds a violation of article 2, 7(1) (a), 8, 9(2), and 10 of the African Charter. It, however, averred that Zambian government should grant Chinula's family wish to return his body for burial in Zambia ³⁹	While Chinula did not live to witness this ruling, Zambia did grant Banda the right to return and continued to use deportation or threat of deportation as a method of

³⁹ Para 40 of the communication.

	to Zambia by threats of imprisonment by Zambia authorities.		and allow the return of Banda to Zambia.	suppressing dissents. ⁴⁰ However, Banda was later allowed by the Zambian government to return after the 2002 elections. ⁴¹
13 th Annual Activity Report (June 1999 – May 2000)				
Comm. 140/94, 145/95, Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria	The alleged proscription of several national newspapers; arrest and detention of democracy activists; physical assault on democracy activists by security	Articles 5, 6, 7(1) (a), 9(1) and 14.	Invites the government to take all necessary steps to comply with its obligations under the Charter.	By the time this decision was reached (15/11/1999), many of the victims have been released, newspaper houses were back to business, and a change in government has taken place

⁴⁰ Dean Zagorac, 'International Courts and Compliance Bodies: The Experience of Amnesty International' in Tullio Treves 'et al' (ed) *Civil Society, International Courts and Compliance Bodies* (T.M.C. Asser Press, Hague, 2005) 37.

⁴¹ Open Society Foundation, 'Abusing Citizenship in Zambia-Again', available at > <https://www.opensocietyfoundations.org/voices/abusing-citizenship-zambia-again>< accessed 06 March 2018.

	agents; promulgation of decree restricting the right to information and to express and disseminate opinions; promulgated decree ousting the jurisdiction of the court; concealment of private property by security agents.			following the death of the Sani Abacha, the then Head of State.
Comm. 143/95, 150/96 Constitutional Rights Project and Civil Liberties Organisation v Nigeria	Prohibition of courts to issue a writ of habeas corpus, or any other prerogative order for the production of persons	Articles 5, 6, 7(1) (a), (c) and (d).	Recommends that Nigeria brings its laws in line with the Charter	The decree was abated upon the death of the then Head of State, Sani Abacha, even before the recommendation by the

	detained under Decree No. 2 of 1984.			Commission on 15/11/1999. ⁴²
Comm. 148/96 Constitutional Rights Project v Nigeria	Arrest and continued detention of 11 soldiers of the Nigerian army after been tried and found innocent twice and also granted state pardon by the then Armed Forces Ruling Council.	Article 6.	Urged Nigeria to respect the judgements of its courts and free the 11 soldiers.	The soldiers were released even before the decision of the Commission on 15/11/1999 following developments after the death of Sani Abacha, the then Head of State. However, no compensation was paid to them. ⁴³
Comm. 151/96 Civil Liberties Organisation V Nigeria	Arrest, detention and trial of several people including civilians by a military tribunal;	Articles 5 and 7 (1)	Appeals to Nigeria to allow accused persons a civil re-trial with full access to lawyers of their choice, and improve their	The accused were released in July 1998 even before the recommendation was made on 15/11/1999 following the

⁴² Nigeria transitioned into a democracy in May 29 1999 following the death of Sani Abacha on 8 June 1998.

⁴³ Victor Ayeni, 'Nigeria' in Victor Ayeni (ed) *The Impact of the African Charter and the Maputo Protocol in Selected African Countries* (Pretoria University law Press, South Africa, 2016) 199.

	secret trial and no appeal are allowed against its decision; denial of the right to a lawyer their choice and right to defence; detention in military facilities under inhuman and degrading conditions.		condition of detention.	death of the then Head of State, Sani Abacha. Hence, there was no re-trial of the accused persons. ⁴⁴
Comm. 153/96 Constitutional Rights Project v Nigeria	Arrest and detention without charge of several persons under Decree No. 2 of 1984.	Articles 6 and 7 (1) (a) and (d).	Appealed to Nigeria to charge the detainees, or release them.	They were subsequently charged with armed robbery, kidnapping, sentenced to death by firing squad and executed on 31

⁴⁴ Frans Viljeon and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples Rights, 1994-2004' (2007) 101 American Journal of International Law, 1.

				July 1997, long before the decision of the Commission on 15 November 1999. ⁴⁵
Comm. 206/97 Centre for Free Speech v Nigeria	Unlawful arrest, detention, trial and conviction of four journalists by a military tribunal; secret trial; denial of access to lawyers of their choice; Decree ousted the right to appeal against the decision	Articles 6 and 7 (1) (a) and (c).	Urged Nigeria to order the release of the four journalists.	The journalists were released soon after the death of the then Head of State, Sani Abacha in 1998 and long before the recommendation by the African Commission on 15 November 1999.

⁴⁵ Amnesty International Index: AFR 44/18/97 of 29 August 1997, available at > <file:///H:/afr440181997en.pdf>< accessed 07 March 2018; Punch Newspaper, 'Otokoto Ritual Murders: 20 Things to know about Convict Hanged 20 years after crime' (November 19, 2016) available at > <file:///H:/afr440181997en.pdf>< accessed 07 March 2018.

Comm. 215/98 Rights International v Nigeria	Arrest and torture at a military camp; denied access to legal counsel.	Articles 5, 6, 7 (1) © and 12 (1) and (2).	The Commission made no recommendation.	Nigeria did not take any action with respect to the violations found. However, the victim fled to the United States on 17/09/1996 and was granted a refugee status long before the findings of the Commission on 15/11/1999. ⁴⁶
Comm. 147/95 and 149/96 Sir Dawda k. Jawara v The Gambia	Alleged abolition of the Bill of Rights and ousting of court jurisdiction; ban of political parties and activities; restriction of freedom of expression,	Articles 2, 6, 7(2), 9(1) and (2), 11, 12(1) and (2), 13(1).	Urged the Gambia to bring its laws in conformity with the provisions of the Charter.	There is no record of compliance by the Gambia. Thus, these recommendations were not complied with because the military officer (Yahya Jammeh) who toppled

⁴⁶ See para 16 and 17 of the communication.

	movement and religion; extra-judicial killings; arrest and detention of people without charge.			Dawda Jawara remained in office from 1994 until 2017. ⁴⁷
Comm. 205/97 Kazeem Aminu v Nigeria	Alleged arbitrary arrest, detention, torture by security officials, denial of access to court in line with Decree No. 2 of 1984; accused went into hiding to avoid military tribunal prosecution.	Article 3(2), 4, 5, 6 and 10 (1).	Request Nigeria to take necessary actions to comply with its obligations under the charter.	No information could be obtained in respect of compliance. However, Nigeria had become a democratic state by the time of this recommendation on 11 May 2000.
Comm. 48/90, 50/91, 52/91, 89/93	Alleged arbitrary arrest and	Articles 2, 4, 5, 6, 7(1) (a),	Recommend that Sudan put an end to these violations	The commission noted that the situation had

⁴⁷ BBC News, 'Profile: Former Gambia President Yahya Jammeh' (22 January 2017), available at > <http://www.bbc.co.uk/news/world-africa-24383225> accessed 07 March 2018.

Amnesty International v Sudan, Comite Loosli Bachelard v Sudan, Lawyers Committee for Human Rights v Sudan, Association of Members of the Episcopal Conference of East Africa v Sudan.	detention without trial or charge; torture; suspension of the constitution; power under Decree No 2 of 1989 to detain persons without reason or charge and trial in special courts; extra-judicial executions.	(c), and (d), 8, 9, 10.	in order to abide by its obligations under the Charter.	improved significantly even before its recommendation ⁴⁸ but it is trite that the ongoing war in South Sudan (formerly part of Sudan) has recorded massive human rights violations. ⁴⁹ There is no record of compliance and the Decree remained in force until December 2002. ⁵⁰
Comm. 54/91, Malawi African association v	Alleged communications relate to situations	Articles 2, 4, 5, 6, 7, 9 (2), 10 (1), 11,	Declared that, during the period 1989-1992, there were massive	Despite Mauritania's admission to have complied

⁴⁸ Paragraph 83 of the communication.

⁴⁹ Human Rights Council, 'Report of the Commission on Human Rights in South Sudan' thirty-fourth session (27 february-24 March 2017) A/HRC/34/63.

⁵⁰ United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31st December 2004* (United Nations Publications, New York, 2005) 216.

<p>Mauritania; 61/91, Amnesty International v Mauritania; 98/93, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v Mauritania; 164/97, Collctif des Veuves et Ayants-droit v Mauritania; 210/98 Association Mauritanienne des Droits de L Hommes v Mauritania.</p>	<p>prevailing in Mauritania between 1986 and 1992 following a military coup in 1984- racially induced arrest, detention and trial of persons; lack of adequate time to prepare defence; trial conducted in Arabic without interpreters for persons who cannot understand it; no appeal was permitted for decisions from the military</p>	<p>12 (1), 14.</p>	<p>violations of human rights and recommended that Mauritania commence an independent enquiry in order to clarify the fate of persons considered disappeared, identify and prosecute offenders; take diligent measures to replace the national identity documents taken from some citizens as well as restitution of belongings looted from them; take appropriate measures to ensure payment of a compensatory</p>	<p>with the recommendation s of the Commission in its Initial State Report 1986-2001 delivered at the 31st Ordinary Session of the African Commission, the Commission's concluding observation highlights more concerns and made further recommendation s for Mauritania which relates to slavery, needs of minority groups, arrest and detention of opposition party members.⁵¹</p>
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⁵¹ Thirty first Ordinary Session, 'Concluding Observations and Recommendations on the Initial Report of the Republic of Mauritania' 2 to 16 May 2002, Pretoria, South Africa. As at 2012, this citizenship has not been conferred on the returnees; see, 'IHRDA Statement on World Refugee Day' available at > <https://www.ihrda.org/2011/06/3125/> accessed 16 April 2018.

	tribunals; restriction on association and assembly; torture and hard labour while in detention; extra-judicial killings and forceful disappearance s.		benefit to the beneficiaries of the victims of the dead and other above- cited violations; reinstate the rights due to the unduly and/or forcibly retired workers; carry out an assessment on the status of degrading practices in the country with a view to identify the deep-rooted causes for their persistence towards its eradication; take appropriate administrative measure on the abolition of slavery in the country.	
14 Annual Activity Report (October 2000- May 2001)				
Comm. 97/93 John k.	Alleged that he was unjustly	Articles 3 (2), 5, 12	Urged Botswana to take appropriate	No record of compliance can

Modise v Botswana	denied his nationality.	(1) and (2), 13 (1) and (2) and 14.	measures to recognise Mr John Modise as its citizen by descent and also compensate him adequately for the violations occasioned.	be obtained. However, based on the follow-up by Interights, the NGO that represented Mr Modise, Botswana has agreed to restore his citizenship, but up to 2002, nothing has been heard from the government. Botswana also refused to pay any form of compensation. ⁵²
Comm. 223/98 Forum of Conscience v Sierra Leone	Alleged that 24 soldiers were tried and sentenced to death by a court-martial which allowed	Articles 4 and 7 (1).	Did not make any recommendation.	The Commission noted with satisfaction that the law denying the right to appeal had been amended to

⁵² Botswana Centre for Human Rights, 'Press Release on the 31st Ordinary Session of the African Commission' available at > <http://www.ditshwanelo.org/bw/may1pres.html>< accessed 07 March 2018; Chidi Odinkalu, 'Back to the Future: The Imperative of Prioritising for the Protection of Human Rights in Africa' (2003) 47 Journal of African Law, 1.

	no right to appeal; arbitrary deprivation of life.			bring it in conformity with the Charter. ⁵³
Comm. 224/98 Media Rights Agenda v Nigeria	Alleged arrest, detention and trial of Niran Malaolu (newspaper editor) before a special military tribunal and sentenced to life imprisonment; denial of access to a lawyer; denial of the right to appeal under Decree No. 1 of 1986.	Articles 3(2), 5, 6, 7 (1), 9.	Urged Nigeria to bring its laws in conformity with the Charter.	Following the political developments after the death of Sani Abacha, Niran Malaolu was released even before the decision of the Commission on 23 rd October 2000.
Comm. 225/98 Huri-Laws v Nigeria	Alleged arrest, detention, harassment	Article 5, 6, 7)1), 9, 10, 12	The Commission made no recommendation.	Following the political developments

⁵³ Para 20 of the Communication. It further averred that the right of life is fulcrum of all rights and thus, Sierra Leone arbitrarily deprived these soldiers their right to life.

	and persecution of members of Civil Liberties Organisation from Nigerian government (CLO); torture; denial of access to a lawyer; denial of access to court based on Decree No 2 of 1984; seizure of personal property.	(1) and (2) and 14		after the death of Sani Abacha, Nigeria became a democratic state long before the findings of the Commission on 23 rd October 2000.
Comm. 231/99 Avocats Sans Frontieres (on behalf of Gaetan Bwampamye) v Burundi	Alleged denial of access to a lawyer;	Article 7 (1) (c).	Request Burundi to take appropriate measures to allow the reopening of the case and the reconsideration in conformity with domestic laws and pertinent	Burundi did not comply with this recommendation because its domestic legislation does not recognise reopening of a criminal case. ⁵⁴

⁵⁴ Amnesty International, 'Burundi: Summary of Human Rights Concerns' available at > <https://reliefweb.int/report/burundi/burundi-summary-human-rights-concerns>< accessed 07 March 2018.

			provisions of the Charter; calls on Burundi to bring its criminal legislation in conformity with its Charter obligations.	
Comm. 232/99 John D. Ouko v Kenya	Alleged arrest and detention without trial; torture; forced to flee from Kenya.	Articles 5, 6, 9, 10, 12 (1) and (2).	Urged Kenya to facilitate the safe return of the complainant.	There is no record of implementation by Kenya.
Comm. 204/97 Mouvement Burkinabe des Droits de l'Homme et des Peuple v Burkina Faso	Alleged reports of human rights violations committed from the days of the revolutionary government to date (1983-1991) - the destruction of personal property,	Articles 3, 4, 5, 6, 7 (1) (d), and 12 (2).	Urged Burkina Faso to identify and take to account those responsible for these violations; compensate victims; accelerate the judicial process of pending cases in domestic courts.	Burkina Faso reported compliance efforts in its 2 nd Periodic Report delivered at the 35 th ordinary Session of the Commission which covered the period of October 1998 to December 2002. ⁵⁵

⁵⁵ It stated to have compensated some of the victims and also elaborated on some of the pending cases in court.

	extra-judicial killings, forceful disappearance .			
Comm. 211/98 Legal Resources Foundation v Zambia	Alleged the amended Zambian constitutions violates the rights of its citizens to participate in government, and equality before the law freely.	Articles 2, 3 (1) and 13.	Urged Zambia to take necessary steps to bring its laws in conformity with the Charter.	Zambia did not comply with this recommendation but it later in 2016 amended its constitution repealing the affected sections of this recommendation .
Comm. 218/98 Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria	Alleged unfair trial and conviction of persons by Special Military Tribunal and were sentenced to death; arrest and detention.	Article 7 (1) (a) and (c).	Urged Nigeria to bring its laws into conformity with the Charter by repealing the Decree; to compensate the victims as appropriate.	The victims were released after the death of the then Head of State long before the findings of the Commission on 23 rd April 2001, and there is no record of any

				compensation to them. The Decree was automatically repealed upon Nigeria transition into democracy in 1999.
15 th Annual Activity Report (October 2001- May 2002) ⁵⁶				
16 th Annual Activity Report (October 2002- May 2003)				
Comm. 222/98 and 229/99 Law Office of Ghazi Suleiman v Sudan	Alleged that some three persons were jailed and investigated under the 1994 National Security Act without charge and access to lawyers and families;	Articles 5, 6, and 7 (1)	Urged Sudan to bring its legislation in conformity with the African Charter; request that the Government of Sudan adequately compensates victims.	Sudan did not implement these recommendations and no record of compliance in all state reports submitted by Sudan. ⁵⁷

⁵⁶ This report dealt only communication 155/96 - *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, and this complaint is in relation to social and economic rights and environmental degradation in the Niger Delta region of Nigeria.

⁵⁷ Frans Viljeon and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples Rights, 1994-2004' (2007) 101 *American Journal of International Law*, 1. The use of secret military trials are still ongoing in Sudan. See, U.S. Department of States, 'Bureau of Democracy, Human Rights and Labor: 2016 Country Reports on Human Rights Practices on Sudan' available at, > <https://www.state.gov/j/drl/rls/hrrpt/2016/af/265306.htm>< accessed 07 April 2018.

	alleged torture of the victims; and also the trial of another 26 civilians under a military court established by a Presidential Decree; denial of access to lawyers of their choice.			
Comm. 228/99 Law Office of Ghazi Suleiman (on behalf of Ghazi Suleiman) v Sudan	Alleged restriction of movement by security officers; several arrests made on the complainant; physical attack on his person and property.	Articles 6, 9, 10, 11, and 12	Request the government of Sudan to amend its existing laws to provide for de jure protection of the human rights to freedom of expression, assembly, association and movement.	Sudan did not implement these recommendations. Security forces are still used and controlled by President Al-Bashir, and his inner circle maintain control of the government. ⁵⁸

⁵⁸ Frans Viljeon and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples Rights, 1994-2004' (2007) 101 American Journal of International Law, 1. The use of secret military trials are still ongoing in Sudan. See, U.S. Department of States, 'Bureau of Democracy, Human Rights and Labor: 2016 Country Reports on Human Rights Practices on

Comm. 236/2000 Curtis Francis Doebller v Sudan	Alleged beating and arrest of several students by security agents; cruel, inhuman and degrading punishment.	Article 5	Request the government of Sudan to immediately amend its criminal law of 1991 to conform to the African charter; abolish the penalty of lashes; to take measures to ensure compensation of the victims.	There is no record of compliance in the state reports submitted by Sudan. ⁵⁹ Sudan has not amended its legislation on lashes. ⁶⁰
Comm. 241/2001 Purohit and Moore v The Gambia	Allegation that the legislation governing mental health (Lunatic Detention Act)	Articles 2, 3, 5, 7 (1) (a) and (c), 13 (1)	Urged the government of The Gambia to repeal the Act and replace it with new legislation that is	The Gambia accepted that there was a plan to amend this Act. ⁶¹ However, The Gambia still

Sudan' available at, > <https://www.state.gov/j/drl/rls/hrrpt/2016/af/265306.htm>< accessed 07 April 2018.

⁵⁹ The criminal Code of 1991 which provides for lashing has not been amended. See United Nations Human Rights Office of the High Commissioner, 'Young Woman Risks 20 Lashes for Indecent Dressing' available at > <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16355&LangID=E>< accessed 07 April 2018.

⁶⁰ Amnesty International, 'Sudan: Abolish the Flogging of Women' available at > https://amnesty.dk/media/1691/sudan_law91.pdf< accessed 07 April 2018.

⁶¹ Paragraph 33-35 of the communication. This, however, led to a series of workshops by World Health Organisation and several others bodies on the review that led to the emergence of the Mental Health Policy and Strategic Plan in 2007, available at > http://www.who.int/mental_health/policy/country/GambiaSummary_7May2007NOPics.pdf?ua=1< , accessed 07 April 2018.

	in the Gambia is outdated and violates several provisions of the African Charter.		compatible with the African Charter; review all cases of persons detained under this Act and make appropriate recommendations for treatment or release; provide adequate medical and material care for persons suffering from mental health problems; report back to the Commission on measures taken in its next periodic report.	retain the outdated Lunatic Detention Act. ⁶² Thus, no report on compliance was found given that The Gambia has not submitted any state report since 1994. ⁶³
17 th Annual Activity Report (November 2003- June 2004)				
Comm. 197/97 – Bah	Alleged forceful expulsion from	Article 14	Recommends that Mauritania takes appropriate steps	There is no record of compliance in

⁶² Mental Health Leadership and Advocacy Programme, *Gambia Mental Health Report 2012*, available at > http://www.mhlap.org/jdownloads/mhlap%202012/mental_health_gambia_report.pdf< accessed 07 April 2018.

⁶³ African Commission on Human and Peoples Rights ‘State Reporting’ available at > <http://www.achpr.org/states/>< accessed 07 April 2018.

Ould Mauritania	v	ancestral domicile.		to restore the plaintiff his rights.	Mauritania combined 10 th , 11 th , 12 th , 13 th and 14 th State Periodic Reports despite the commission express request for in its Initial Report, 1986-2001 for measures taken to implement recommendations.
Comm. 199/97 Odjouuoribt Cossi Paul V Benin	-	Alleged denial of justice by Benin judiciary.	Article 7 (1) (d).	Request Benin to take appropriate measures to ensure the complainant's appeal is determined; urged Benin to take necessary steps to pay appropriate compensation for damages due to unduly prolonged	Benin has not submitted any state report since after its 1 st Periodic Report, 1993-1998; thus, there is no record of compliance with this recommendation despite appeal

			proceedings in the processing of his case.	letters from the Commission. ⁶⁴
Comm. 240/2001 – Interights et al. (on behalf of Mariette Sonjaleen Bosch) v Botswana	Alleged that Mrs Bosch was convicted wrongly and sentenced to death; alleged violation of the right to life by the imposition of death sentence.	No violation of the African charter was found.	Urged Botswana to take measure to abolish the death penalty; request that Botswana report back on measures taken in its next periodic report.	No step was taken by Botswana to implement this recommendation . Death sentence is still on the statute books of Botswana. ⁶⁵
Comm. 242/2001 Interights, IHRDA, and Association Mauritanienne des I’Homme v Mauritania	Alleged that the dissolution of a political party, seizure of their movable and immovable property and arrest of its leaders violate provisions of the African Charter.	Article 10	Finds a violation of article 10. No recommendation was made.	No specific action was taken.

⁶⁴ 43rd Activity Report on the African commission on Human and Peoples’ Rights, page 6.

⁶⁵ Section 26 (1) of the 1964 Penal Code of Botswana.

Comm. 250/2002 – Lisebeth Zegveld and Mussie Ephrem v Eritrea	Alleged detention for their political belief, without access to lawyers, families, and without trial.	Articles 2, 6, 7 (1) and 9 (2)	Urged Eritrea to order the immediate release of the 11 detainees and compensate them.	Although Eritrea released some political prisoners, the complainants, in this case, have since their arrest and detention in 2001, not been seen. ⁶⁶
18 th Activity Report (November 2004- May 2005)				
Comm. 251/2002 – Lawyers for Human Rights v Swaziland	Alleges that King's Proclamation No. 12 of 1973 which repeals the 1968 constitution of Swaziland violates the rights and freedom of Swaziland citizens as incorporated in	Articles 1, 7, 10, 11 and 13	Recommends that the Proclamation and subsequent Decree No.3 of 2001 be brought in conformity with the provisions of the charter; that the state should engage with stakeholders and draft a new constitution; Swaziland to	There is no record of implementation of this recommendation . Swaziland has only submitted its 1 st Periodic Report for the period 1995-2000. However, a new constitution of the Kingdom of

⁶⁶ Centre for Human Rights, 'Centre urges Implementation of Shumba case and calls on African Commission to reassert its own independence' available at > <http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1618-centre-urges-implementation-of-shumba-case-and-calls-on-african-commission-to-reassert-its-own-independence.html>< accessed 19 April 2018.

	the African charter; alleges that the king's power to overturn court decisions deposes the Swazi people of an effective judiciary.		inform the Commission on measures taken to implement the above recommendations.	Swaziland was adopted on July 26, 2005, but does not repeal powers enshrined in the Proclamation to the Nation, 1973. ⁶⁷
19 th Activity Report (July 2005- December 2005) ⁶⁸				
20 th Activity Report (January –June 2006)				
Comm. 227/1999 – DRC v Burundi, Rwanda, Uganda	Alleges grave and massive violations of human rights committed by the armed forces of the respondent states in the DRC.	Articles 2, 4, 5, 12(1), 14.	Urges the respondent states to abide by their African charter obligations and other international treaties and withdraw their troops immediately from the DRC; reparation is paid to the complainant	The commission acknowledged the withdrawal of respondent armed forces from the complainant state. ⁶⁹ However, no reparation was paid to DRC.

⁶⁷ For instance, see section 79 of the constitution; Buhle Dube and Alfred Magagula, 'Update: The Law and Legal Research in Swaziland' available at > <http://www.nyulawglobal.org/globalex/Swaziland1.html>< accessed 19 April 2018.

⁶⁸ No communication was finalised or decided.

⁶⁹ Ruling of the commission in the above case, paragraph 99.

			state for and on behalf of the victims of the human rights abuses.	
Comm. 249/2002 – African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea	Alleged that President Conte’s speech on 9 th September 2000 for the arrest, search and confinement of Sierra Leoneans incited massive human rights violation against Sierra Leoneans in Guinea.	Articles 2, 4, 5, 12 (5) and 14.	Recommends that a joint commission of the Sierra Leonean and Guinea governments be established to assess the losses by various victims with a view to compensate them.	Guinea did not comply with this recommendation ; also, Guinea has never submitted any State Report to the Commission pursuant to article 62 of the African Charter. ⁷⁰
21 st Activity Report (May- November 2006)				
Comm. 253/2002 – Antoine	Alleged violation of articles 2, 3	Articles 3, 7 and 14.	Urged Congo to harmonise its legislation with	The AHSR took no record of implementation

⁷⁰ 43rd Activity Report on the African commission on Human and Peoples’ Rights, page 6.

Bissangou v Republic of Congo	and 21(2) of the African Charter.		that of African charter; request Congo to compensate the complainant by paying him the amount fixed by the High Court of Brazzaville, to compensate for the loss suffered by the complainant as determined by Congolese legislation.	and no specific action under article 58 (2). However, Congo has not submitted any report since after its Initial and Cumulative Report in 2008, covering the period 2001 - 2007.
Comm. 245/2002 - Zimbabwe Human Rights NGO Forum v Zimbabwe	Alleges that political violence followed because of Constitutional Referendum in February 2000 which was targeted towards the white farmers, teachers, civil	Articles 1 and 7.	Calls on Zimbabwe government to establish a Commission of inquiry for investigation of causes of the violence and bring violators to justice; identify victims of the violence and compensate them; report to the	This recommendation was not complied with, rather Zimbabwe responded to the African commission's decision justifying the reason for actions that took place between

	servants and others believed to be supporting opposition parties; torture, rape, arson, death threats and extra-judicial killings of opposition members;		commission during its next periodic report.	February and June 2000. ⁷¹
22 nd Activity Report (November 2006- May 2007)				
Comm. 275/2003 – Article 19 v Eritrea	Alleged arrest and continuous detention incommunicado of 18 journalists in Eritrea for criticising President Afewerki's	Articles 1, 5, 6, 7 (1), 9.	Urged the government of Eritrea to release or commence trial of detained persons; to lift the ban of the press; grant detainees immediate access to lawyers and	Although Eritrea released some political prisoners, the complainants, in this case, have since their arrest and detention in 2001, not been seen. ⁷²

⁷¹ Executive Council, Eleventh Ordinary Session, 25-29 June 2007, at Accra Ghana, EX.CL/364(XI), page 103.

⁷² Centre for Human Rights, 'Centre urges Implementation of Shumba case and calls on African Commission to reassert its own independence' available at ><http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1618-centre-urges-implementation-of-shumba-case-and-calls-on-african-commission-to-reassert-its-own-independence.html>< accessed 19 April 2018.

	rule; a ban on private press.		families; take measures to pay compensation to the detainees.	
23 rd Activity Report (May 2007- May 2008) ⁷³				
24 th Activity Report (November 2007- May 2008)				
Comm. 292/2004 – IHRDA (on behalf of Mr Esmaila Connateh and 13 other Gambians) v Angola	Alleged arrest, assault, detention and deportation of complainants from Angola without any legal protection; deportation was carried out due to the origin of affected persons; denial of access to courts of law;	Articles 1, 2, 5, 6, 7, (1) (a), 12 (4), 12 (5), 14.	Request Angola to take necessary measures to redress the violations; ensure its immigration policies, measures and legislations do not have the effect of discriminating against persons on the basis of race, origin, sex; ensure medical care is given to persons in detention; initiate procedures that guarantee effective	No specific action was taken to remedy this situation and the AHSG did not act in accordance with article 58 (2). ⁷⁴ Meanwhile, Angola acknowledged some measures taken in the area of training on law enforcement agents and the prevention of promotion of

⁷³ The Commission decided only one communication on merit- comm. 307/2005, *Mr Obert Chinhamo v Zimbabwe*, and ruled that the complainant did not fulfil requirement under article 56 (5) of the charter.

⁷⁴ See, ‘Statement by IHHRDA to the African Commission at its 58th Ordinary session in Banjul, The Gambia’ available at > <https://www.ihrda.org/2016/04/ihrdas-statement-on-implementation-of-the-african-commissions-decision-in-communication-29204-ihra-angola-58th-ordinary-session-of-the-commission/>< accessed 18 April 2018.

	and seizure of property.		<p>access to competent authorities such as courts for detainees; ensure adequate compensation is paid to victims; institute safeguard to ensure individuals are not deported to countries where they might face torture; allow access to detainees on the request of relevant bodies; institute human rights training for law enforcement agencies; report to the commission on measures taken to implement the recommendations.</p>	<p>individual, organisational and media-sponsored discrimination in accordance with article 44 of its constitution.⁷⁵</p>
25 th Activity Report (May-November 2008)				

⁷⁵ 2nd Period Report of Angola, submitted 24 September 2011, period covered 1999-2010.

<p>Comm. 246/2002 – Mouvement Ivoirien des Droits Humains (MIDH) v Cote d'Ivoire</p>	<p>Alleged that the newly adopted constitution of Cote d'Ivoire contains discriminatory provisions that restrict freedom of political activities and functions.</p>	<p>Articles 1, 2 3 (2), 7 and 13</p>	<p>Request Cote d'Ivoire to take appropriate measures to remedy the situation; request parties to inform the commission on the progress made in reviewing the discriminatory provisions of the constitution.</p>	<p>No specific action was taken to remedy this situation, and the AHSJ did not act in accordance with article 58 (2). However, Cote d'Ivoire has promulgated and adopted a new constitution in 2016. Although the 2016 constitution scrapped the discriminatory eligibility requirement for political offices of both parents being natural born Ivoirians, it empowers the president to appoint 1/3 of</p>
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				the members of the Senate. ⁷⁶
26 th Activity Report (December 2008-May 2009)				
Comm. 262/2002 – Ivorian Human Rights Movement (MIDH) v Cote D’Ivoire	Alleged discrimination through policies of denial of identity; denial of rights to participate in government due to ethnic origin.	Articles 2 and 14.	To ensure effective application of Law 2004-412 of 14 th August 2004 amending article 26 of Law 98-750; restore all land where to owners who were deprived under article 26; pay, if need be, fair and equitable compensation to victims.	Law 2004-412 of 14 th August 2004 has amended article 26 of the Law 98-750 of 23 rd December 1998 which introduced a policy of discrimination; ⁷⁷ takes note of the ongoing reconciliation process and negotiations. ⁷⁸
Comm. 281/2003 – Marcel Wetsh’ Okonda Koso and others v DRC	Alleged arrest and trial of a civilian for civil action by a military court without the right to appeal or review.	Article 7 (a) (b) and (d)	Recommends the guarantee of the independence of the tribunals; grant the victims a fair and equitable amount as compensation;	No specific action was taken to remedy this situation, and there is no record of implementation in the DRC’s up-

⁷⁶ Article 87 of the 2016 constitution of Cote D’Ivoire.

⁷⁷ Paragraph 73 of the Communication 262/2002

⁷⁸ Paragraph 74 and 77 of the communication.

			harmonise its legislation with its international commitments.	to-date State Reports. Also, the AHSG did not act in accordance with article 58 (2). DRC, however, accepted to have taken note of the recommendation to safeguard the independence of its judiciary and is implementing it. ⁷⁹
Comm. 284/2003 – Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe	Alleged that some provisions of a new media law, the Access to Information and Protection of Privacy Act of 2002 prohibits 'media mass	Articles 1, 3, 7, 9 (2) and 14.	Recommends that victims be adequately compensated.	No specific action was taken to compensate the victims. The AHSG did not act in accordance with article 58 (2). Meanwhile, Zimbabwe has not submitted any State Report

⁷⁹ Initial report and Periodic Report of DRC, period covered from 2005 to 2015, page 14, available at > http://www.achpr.org/files/sessions/61st/state-reports/2005---2015/drc_periodic_report_2005_2015_eng.pdf< accessed 18 April 2018.

	services' from operating until they have registered with the Media and Information Commission and alleged seizure of property and threat to arrest by security agents following media houses refusal to adhere to this law.			in compliance with article 62 after the submission of its 7 th to 10 th Periodic Report covering 1996-2006. ⁸⁰
Comm. 294/2004 - Zimbabwe Lawyers for Human Rights and Institute for human rights and Development	Alleged violation of freedom of expression and freedom to disseminate information; alleged illegal	Articles 1, 2, 3, 7 (1) (b), 9, 12 (4).	Recommends state to ensure court decisions are respected and implemented; rescind the deportation orders and allow Mr Meldrum to return	No specific action was taken to compensate the victims. The AHSG did not act in accordance with article 58 (2). However, the commission

⁸⁰ The Access to Information and Protection of Privacy Act of 2002 has been amended by Access to Information and Protection of Privacy Act, No. 20 of 2007, which came into force 11 January 2008.

(on behalf of Andrew Barclay Meldrum) v Zimbabwe	deportation of Mr Meldrum.		to Zimbabwe, if he so wishes; ensure the Supreme court finalises on cases filed by Mr Meldrum; grant accreditation to Mr Meldrum to practice journalism; report to the commission on the implementation of these recommendations.	admits the amendment of section 80 (1) (b) of AIPPA which was the ground to deny Mr Meldrum right to accreditation as a journalist. ⁸¹ Furthermore, Meanwhile, Zimbabwe has not submitted any State Report in compliance with article 62 after the submission of its 7 th to 10 th Periodic Report covering 1996-2006.
Comm. 297/2005 – Scanlen and	Alleged violation of freedom of expression and	Article 9	Recommends a repeal of section 79 and 80 of the AIPPA;	Although the AHSG did not act under article 58 (2), Zimbabwe

⁸¹ Paragraph 3 of communication. It is worth noting that the Access to Information and Protection of Privacy Act of 2002 has been amended by Access to Information and Protection of Privacy Act, No. 20 of 2007, which came into force 11 January 2008.

Holderness v Zimbabwe	information by sections 79 and 80 of Access to Information and Protection of Privacy Act demanding for a compulsory accreditation for journalists and payment of fee violates their human rights.		decriminalise offences relating to accreditation and the practice of journalism; adopt legislation providing a framework for self-regulation of a journalist; report on the implementation of these recommendations within six months.	has repealed in its amended Access to Information and Protection of Privacy Act, the affected provisions. ⁸²
Comm. 266/2003 – Kevin Mgwanga Gunme, et al. v Cameroon	Alleged political and economic marginalisation of the people of southern Cameroon; discrimination;	Articles 1, 2, 4, 5, 6, 7 (1), 10, 11, 12, 13 amongst other articles.	Recommends that Cameroon abolish all discriminatory practices; stop the transfer of accused persons from Anglophone provinces to	No implementation and the ASH did not act under article 58 (2). ⁸³

⁸² See the Access to Information and Protection of Privacy Act, No. 20 of 2007, which came into force 11 January 2008.

⁸³ In its Concluding Observation for Cameroon's Third Periodic State Report for 2008-2011, Cameroon admitted to have launched a national study on indigenous population in its bid to curb the existing discrimination. Human rights violations has continued in Cameroon and to the knowledge of the African Commission Rapporteur for Cameroon; see, 'Press Release for Human Rights Situation in Cameroon Following Strike Actions by Lawyers, Teachers and Civil Society', available at > <http://www.achpr.org/press/2016/12/d340/> accessed 18 April 2018.

	constant arrest and detention; torture, killings of the people of southern Cameroon.		Francophone provinces for trial; ensures persons facing criminal charges are tried in languages they understand and ensure interpreters are employed; pay compensation to victims of discrimination; dialogue with affected parties; report on the implementation within 180 days.	
27 th Activity Report (June 2009- Novemeber 2009)				
Comm. 272/2003 – Association of Victims of Post Electoral Violence and	Alleged destruction of property; arrest; serious bodily harm and injury.	Articles 2, 4, 7 and 14.	To take necessary measures to guarantee the protection of human rights at all times; pursue its commitment for	No implementation and the ASH did not act under article 58 (2). ⁸⁴

⁸⁴ Human rights violations has continued in Cameroon and to the knowledge of the African Commission Rapporteur for Cameroon; see, ‘Press Release for Human Rights Situation in Cameroon Following Strike Actions by Lawyers, Teachers and Civil Society’, available at > <http://www.achpr.org/press/2016/12/d340/>< accessed 18 April 2018.

INTERIGHTS v Cameroon			fair and equitable compensation to victims or their beneficiaries.	
Comm. 276/2003 – Centre for Minority Rights Development (Kenya and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya	Alleged displacement of Endorois people from the ancestral land without compensation; denial of the right to practice religion.	Articles 1, 8, and 14, amongst other articles.	Urged that the right of ownership of Endorois ancestral land be recognised; grant unrestricted access to Lake Bogoria and its surrounding sites for religious and cultural rites; pay adequate compensation to the community for all the loss suffered; report on implementation within three months.	Following the decision on 2 February 2010, Kenya established a Taskforce in September 2014 to implement the decision. ⁸⁵ Whereas the recommendation has not yet been complied with, the combined state report did not provide information on the legislative measure taken to protect indigenous

⁸⁵ However, the Commission noticed with dismay that CSOs and members of the Endorois community are not part of the Taskforce, see concluding observation of the African commission on Kenya combined 8th-11th Periodic Report, 2008-2014, available at > http://www.achpr.org/files/sessions/19th-ao/conc-obs/8th-11th-2008-2014/kenya_concluding_observations_8th_to_11th_periodic_report_.pdf< accessed 18 April 2018.

				people and acts of investigation to harassment, assault. ⁸⁶
28 th Activity Report (November 2009 – May 2010)				
Comm. 373/2009 (formerly 242/2001) – Interights, IHRDA, and Association Mauritanienne des Droits de l’Hommes v Mauritania	A review of the Commission’s decision on the merit of communication 242/2001 adopted in May 2006 for being <i>infra petita</i> and for not representing the required guaranteed of impartiality.	Articles 1 and 14	Recommends state pay adequate compensation to the victim; take steps to ensure that its law on freedom of association, in particular, the establishment and functioning of political parties, conforms with the Charter; inform the commission of measures taken within 180 days.	There is no record of compliance by Mauritania, and the AHSB has not acted to ensure state party complies with this recommendation. ⁸⁷
Comm. 313/05 –	Alleged expulsion of an Australian	Articles 2, 7, (1) (a), 9, 12 (4).	That adequate compensation is provided which	Botswana explicitly noted that it is not

⁸⁶ Ibid. however, as at May 2017, Kenya has not implemented this recommendation; see, Committee on the Elimination of Racial Discrimination, ‘Concluding Observation of the Fifth to Seventh Periodic Reports of Kenya’, available at > http://minorityrights.org/wp-content/uploads/2016/11/INT_CERD_COC_KEN_27475_E.pdf accessed 18 April 2018.

⁸⁷ Mauritania combined Period State Report 10th, 11th, 12th, 13th and 14th for the period 2006-2014.

Kenneth Good v Botswana	national for his political views on Botswana and denial of justice.		shall include his remuneration last during his expulsion; take steps to ensure sections 7 (f), 11 (6) and 36 of the Botswana Immigration Act and its practices conform to international human rights standards and the charter.	bound by this decision. ⁸⁸
Comm. 279/03 – Sudan Human Rights Organisation v Sudan Merged	Alleged gross, massive and systematic violations of human rights against indigenous black African	Articles 1, 4, 5, 6, 7 (1), 12 (1) and (2) 14 and amongst others.	Urged Sudan to take steps to ensure protection of victims in Darfur region; conduct official investigation into abuses committed	No implementation. ⁸⁹

⁸⁸ Botswana through a Diplomatic Note Ref: 10/12BEA5/21 C VIII (4) AMB of 23rd March 2012, unequivocally stated its position on this cases; see page 9 combined 32nd and 33rd Activity Report of the African commission on Human and Peoples' Rights.

⁸⁹ The complaint was based on massive violations of human rights during the war in Sudan between Sudanese army and some armed militia groups which later resulted in the first genocide in the 21st century; see Al-Jazeera, Human Rights Lost in Darfur' available at > <https://www.aljazeera.com/focus/humanrightsun/2008/12/200812810113311766.html>< accessed 18 April 2018.

Comm. 296/05 – Centre on Housing Rights and Evictions v Sudan	tribes in the Darfur region; large-scale killings, forced displacement of populations; destruction of property; arrest and detention without trials; torture and inhuman treatment and punishment; rape; trial by special military courts; arming and sponsoring of a militia group.		by military forces and militia groups; undertake legislative and judicial reforms; prosecute those responsible for the human rights violations; take steps to give remedy to victims of human rights abuses including restitution and compensation; resist adopting amnesty laws for perpetrators of human rights.	
29 th Activity Report (May – November 2010) ⁹⁰				
30 th Activity Report (November 2010- April 2011) ⁹¹				
31 st Activity Report (April – November 2011)				

⁹⁰ All four communications entertained in this activity report were declared inadmissible for non-compliance with article 56 of the African charter and they are communications 305/05 – *Article 19 and other v Zimbabwe*; 338/07- *SERAP v Nigeria*; 306/05 – *Samuel T. Muzerengwa and 110 others v Zimbabwe*; 361/08 – *J. E. and P. J. L. Zitha v Mozambique*.

⁹¹ The commission seized five communications, struck out one, ruled one to be inadmissible while the others are pending before the commission.

<p>Comm. 232/06 Egyptian Initiative for Personal rights v Egypt</p>	<p>Alleged physical and sexual assault due to expressing their political views by unidentified men and security agents; seizure and destruction of personal property; threats of more physical harm if court cases continue.</p>	<p>Articles 1, 2, 3, 5, 9(2).</p>	<p>Ordered Egypt to commence an investigation into the allegation and bring perpetrators to justice; and compensate the victims in the amount of EP57,000; urges it to ratify the Women’s Protocol; to report back on measures taken within 180 days.</p>	<p>Egypt reported that it had made efforts to protect the rights of women 36th Activity Report.</p>
<p>Comm. 277/03 Spilg and Mack and Ditshwashlo v Botswana</p>	<p>Alleged wrongful sentence to death by hanging.</p>	<p>Article 5</p>	<p>Urged Botswana to impose a moratorium on execution with a view to abolishing death penalty; report back to it in</p>	<p>Botswana did not comply with this recommendation . Botswana is a retentionist country and execute persons sentenced to</p>

			its next state report	death by hanging. ⁹²	
Combined 32 nd and 33 rd Activity Report (February – October 2012)					
Comm. 288/04 Gabriel Shumba Zimbabwe	- v	Alleged arrest, seizure of property; detention without charge and denial of access to lawyers or family; torture and death threat by security agents.	Article 5	Recommend that victim be paid adequate compensation; inquiry be initiated to bring perpetrators to justice; report on implementation within three months	Recommendatio n not complied with. ⁹³
Comm. 295/04 Zimbabwe Human Rights NGO Forum (on behalf of Noah Kazimgachire, john	-	Alleged killings by security agents;	Article 1 and 4.	Urged to undertake domestic law reform to bring the domestic law on compensation in conformity with African charter; pay compensatory damages to the	There is no record of compliance with this recommendation . However, Zimbabwe has not submitted its

⁹² Section 26 of 1964 Penal Code and section 128 of the Botswana Defence Act of 1977.

⁹³ The complainant has over time sent correspondence to the commission, with the last one being sent on the 24th February 2017, indicating that the state has not yet implemented the recommendation. See page 14 of 42nd Activity Report of the African commission on Human and Peoples' Rights.

Chitsenga, Elias Chemvura and Batania Hadzisi) v Zimbabwe			heirs and next of kin of four deceased persons.	periodic report since 2006.
Comm. 310/05 – Haregewoin Gabre-Selassie and IHRDA v Ethiopia	Alleged arrest and detention without trial; Proclamation by Special Public Prosecutor’s Office suspending the applicability of time limitation for trial in criminal trials and habeas corpus making their trial to last for more than 15 years.	Article 7 (1) (b) (d)	Urged state to pay adequate compensation to victims; report on implementation within three months.	Many of the victims could not be contacted; there is no record of enforcement. ⁹⁴
Comm. 286/04 – Dino Noca v DRC	Allegation of revocation and withdrawal of	Article 3, 7 (1) (c) and 14	Enjoins DRC to restore the right to property of the	No record of compliance with this

⁹⁴ Bright Theu, ‘Human Rights Litigation using International Human Rights Law: The IHRDA Experience’ (2013) 17 Law, Democracy and Development, 504.

	building under the ordinance No. 74-152 of July 2, 1974, relating to abandoned property.		beneficiaries of late Mr Noca by reinstating their title deed; pay them expeditious, just and fair compensation; compensate without delay for all damages suffered by Mr Noca family; submit a report on implementation within 180 days.	recommendation in its state periodic report; however, it is observed that Mr Noca was later offered a title deed, but no financial compensation was offered. ⁹⁵
Comm. 365/08 – Christopher Byagonza v Uganda	Alleged death sentence on a minor.	Article 4.	Urged Uganda to reform its domestic law in conformity with the African Charter; to report on implementation within 180 days.	Uganda partly implemented the African commission decision by re-sentencing the complainant under the Kigula judgement. ⁹⁶

⁹⁵ Racheal Murray and Dabra Long, ‘What Role should the African Commission play in following up its own findings?’ in *The Implementation of the Findings of the African Commission on Human and Peoples’ Rights* (Cambridge University Press, 2015) 119.

⁹⁶ See page 9 of 36th Activity Report of the African commission on Human and Peoples’ Rights; see also Amnesty international, *Death Sentences and Executions 2013*, available at > <https://www.amnestyusa.org/files/act500012014en.pdf>< accessed 18 April 2018.

				However, the death penalty is still retained in the statute books of Uganda although the last execution took place in 2005. ⁹⁷
34 th Activity Report (February – April 2013)				
Comm. 270/03 – Access to justice v Nigeria				Not yet published by the commission at the time of writing.
Comm. 302/05 Mr Mamboleo M. Itundamilamb a v DRC	Alleged non-protection by the law in his suit against the government	Articles 3 and 7 (1) (a) and (c)	Urged DRC to recognise or cause to be recognised the complainants' right to claim; request DRC to grant a fair compensation to the complainant according to its	No specific information could be obtained on the actions taken by DRC. ⁹⁸

⁹⁷ Concluding Observation and Recommendations on the 5th Periodic State Report of the republic of Uganda (2010-2012), available at > http://www.achpr.org/files/sessions/57th/conc-obs/5-2010-2012/concluding_observations_5th_state_report_uganda.pdf< accessed 18 April 2018; Amnesty International, 'Uganda 2017/2018' available at > <https://www.amnesty.org/en/countries/africa/uganda/report-uganda/>< accessed 18 April 2018.

⁹⁸ There was no mention of steps taken by DRC in its up-to-date state periodic reports.

			law; grant complainant compensation for the cost of procedure; report back to it on measures of implementation within 180 days.	
35 th Activity Report (July – November 2013)				
Comm. 259/02 – Groupe de Travail sur les Dossiers Judiciaires Strategiques v DRC	Alleged wrongful death sentences pursuant to Executive Order No. 019 of 23 August 1997 establishing the military court in DRC.	Articles 1, 4, 7 (1) (c)	To harmonise its legislation with the African charter; pay compensation to the victims; report back to the commission within 180 days.	All persons sentenced to death had it commuted to life imprisonment except one person. ⁹⁹ However, the death sentence is still on the statute books of DRC.
Comm.274/03 – INTERIGHTS, ASADHO and	Alleged that in the days following the assassination of President	Articles 5, 6, 7.	To align the provisions of Decree-Law No. 019 of 23 August 1997 establishing a	Death sentence remains in the statute books of DRC even though no

⁹⁹ Para 4 of the communication.

<p>Advocate O. Disu v DRC</p>	<p>Kabila several arrests were made; detention without trial for months; torture and inhuman treatment at a military facility used for the detention; trial of both civilians and military personnel by a special military tribunal established by Decree-Law No. 019 of 23 August 1997 and subsequent death sentence.</p>		<p>military court with international standards of fair trial; to open and review the case for persons in detention; to maintain a moratorium with a view to abolishing death penalty; to compensate complainants fairly violations suffered; report back to the commission within 180 days.</p>	<p>execution has taken place since 2003 and this includes the victims of this communication. However, this Decree was suppressed on 25 March 2003 when laws Nos. 023/2002 and 024/2002 of 18 November 2002 came into force providing a code of military justice and military criminal code.¹⁰⁰</p>
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¹⁰⁰ Attacks on Justice: Democratic Republic of Congo, available at > <http://www.refworld.org/pdfid/48abdd680.pdf> accessed 21 April 2018.

<p>Comm. 368/09 – Abdelhadi Ali Radi and others v Sudan</p>	<p>Alleged killings of police officers and displaced persons following violence from forceful removal from a refugee camp; arrest and detention without trial for more than 12 months; alleged torture and inhuman treatment during the period of detention; death as a result of inhuman</p>	<p>Articles 1, 5, 6, 7 (1) (c) (d)</p>	<p>Pay adequate compensation to the victims in accordance with domestic law for the rights violated; initiate an effective and impartial investigation into the circumstances of arrest and detention; amend legislation incompatible with the charter; inform the commission in 180 days of steps taken to implement the decision.</p>	<p>Whereas some of the dead victims were identified, there is no record of payment to their families of any compensation.¹⁰¹ Sudan did not initiate an independent investigation over the circumstances of arrest and detention.¹⁰²</p>
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¹⁰¹ Submission to the UN Human Rights Committee ahead of its emanation of Sudan’s Fourth Periodic Report under the ICCPR, June 2014, available at > http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/SDN/INT_CCPR_CSS_SDN_17479_E.pdf accessed 21 April 2018.

¹⁰² African Commission Concluding Observation and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, available at > http://www.achpr.org/files/sessions/12th-eo/conc-obs/4thand5th-2008-2012/concluding_observation_.pdf accessed 24 April 2018.

	treatment and physical assault at detention.			
36 th Activity Report (November 2013- May 2014)				
Comm. 287/04 – Tijani Duga Ernest (on behalf of Cheonumo and others) v Cameroon	Alleged arrest and detention without trial; torture and inhuman treatment; trial by a special military court; wrongful sentence to various prison terms.	Articles 5 and 7	Take immediate steps to retrial those in detention; to pay compensation to victims; investigate and punish perpetrators of torture and inhuman treatments; educate staff of its law enforcement institutions on international human rights; amend its laws to conform to the African charter; report to the	Cameroon did not take any specific action and the AHSG did not act under article 58; however, the African Commission requested Cameroon in 2014 to investigate and punish actors in its continued torture and amend its laws in conformity with its obligation under the Charter. ¹⁰³

¹⁰³ African Commission Concluding Observation and Recommendations on the 3rd Periodic Report of the Republic of Cameroon, available at >http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf< accessed 23 April 2018.

			commission within 180 days.	
Comm. 379/09 – Monim Elgak, Osman Hummeida and Amir Suliman v Sudan	Alleged arrest and detention by men of the National Security and Intelligence Services because of their working relationship with the ICC; physical assault; threat of death.	Articles 1, 5, 6, 9, 10, 12	Pay adequate compensation to the complainants; investigate and prosecute persons involved in the incarceration and torture of complainants; reopen and unfreeze bank accounts; inform the commission within 180 days of measures taken.	Sudan did not report to the Commission on steps taken to comply with this decision and there is no evidence of prosecution of the security agents that were involved in the violation. ¹⁰⁴ No action was taken by the AHSG under article 58.
37 th Activity Report (June – December 2014) ¹⁰⁵				
38 th Activity Report (January – May 2015)				
Comm. 317/2006 The Nubian	Alleged non-recognition as citizens and	Articles 1, 2, 3, 5,	Request that Kenya establish objective, the transparent	Recommendation not complied with. ¹⁰⁶

¹⁰⁴ ESCR-Net Case Law Database, ‘Monim Elgak, Osman Hummeida and Amir Suliman v Sudan, Communication 379/09’, available at > <https://www.escr-net.org/caselaw/2016/monim-elgak-osman-hummeida-and-amir-suliman-v-sudan-communication-37909>< accessed 23 April 2018.

¹⁰⁵ The two communications considered on the merit have been authorised for publication by the AHSG; see page 9 of the Activity Report, available at > http://www.achpr.org/files/activity-reports/37/actrep37_2015_eng.pdf< accessed 18 April 2018.

¹⁰⁶ The complainant sent a correspondence to the commission on December 2015 indicating that the state has not complied with its recommendation; see, page 9 of the 40th Activity Report of the African Commission on Human and Peoples’ Rights.

Community in Kenya v Kenya	treatment as aliens by Kenyan government; alleged disenfranchisement and exclusion from both political and social development; denial of fundamental rights under the Kenyan constitution; displacement from their dwelling place and land.	12, 13, 14	and non-discriminatory procedure for determining citizenship; recognise Nubian land rights over Kibera; ensure that any eviction from Kibera is carried out in accordance with international human rights standard; report back on measures taken within 180 days.	
Comm. 318/06 Open Society Justice Initiative v Cote d'Ivoire	Alleged that the concept of 'ivorite' which grants nationality to only persons	Articles 1, 2, 3, 5, 12, 13, 14	Amend the provisions of sections 35 and 65 of the constitution in accordance with the provisions of	Recommendation not complied with. ¹⁰⁷

¹⁰⁷ The complainant sent a correspondence to the commission on 21 December 2015 indicating that the state has not yet complied with its recommendation; see, page 9 of the 40th Activity Report of the African Commission on Humana and Peoples' Rights.

	<p>born in the country by two Ivorian parents as discriminatory ; xenophobic behaviour against the Dioulas; extrajudicial killings; arrest and illegal detention by government officials; denial of political and social benefits.</p>		<p>articles 2 and 13 of African charter; recommend that Cote d'Ivoire ensure that its nationality law should be consistent with articles 2 and 5 of the charter; adopt more legislative and administrative mechanisms to implement measures necessary for the recognition of Ivorian nationality by origin of the Dioulas through a simplified declaration procedure; improve upon an effective non-discriminatory birth registration system; return the</p>	
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			lands or compensate victims whose lands were expropriated; forward a written report on the implementation within 180 days.	
Comm. 389/10 Mbiankeu Genevieve v Cameroon	Alleged prevention from enjoying ownership of land; destruction of property; assault and death threat.	Article 1 and 14	Request that a plot of land of equal value and nature be given to the complainant or compensate in cash with the sum of 50, 692, 185 CFA francs; to pay further damages assessed as compensation for material damage; pay the sum of 15, 391, 460 CFA francs as compensation for	Recommendation not complied with. ¹⁰⁸

¹⁰⁸ The complainant sent a correspondence to the commission on 21 December 2015 indicating that the state has not yet complied with its recommendation; see, page 9 of the 40th Activity Report of the African Commission on Humana and Peoples' Rights.

			the deprivation and enjoyment of the right to property, pay the sum of 5, 000, 000 CFA francs as non-material damages suffered as a result of frustration since the land was expropriated; report in 180 day of measures taken to implement this decision.	
39 th Activity Report (May – November 2015)				
Comm. 346/07 Mouvement du 17 Mai v DRC	Alleged tactical refusal to register a political party despite court ruling on it.	Articles 7 (1) and 13.	Draw all legal consequences of the infringement of court's judgment REC 158; determine the number of M17 candidates actually elected at the 2006 national legislative election; pay financial	No specific information from DRC on the implementation of this recommendation and the AHSG did not act under article 58 of the African Charter.

			compensation to M17 candidates whose seats have not been allocated; ensure that the M17 participates freely in then political exercises in DRC; report back in writing within 180 days.	
Comm. 416/12 Jean Marie Atangana Mebara v Cameroon	Alleged illegal detention; indictment over a matter already decided by the court.	Articles 6 and 7 (1) (b), (c) and (d)	Order immediate release of the complainant; take prompt and appropriate measures to sanction government employees responsible for violation; pay 400, 000, 000 CFA francs as compensation for material and non-	No specific information from Cameroon on the implementation of this recommendation and the AHSG did not act under article 58 of the African Charter. ¹⁰⁹

¹⁰⁹ African Commission Concluding Observation and Recommendations on the 3rd Periodic Report of the Republic of Cameroon, available at >http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf< accessed 23 April 2018.

			material damages suffered; report in writing within 180 days.	
Comm. 319/06 INTERIGHTS and Ditshwanelo v Botswana	Alleged sentence to death by hanging; denial of access by family and counsel before his execution; violation of rights to life and inhuman treatment by the imposition of death penalty.	Articles 5 and 1	Review relevant legislation to provide for the compensation to the family of the victim; to observe a moratorium on the death penalty and to abolish the death penalty; report to the commission within 180 days on measures taken.	Botswana did not comply with this decision. Botswana is a retentionist country and execute persons sentenced to death by hanging. ¹¹⁰
Comm. 325/06 OMCT and LIZADEEL v DRC	Alleged sexual and physical abuse of 17-year-old girl; threat to life.	Articles 2, 4, 5, 7 (1) (a).	Take appropriate measures to prosecute perpetrators of Celine's rape; grant adequate compensation to	No specific steps were taken by DRC and the AHSG did not act under article 58.

¹¹⁰ Section 26 of 1964 Penal Code and section 128 of the Botswana Defence Act of 1977.

			<p>the victim as well as medical and psychological assistance; adopt measures to repress sexual violence; organise awareness campaign for the public on social behavioural violence against women; organise training sessions for law enforcement agents and magistrate; report to it on implementation within 180.</p>	
<p>Comm. 341/07 Equality Now v Ethiopia</p>	<p>Alleged abduction, rape and forceful marriage; dismissal of appeal at</p>	<p>Articles 3, 4, 5, 6, 7 (1) (a)</p>	<p>Pay the sum of USD\$150, 000 as compensation for non-material damages; adopt and implement legislative measure</p>	<p>No specific steps were taken by DRC and the AHSG did not act under article 58.</p>

	various judicial bodies.		to address marriage by abduction and rape; prosecute offenders; train judicial officers handling human rights cases against women; report within 180 days on measure taken.	
40 th Annual Activity Report (February – April 2016) ¹¹¹				
41 st Annual Activity Report (May – November 2016)				
Comm. 393/10 IHRDA v DRC	Alleged killings, torture, inhuman treatment, arbitrary arrest, displacement	Articles 1, 4, 5, 6, 7, 14.	Ordered the payment of USD\$2, 5000, 000 to the victims and their families; identify and compensate victims who are not party to this	This recommendation has not been implemented. ¹¹²

¹¹¹ Details on communications not publicly available at the time of writing. Cases decided include: Comm. 355/07 Ezzat and Enayet v Egypt, Comm. 385/10 ICJ v Kenya, Comm. 392/10 Me. Theogene Muhayeyezu v Rwanda, Comm. 408/11 Alidor Kabambi v DRC, Comm. 423/12 Mack Kit v Cameroon, Comm. 428/12 Dawit Issak v Eritrea, and, Comm. 433/12 Ngandu v DRC. See also Micheal Nyarko and Ademola Jegede, ‘Recent Development: Human Rights Development in the African Union during 2016’ (2017) 17 African Human Rights Law Journal, 295.

¹¹² IHRDA, ‘Questions and Answers: The Kilwa Massacre and the Landmark Decision of the African Commission on Human and Peoples’ Rights’, available at > <https://www.ihrda.org/2017/08/questions-and-answers-the-kilwa-massacre-and-the-landmark-decision-of-the-african-commission-of-human-and-peoples-rights/>< accessed 19 April 2018.

	<p>and forceful disappearance by security agencies in collaboration with a foreign mining company against the habitants of the eastern town of Kilwa; destruction of homes and property; summary execution of 28 persons;</p>		<p>communications; lunch a new criminal investigation and take measures to prosecute and punish all agents of the state and the mining company involved in these violations; issue an apology to victims of these violations; exhume and re-bury with dignity the bodies dumped in mass graves; rebuild social amenities destroyed and provide counselling for victims; report back within 180 days on measures taken.</p>	
<p>42nd Activity Report (February – May 2017)¹¹³</p>				

¹¹³ The Commission did not grant any decision on the merit; rather it was seized of some communications and issued some provisional measures.

43 rd Activity Report (June – November 2017) ¹¹⁴
44 th Activity Report (November 2017- May 2018) ¹¹⁵
45 th Activity Report (June – November 2018) ¹¹⁶

Appendix II - Information about member state compliance with African Court decisions

Case information/ App. No.	Recom mendat ion year	Alleged violated Articles of African Charter	Violations found/ Recommendati on	State implementation
App. No. 001/2014 Actions pour la protection des Droits de l'Homme (APDH) v. Republic of Cote d'Ivoire	2014	3, 13	Ordered the Amendment of State Electoral Law.	No implementation. The composition of the Ivorian Electoral Board in Law No. 2014-335 of June 18, 2014 has not been amended. The Council of Ministers did not act under article 29(2) of the Court Protocol.

¹¹⁴ The Commission decided only one communication on merit and details on this finding is yet to be published: the communication is - Comm. 339/2007 - *Patrick Okiring and Agupio Samson (Represented by Human Rights Network and ISIS-WICCE v Uganda*.

¹¹⁵ The Commission did not grant any decision on the merit; rather it was seized of some communications and struck out thirteen communications for diligent prosecution and deferred six communications.

¹¹⁶ The Commission considered thirty-nine communications of which only one communication was decided on the merit (details not available at the time of writing this thesis- communication 348/07- *Collective of Families of Missing Persons in Algeria v Algeria*). Also, no information was received regarding the implementation of decisions on communications in accordance with Rule 112 of Procedure of 2010.

App. No. 007/2013 Mohamed Abubakari v. United Republic of Tanzania	2016	7	Declined to make specific release order from prison but ordered State to take Measures to remedy.	No implementation has been made by Tanzania. ¹¹⁷
App. No. 006/2013 Wilfred Onyango Nganyi & 9 Others v. United Republic of Tanzania	2016	7	Ordered State to give legal aid to the applicant; expedite and finalise criminal appeals by and against the applicant.	Criminal appeal was concluded before the Court decisions and judgment delivered on 10 December 2015. However, Legal Act of 2007 was signed and gazetted on March 3, 2017.
App. No. 004/2013 Lohe Issa Konate v. Burkina Faso	2015	9	Ordered State to amend legislation on defamation in order to make it complaint with article 9 by repealing	By email dated 11 April 2018, the Respondent State informed the Court that it has complied with all the Court orders. For instance, it promulgated Law

¹¹⁷ See Africa Union Executive Council, Report on the Activities of the African Court adopted January 2017 at Thirtieth Ordinary Session, available at > <http://www.african-court.org/en/index.php/publications/activity-reports>< accessed 25 February 2018.

			custodial sentences for acts of defamation and to ensure that other sanctions of defamation meet international standards.	Number 057-2015/CNT of 04 September 2015 and Law Number 058-2015/CNT of 04 September 2015 as legislative measures to remedy the violations found.
App. No. 002/2013 The African Commission on Human and Peoples' Rights v. Libya	2016	6, 7	Ordered State to take measures to guarantee Mr Kadhafi's rights	implementation. The Council of Ministers did not act under article 29(2) of the Court Protocol. However, the victim was released in 2017 by a rebel group that took control of the location where the victim was imprisoned. ¹¹⁸
App. No. 005/2013	2015	1, 3, 5, 6, 7, 9	Take measures to remedy	No specific information could be

¹¹⁸ It is worth mentioning that Saif Al-Islam's release from prison was not due to the decisions of the African Charter mechanisms; rather, on an instruction of a House of Representatives of an armed group based in the eastern city of Tobruk- see Aljazeera News, 'Saif Al-Islam Gaddafi freed from prison in Zintan' available at > <http://www.aljazeera.com/news/2017/06/saif-al-islam-gaddafi-freed-prison-zintan-170610190700610.html>< accessed 29 September 2017.

Alex Thomas v. United Republic of Tanzania			violations; reopen the defence and the retrial of the applicant.	obtained on measures taken to comply with this decision. ¹¹⁹
App. No. 013/2011 Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v Burkina Faso	2014	1, 7, 9(2)	Damages awarded; ordered State to take measures to remedy violations	Burkina Faso paid the applicant the sum of 233,135,409 (two hundred and thirty-three million one hundred and thirty-five thousand four hundred and nine) CFA francs, representing the amount owed to the beneficiaries of Norbert Zongo and his three companions. The respondent State has by email dated 11 and 27 April 2018 informed the Court on measures taken

¹¹⁹ See Africa Union Executive Council, Report on the Activities of the African Court (adopted January 2017) 10, available at > <http://www.african-court.org/en/index.php/publications/activity-reports>< accessed 25 February 2018,

				to implement the decision. ¹²⁰
App. No. 009/2011 Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania	2013	2, 3, 10, 13	Ordered State to take constitutional, legislative and other measures to remedy violations	No implementation. The affected articles of the constitution are not yet repealed or amended. ¹²¹
App. No. 006/2012 African Commission on Human and Peoples' Rights v.	2017	1, 2, 8, 14, 17, 21, and 22.	State to take appropriate measures to remedy all the violations established.	Kenya has not provided the Court with comments on steps taken to effect recommendation, no implementation. ¹²²

¹²⁰ Ibid, 9.

¹²¹ Ibid, 8-9. No legislative or other measures has been taken by government to remedy the violations found. However, the referendum on the proposed new constitution which proposed for independent candidates is pending.

¹²² Ibid, 11.

Republic of Kenya				
App. No. 003/2014 Ingabire Victoire Umuhoza V Rwanda	2017	7 and 9,	Ordered Rwanda to restore the rights of the applicants but declined to order direct release of the applicant, without prejudice to the Respondent State's power to take the measure itself.	Applicant has been granted presidential pardon, although no official notification has been submitted to the Court.
App. No. 003/2015 Kennedy Onyachi V Tanzania	2017	1, 6, and 7.	Ordered Tanzania to erase consequences of violations established and establish the rights of the applicants.	Tanzania has not implemented this decision.

<p>App. 011/2015 Christopher Jonas v Tanzania</p>	<p>2017</p>	<p>7 and 1.</p>	<p>Declined to make direct order to release the applicant, without prejudice to the Respondent State's power to take the measure itself but held that the 30 years prison sentence was not in force at the time the offence was committed.</p>	<p>Tanzania has not implemented this decision.</p>
<p>App. No. Aundo Ochien Anudo V Tanzania</p>	<p>2018</p>	<p>7 and 14</p>	<p>Held the Tanzania violated the applicant's right not to be expelled arbitrarily, ordered Tanzania to amend its legislation.</p>	<p>Tanzania has not complied with this decision and no legislation measures has been taken to remedy the violation.</p>

App. No Thobias Mango and another v Tanzania	2018	1, 7, 13	Orders Tanzania to restore the rights of the applicants but declined to make direct order to release the applicant, without prejudice to the Respondent State's power to take the measure itself	Tanzania has not complied with this decision.
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