

**INVESTIGATING THE CHALLENGES IN ENFORCING
INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA: TOWARDS
AN EFFECTIVE REGIONAL SYSTEM**

by

MORRIS KIWINDA MBONDENYI

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PROMOTER: PROF ANDRÉ MBATA B MANGU

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DECLARATION

I declare that “**Investigating the challenges in enforcing international human rights law in Africa: Towards an effective regional system**” is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Morris Kiwinda Mbondenyi

Date

DEDICATION

To my mother, Mrs. Lenah Mbondenyi, whose tireless labour to make me a success will forever be engrained in my heart,

To my brothers, sisters, nephews and nieces who have constantly instilled in me a sense of belonging and the desire to reach the heights I have wanted to reach,

To my close circle of friends across the African continent and the globe; your efforts to make me a success will forever be remembered,

To all Africans- both young and old- who have relentlessly fought for democracy and human rights.

He that dwelleth in the secret place of the Most High shall abide under the shadow of the Almighty. I will say of the LORD, *He is* my refuge and my fortress: my God; in him will I trust. Surely He shall deliver thee from the snare of the fowler, *and* from the noisome pestilence. He shall cover thee with His feathers, and under His wings shalt thou trust: His truth *shall be thy* shield and buckler. Thou shalt not be afraid for the terror by night; *nor* for the arrow *that* flieth by day; Nor for the pestilence *that* walketh in darkness; nor for the destruction that wasteth at noonday. A thousand shall fall at thy side, and ten thousand at thy right hand; but it shall not come nigh thee. Only with thine eyes shalt thou behold and see the reward of the wicked. Because thou hast made the LORD, which is my refuge, even the most High, thy habitation; There shall no evil befall thee, neither shall any plague come nigh thy dwelling. For He shall give His angels charge over thee, to keep thee in all thy ways. They shall bear thee up in their hands, lest thou dash thy foot against a stone. Thou shalt tread upon the lion and adder: the young lion and the dragon shalt thou trample under feet. Because he hath set his love upon me, therefore will I deliver him: I will set Him on high, because he hath known my name. He shall call upon me, and I will answer him: I will be with him in trouble; I will deliver him, and honour him. With long life will I satisfy him, and shew him my salvation.

(Psalm 91: 1-16, King James Version)

In loving memory of my dear late father,

Lewis George Mbondenyi

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This work is to me both a reminder and commemoration of the inputs of many people. It has taken years of hard work, sacrifice and relentlessness for this doctoral thesis to be completed. Without the strength and hand of the Almighty God over my life, this work would definitely not have seen the light of the day. I am grateful to my gracious LORD for His mercy, love, strength and care; for protecting me, saving me and guiding me through every stage of this thesis. He has been the ever present help in times of trouble, my comforter, inspiration and the friend that sticks closer than a brother. This work is indeed a living testimony that the LORD is *Jehovah Jireh* and *Ebenezer* because He ordered my steps and commanded the many people and institutions that assisted me to complete this academic journey. I have come to appreciate that success comes, not by might nor by power, but by the Spirit of God (Zechariah 4:6). Indeed, if you delight yourself in the LORD, He will grant you the desires of your heart (Psalm 37:4). To Him be all the glory for ever and ever! Amen.

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Without the generous contribution of the University of South Africa (UNISA), this work may not have been completed. The university offered me a scholarship (Post Graduate Bursary) which catered for my tuition fees for the entire duration of my doctoral study. Additionally, it offered funds for the miscellaneous expenses that were incurred towards the completion of this work. The university's libraries in the Main Campus in Pretoria and Johannesburg Centre were really resourceful to me in the course of compiling this work. The vast academic resources and conducive academic environment were very essential ingredients to the successful completion of this project. More particularly, the assistance of Karen Breckon, the Search Librarian at UNISA's Main Campus library, is acknowledged. I am equally indebted to all the members of staff of UNISA who were involvement in making this study a great success.

Of similar importance to this achievement is my late father, Lewis George Mbondenyi, who desired to see the end of my academic journey. He constantly reminded me that success is my 'middle name'. I attribute a great deal of my success to his input in my life. He did not spare anything to support, care, nurture and educate me. His demise just after the completion of my bachelor's degree was a great shock, yet it did not deter me from fulfilling the dream of becoming an academic giant, even in his absence. As the Bible records 'absent in the body, present in the spirit', I believe he is presently with the great crowd of witnesses, celebrating my achievement. My achievement is his achievement; my success is his success. His name certainly deserves to accompany the 'Dr.' title that comes with the successful completion of this work.

Likewise my mother, Mrs. Lenah Nakijwa Mbondenyi, who stood by my late father to ensure my success, needs to be acknowledged. She has indeed stood her ground in good and bad times; in season and out of season, to support me through this long academic journey. May the Almighty God bless her with long life and energy to see and experience that which He has kept in store for her. In addition, I owe gratitude to my brothers and sisters, who were there for me, supported me and encouraged me to reach this far. May this work be of benefit to their sons and daughters.

Through the collaborative efforts of my many friends, relatives, teachers and colleagues, this dream has finally become a reality. Because of their optimism and constant encouragement they will forever be remembered as long as the development and completion of this study is concerned. You indeed have been a perpetual fountain of joy and encouragement to me. Special thanks go to my spiritual guardians, mentors and pastors, both in Kenya and South Africa, for their constant advice and prayers. They taught me to build on the solid foundation, which is the word of God. May God richly bless them to become a source of inspiration to many other people both now and in the generations to come.

My long academic journey began in 1984, at Meadows nursery school in Kenya, when I was still 'the timid little boy'. I then went uphill through Ganjoni Primary school and further up to Moi High School Kabarak (MHSK). Before I could figure out who I really was, it was time to leave high school and join Moi University for my Bachelors degree. I definitely did not intend to remain an academic bachelor, so I traversed the vast continent of African, in pursuit of more knowledge, all the way to the southern hemisphere for my Masters degree at the University of South Africa.

The memory of the experiences I had in all these institutions, and the people I brushed shoulders with, causes a fountain of joy to spring in my heart. It has been an uphill task all along but their constant support and encouragement kept me on course. All the schools I attended from my childhood drove in me one indelible message: 'Morris! You are destined to succeed in life!' This message has indeed kept me going against all odds. Experience has taught me to appreciate all the people God brings into my life, more particularly, the teachers, lecturers and professors who imparted in me a wealth of knowledge. It is not possible to mention everyone who contributed to the success of this work because the list is not only long but also endless.

Many institutions have also been a stepping-stone towards this end. These include the International Criminal Tribunal for Rwanda (ICTR), whose small, but resourceful, library I was able to consult when I was working at the institution as a legal researcher. Others

are: the University of Witwatersrand (Wits) library in Johannesburg, South Africa; University of Pretoria Library; University of Swaziland (UNISWA) library; and the South African Human Rights Commission (SAHRC) library in Johannesburg.

Lastly, I am greatly indebted to those writers, scholars, leaders and activists whose works have inspired me to contribute to the lives of my fellow Africans through this thesis. This study would not have attained its present status without the academic resources produced by this category of people. Their efforts and contribution to the human rights agenda in the continent cannot go unmentioned.

Morris Kiwinda Mbondenyi

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ABSTRACT AND KEY TERMS

Abstract

This study is entitled ‘investigating the challenges in enforcing international human rights law in Africa: Towards an effective regional system’. It centres around a critical research problem namely: what challenges beset regional enforcement of human rights law in Africa and how can they be addressed to ensure the effective promotion and protection of human rights in the continent? It critically reviews and revisits the discourses and scholarly arguments on the crucial issue of regional enforcement of human rights law in Africa. It traverses through historical epochs in order to explain the origins, scope and evolution of human rights law in Africa. This is done in the quest for answers to questions such as: When and how did Africa’s regional human rights system originate? What factors led to its emergence? Was the concept of human rights recognised in Africa prior to European colonial rule? What is the present status of international human rights in Africa? It therefore lays the foundations for a better understanding of the historical and philosophical origins and evolution of Africa’s regional human rights system. The study then proceeds to review the normative and institutional mechanisms established in Africa to enforce human rights at the regional level. Particularly, it highlights the roles of the African Commission and Court on Human and Peoples’ Rights in the light of their contribution to, and challenges in, the enforcement of human rights in the region. The study concludes with recommendations on the possible ways to invigorate the African human rights system. One of the key findings is that, with appropriate reforms, the system can be more effective.

Key Terms:

Human rights; African human rights system; enforcement; International human rights; African Commission on Human and Peoples’ Rights; African Union; African Court on Human and Peoples’ Rights; Pre-colonial Africa; Reforms; Challenges; Communication; African Charter; Organisation of African Unity; African Charter on Human and Peoples’ Rights.

LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACJ	African Court of Justice
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AHSG	Assembly of Head of States and Government
AIDS	Acquired Immune Deficiency Syndrome
AJIL	African Journal of International Law
AM. J	American Journal
APRM	African Peer Review Mechanism
ART	Article
AU	African Union
CAT	Convention against Torture
CAAU	Constitutive Act of the African Union
CE	Council of Europe
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CILSA	Comparative and International Law Journal of Southern Africa
CODESTRIA	Council for the Development of Economic and Social Research in Africa
COMP.L	Comparative Law
DRC	Democratic Republic of Congo
EC	Executive Council (of the African Union)
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ED(S)	Editor(s)
ESC	European Social Charter
EU	European Union
FGM	Female Genital Mutilation

GA	General Assembly
GA. Res.	General Assembly Resolution
HUM.RTS	Human Rights
IACHR	Inter-American Convention on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Covenant on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHRR	International Human Rights Report
ILM	International Legal Material
ILO	International Labour Organisation
IMF	International Monetary Foundation
INTL	International
INTL	International Law
LJ	Law Journal
LLB	Bachelor of Laws
LLD	Doctor of Laws
LLM	Master of Laws
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OSCE	Organisation for Security & Co-operation in Europe
OAU	Organisation of African Unity
P.	Page
PARA	Paragraph
PCIJ	Permanent Court of International Justice
PP	Pages

RSA	Republic of South Africa
SA	South Africa
SADC	Southern African Development Community
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAP	Structural Adjustment Programme
SAPL	South African Public Law
SAYIL	South African Year Book of International Law
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Education, Science, and Cultural Organisation
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations Children's Fund
UNISA	University of South Africa
UNISWA	University of Swaziland
UNP.	Unpublished
UNTS	United Nations Treaty Series
US/USA	United States/ United States of America
USSR	Union of Soviet Socialist Republic
V.	Versus
VOL	Volume

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background

International human rights law is recognised as a distinct branch of law with its own institutions, jurisprudence and norms.¹ Currently, it registers a tremendous positive impact on legal systems throughout the world², although this was hardly the situation years ago.³ Umozurike correctly observed that human rights appeared to enjoy low esteem during the 1970s, particularly in Africa.⁴ His observations were predicated on the overt passiveness the former Organisation of African Unity (OAU)⁵ maintained in condemning human rights violations in a number of independent African states by ‘unduly emphasising the principle of non-interference in the internal affairs of member states.’⁶

¹See Eze O, *Human rights in Africa: Some selected problems* (1984), p. 1. Eze observed that after the Helsinki Accord of 1975 on European Security, human rights issues were injected into and apparently form part of the equation of international relations.

² See generally the arguments advanced in Titus D, *The applicability of the international human rights norms to the South African legal system* (1993), pp. 2-3. Titus acknowledged that it is not until as recently as 1946 when the impact and importance of international human rights law began to be felt, particularly in Africa, but more so, in South Africa.

³ See Kirby M, ‘The role of the judge in advancing human rights by reference to international human rights norms’, (1988) 62 *Australian Law Journal*, p. 530.

⁴ Umozurike U, ‘The African Charter on Human and People’s Rights’, (1983) 77 *American Journal of International Law*, p. 902.

⁵ Established in 1963, through the OAU Charter, adopted 25 May 1963, 3 (1964) *International Legal Material*, p. 1116. For a discussion on OAU, see generally, Chanda A, ‘The Organisation of African Unity: An appraisal’, (1989), *Zambia Law Journal*, pp. 1-29; Amate C, *Inside Organisation of African Unity and its Charter* (1968); Mazzeo D (ed.), *African regional organisations* (1984).

⁶Umozurike U, ‘The African Charter on Human and People’s Rights’, note 4 above, p. 902. Umozurike expressed his disapproval of the OAU’s inability to end the culture of impunity in the continent by quoting

The massacre of thousands of Hutus in Burundi, as well as the despotic regimes of dictators Idi Amin of Uganda, Macias Nguema of Equatorial Guinea and Jean-Bedel Bokassa of the Central African Republic seem to have escaped the rather blind eye of the OAU.⁷ Indeed even events in international circles at the time were less conducive to the thriving of a robust human rights culture.⁸ For example, international law emphasised the doctrine of sovereignty of states which in a way created focus on the consolidation of political power rather than the protection and promotion of human rights.

In pursuit of sovereignty, independent states were constantly in conflict amongst themselves while the non-independent ones pursued their independence.⁹ There was therefore an upsurge of violence and by extension, violation of human rights. As a result of the need to contain this state of chaos and stem the egregious violation of human rights and the attendant culture of impunity, numerous treaties were concluded at both the global and regional levels creating mechanisms to stop impunity.

At the global level, the United Nations (UN) created, for example, reporting mechanisms in the Convention on the Elimination of All Forms of Racial Discrimination¹⁰, the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture¹¹, and more recently, the Optional Protocol to the

President Sékou Tourés' assertion that the OAU was not "a tribunal which could sit in judgement on any member state's internal affairs." He sees this attitude as a self-imposed inhibition by the OAU members, "not so much to protect their legitimate states", as to fend off international concern for gross abuses of Human rights in some African states."

⁷ Ibid.

⁸ See Mbondenyi M and Sifuna N, 'A review of procedural and jurisdictional challenges in enforcing international human rights law under the African Charter regime', (2006) *Berkeley Legal Press, Working paper No. 1869* at <http://law.bepress.com/expresso/esps/1869>, 2, last accessed on 13 June 2008.

⁹ Ibid

¹⁰ CERD, Art 14. Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965; entry into force 4 January 1969, in accordance with Article 19.

¹¹ CAT, Art 22. The procedures stipulated under this Convention are similar in a number of ways to those provided for under the CERD.

Convention on the Elimination of All Forms of Discrimination Against Women.¹² At regional levels, complaints are allowed under the European Convention on Human Rights and Fundamental Freedoms¹³, the American Convention on Human Rights¹⁴ and the African Charter on Human and Peoples' Rights.¹⁵ Some mixed-model approaches have also been initiated to overcome the weaknesses of both the international and national justice mechanisms.¹⁶

Whereas the universal system of human rights established under the UN played a vital role in the enforcement of international human rights law immediately after the Second World War, its wide geographical jurisdiction undermined its efficacy.¹⁷ Other factors such as the lack of adequate resources to accommodate the increasing number of human rights violations, the adverse effects of the cold war which pitted one nation against

¹² The United Nations General Assembly adopted the Optional Protocol in October 1999 (A/res/54/4). The Optional Protocol entered into force on 22 Dec 2000, after ten states had become parties thereto.

¹³ Arts 25-34, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. p. 222, entered into force September 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. According to this Convention, complaints could be made either through the Commission or the European Court for Human Rights. Both the Court and the Commission have their own procedures that at some point are distinct from each other.

¹⁴ See, Art 44, American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. p. 123, entered into force July 18, 1978. This Article provides that 'Any person or group of persons, or any non-governmental entity legally recognised in one or more member state of the organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a state party.'

¹⁵ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, (1982) 21 *ILM*, p. 58, entered into force October. 21, 1986; See Art 55. Arts 56 to 59 of the Charter provide further directions on how the Commission is to deal with the Communications presented to it.

¹⁶ Following a civil war in Sierra Leone, the UN Security Council adopted Resolution 1315 on 14 August 2000 requesting the UN Secretary General to start negotiations to create a Special Court to prosecute 'those most responsible for committing human rights violations' in the country during that period. On 16 January 2002, an agreement establishing the court was signed between the government of Sierra Leone and the UN. This court has adopted a statute that prosecutes both international and national crimes.

¹⁷ During this period, the UN was the key (if not the only) enforcer of human rights globally, making it practically impossible for it to effectively address all concerns on human rights violations.

another and the issue of veto powers, made it even harder for human rights to be effectively enforced at that level.¹⁸

Additionally, some states, particularly those in Africa, were not willing to accept the human rights standards established by the UN because their participation ‘in the early years of the human rights revolution was meagre.’¹⁹ It is argued that in the early years of the UN, Africa was still largely colonised. Only four African states, which were independent at that time, were founding members of the UN.²⁰ The remaining states were ‘represented’ by their colonial masters.²¹ Thus, in the drafting and adoption of the Universal Declaration on Human Rights in 1948²², so it is contended, Africans were largely un-represented.²³ Accordingly, concerted efforts towards the realisation of international human rights law led to the emergence of regional human rights systems; namely, the European²⁴, Inter-American²⁵ and African systems.²⁶

¹⁸ Mugwanya G, *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003), pp. 24-29.

¹⁹ *Ibid*, p. 26.

²⁰ *Ibid*. These were Ethiopia, Egypt, the Union of South Africa and Liberia. Egypt was admitted to the UN membership on October 24, 1945, while the Union of South Africa, Liberia and Ethiopia were admitted on November 7, 12 and 13 respectively.

²¹ Mugwanya G, note 18 above, p. 26.

²² See generally, the *Universal Declaration on Human Rights*, G.A Res. 217 (III), adopted on December 10, 1948.

²³ See Mutua M, ‘The ideology of human rights’, (1996) 36 *Virginia Journal of International Law*, p. 605.

²⁴ For detailed discussions on the European system of human rights, see generally, Higgins R, ‘The European Convention of Human Rights’, in Meron T, (ed.), *Human rights in international law: Legacy and policy issues* (1984) p. 495; Jacobs E, ‘The European Convention on Human Rights’, in Benhardt R & Jolowicz J (eds.), *The international enforcement of human rights* (1987), p. 31; Castberg F, *The European Convention on Human Rights* (1974); Morrison C, *The developing European law of human rights* (1967); Wright J, *The European Convention on Human Rights: An analysis and appraisal* (1978); Fawcett J, *The application of the European Convention on Human Rights* (1987); Beddard R, *Human rights and Europe: A study of the machinery of human rights protection of the Council of Europe* (1980); Mahoney P, ‘Speculating on the future of the reformed European Court of Human Rights’, (1999) 20 *Human Rights Law Journal*, p. 1.

²⁵ See generally, Harris D & Livingstone S (eds.), *The Inter-American system of human rights*, (1998); David S, *The Inter-American human rights system* (1997); Vander Wilt H, ‘The OAS system for the

In Africa, a number of important events persuaded the former OAU (currently African Union (AU)) to establish a regional human rights system.²⁷ These include, encouragement at the UN level for regional human rights mechanisms, NGO lobbying and the recognition by some African leaders that human rights violations in another state were also their concern.²⁸ This culminated in the adoption of the African Charter on Human and Peoples' Rights (ACHPR) by the OAU Assembly of Head of States and Government (AHSOG).²⁹

protection of human rights', in Hanski R & Suksi M (eds.), *An introduction to the international protection of human rights: A textbook* (1997); Buergenthal T, *Human rights in a nutshell* (1995); Buergenthal T, 'The advisory practice of the Inter-American Human Rights Court', (1985) 79 *American Journal of International Law*, p. 1; Shelton D, 'The jurisprudence of the Inter-American Court of Human Rights', (1994) 10 *American University Journal of International Law and Policy*, p. 333.

²⁶ See generally Ankumah E, 'Universality of human rights and the African Charter on Human and Peoples' Rights', (1992) *Universaliteit van Mensenrechten*, pp. 25-38; Benedek W, 'The African Charter and Commission on Human and Peoples' Rights: How to make it more effective', (1993) 1 *Netherlands Quarterly of Human Rights*, pp. 24-40; Busia K, 'The status of human rights in pre-colonial Africa: Implications for contemporary practices', in McCarthy E, et al (eds), *Africa, human rights, and the global system* (1994); Carver R, 'How African governments investigate human rights violations', (1988) *Third World Legal Studies*, pp. 161-83; Flinterman C & Ankumah E, 'The African Charter on Human and Peoples' Rights', in Hannum H (ed), *Guide to international human rights practice* (1992), pp. 159-69; Kiwanuka R, 'The meaning of "People" in the African Charter on Human and Peoples' Rights', (1988) 82 *American Journal of International Law*, pp. 80-101; Mutua M, 'The Banjul Charter and the African Cultural Fingerprint: An evaluation of the language of duties', (1995) 35 *Virginia Journal of International Law*, pp. 339-80; Mutua M, 'The African human rights system in a comparative perspective: the need for urgent reformulation', (1993) 5 *Legal Affairs*, p. 31; Neff S, 'Human rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the light of case law from Botswana, Lesotho and Swaziland', (1984) 33 *International & Comparative Law Quarterly*, pp. 331-47; Swanson J, 'The emergence of new rights in the African Charter', (1991) 12 *New York Law School Journal of International & Comparative Law*, pp. 307-33; Welch C, 'The African Commission on Human and Peoples' Rights: A five-year report and assessment', (1992) 14 *Human Rights Quarterly*, pp. 43-61.

²⁷ Murray R, *Human rights in Africa: From the OAU to the AU* (2004), p. 22.

²⁸ Ibid.

²⁹ Adopted 27 June 1981, 21 ILM (1982), p. 58.

With the subsequent coming into force of the ACHPR in October 1986, the essence of regional promotion and protection of human rights in Africa was thus officially acknowledged by the OAU.³⁰ Apart from guaranteeing a catalogue of rights, the Charter also provided for the establishment of their enforcement mechanism; namely, African Commission on Human and Peoples' Rights (hereinafter 'the African Commission' or 'the commission').³¹ While the inception of the African Charter was regarded as some form of recognition that human rights in one state were matters of concern to other states, it has constantly been argued that its enforcement mechanisms are not at all effective.³²

Murray, for example, noted that 'resolutions adopted by the OAU organs relating to the work of the African Commission and in the adoption of its reports have generally ...been limited to formalities....'³³ The African human rights system generally, and the African Commission in particular, therefore, have been found wanting in a number of areas.³⁴ As a result, the commission has gradually lost the favour and unique status of being the only human rights watchdog in the region which it initially enjoyed at its inception. Africa's regional human rights system has been seen not only as the least developed but also the least effective as compared with its American and European counterparts.³⁵ This is rather strange especially since the African Charter is the most widely ratified regional human rights instrument in the world.³⁶

In spite of the Charter's ratification by all the OAU/AU member states, human rights have continued to be relentlessly violated in the continent.³⁷ These violations are

³⁰ Murray R, *Human rights in Africa*, note 27 above, p. 22.

³¹ The African Commission on Human and Peoples' Rights was established in 1987 'to promote human and peoples' rights and ensure their protection.' See Article 30 of the African Charter.

³² Murray R, *Human rights in Africa*, note 27 above, p. 23.

³³ Ibid.

³⁴ Mubangizi J, 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains', (2006) 6 *African Human Rights Law Journal*, p. 147.

³⁵ Ibid, p. 148.

³⁶ Ibid.

³⁷ Hopkins K, 'A new human rights era dawns on Africa?' (2003) 18 *SAPR/PL*, p. 360.

instigated by many factors: civil strife, breakdown of states and the rise of dictatorial regimes, genocide, and the quagmires of refugee and internally displaced persons, among others.³⁸ Baimu correctly observed ‘the fact that conflicts, and the associated massive human rights violations, have continued to engulf the continent when most of the African states are bound by the provisions of the Charter indicates that the African Charter is still not taken seriously by many African states.’³⁹ To complement the African Commission, the African Court on Human and Peoples’ Rights (hereafter ‘the African Court’ or ‘the court’) was subsequently established.⁴⁰ Whether or not the court has the potential to adequately reinforce Africa’s regional human rights system is analysed in detail elsewhere in this thesis.

It is noteworthy, however, that it took a year and a half, for only two of the OAU/AU member states- Burkina Faso and Senegal- to ratify the Protocol on the Establishment of the African Court on Human and Peoples’ Rights.⁴¹ This initial response by African states is indicative of their overt resilience to impunity and a display of the incumbent laxity to uphold the commitment to human rights promotion and protection in the continent as clearly stipulated in the African Charter.⁴² While some scholars have high hopes for the court, believing it will make African leaders more conscious of their human rights obligations⁴³, others doubt that it will do much to improve a grave human rights

³⁸ See Mugwanya G, *Human rights in Africa*, note 18 above, p. 54.

³⁹ Baimu E, ‘Commission and the Court’, *Conflict Trends* No 3/2001, p. 19.

⁴⁰ See generally, Van der Mei A, ‘The new court on Human and Peoples’ Rights: Towards an effective human rights protection mechanism for Africa?’ *Leiden Journal of International law* (2005) 18/1, pp. 113-29; Heyns C, ‘A human rights court for Africa’, *Netherlands Quarterly of human rights* (2004) 22/3, pp. 325-7; Viljoen F, ‘A human rights court for Africa and Africans’ (2004) 1/30 *Brooklyn Journal of International law*, pp. 1-66.

⁴¹ Both countries ratified the Protocol in 1998. As at 15 of October 2007, 24 states had ratified the Protocol. See Magnarella, J. ‘Achieving human rights in Africa.’ 4(2): 2. [online] URL: <http://web.africa.ufl.edu/asq/v4/v4i2a2.htm>, last accessed on the 11 December 2007.

⁴² Ibid. See also the Preamble and Article 1 of the African Charter on Human and Peoples’ Rights.

⁴³ See for example, Harrington J, ‘The African Court on Human and Peoples’ Rights’, in Evans M and Murray R, *The African Charter on Human & Peoples’ Rights: The System in Practice, 1986-2000*, (2002), p. 305; O’Shea A, ‘A critical reflection on the proposed African Court on Human and Peoples’ Rights’,

situation in the continent, whose causes are primarily economic, demographic and political.⁴⁴

Some have argued that the court, given its normative and institutional frameworks, is a typical reflection of the unwillingness of the OAU/AU member states to create a powerful regional human rights mechanism that would from time to time call them to account for violations in their domestic jurisdictions.⁴⁵ These arguments are pursued further and addressed systematically in the course of this study. However, it is important to note at this juncture that the court is a timely innovation, whose establishment cannot be underrated.

An overall assessment reveals that human rights suffered a major blow within Africa during the period between the early 1970s and the late 1990s as a result of a series of coups and egregious violations of civil, political and economic rights. This was regardless of the promulgation of the African Charter and the subsequent establishment of the

(2001) 1 *African Human Rights Law Journal*, p. 285; Udombana N, 'Toward the African Court on Human and Peoples' Rights: Better late than never', (2000) 3 *Yale Human Rights and Development Law Journal*, p. 45; Mubangizi J and O'Shea A, 'An African Court on Human and Peoples' Rights', (1999) 22 *South African Yearbook of International Law*, p. 256; Mutua M, 'The African Human Rights Court: A two-legged stool?', (1999) 21 *Human Rights Quarterly*, p. 342; Naldi G and Magliveras K, 'Reinforcing the African system of human rights: The Protocol on the establishment of a regional court of human and peoples' rights', (1998) 16 *Netherlands Quarterly of Human Rights* p. 431; Stemmet A, 'A future African court for human and peoples' rights and domestic human rights norms', (1998) 21 *South African Yearbook of International Law*, p. 233; and Naldi G and Magliveras K, 'The proposed African Court on Human and Peoples' Rights: Evaluation and comparison', (1996) 9 *African Journal of International and Comparative Law*, p. 944.

⁴⁴ See generally, Dieng A, 'Introduction to the African Court on Human and Peoples' Rights', (2005) 15 *INTERIGHTS Bulletin*, p. 3; Bekker G, 'The African Court on Human and Peoples' Rights: Safeguarding the interests of African states', (2007) 51/1 *Journal of African Law*, p. 153.

⁴⁵ See these arguments in Nmehielle O, 'Towards an African court of human rights: Structuring and the court', (2000) 6/1 *Annual Survey of international and Comparative Law*, pp. 96-109; Loyds A & Murray R, 'Institutions with responsibility for human rights protection under the African Union', (2004) 48/2 *Journal of African Law*, pp. 165-86.

African Commission on Human and Peoples' Rights. The worrisome increase in human rights violations on the continent during this period provoked a number of initiatives aimed at salvaging the continent from the rising impunity.

The end of the second millennium was therefore embraced as the opportune time to reposition and set the continent on a firm path to development, peace and the respect for human rights.⁴⁶ It witnessed the emergence of new human rights institutions and initiatives, such as the New Partnership for Africa's Development (NEPAD), the African Peer Review Mechanism (APRM) and the African Court. It also provoked the restructuring of old institutions such as the OAU, which later became the African Union, to make them more attuned to the human rights tide that was sweeping the globe more intensely than before. These initiatives marked a dramatic departure from the passiveness to human rights issues previously displayed by the majority of African states. Their contribution to the advancement of human rights promotion and protection on the continent cannot be overlooked. The Constitutive Act of the African Union, for example, has more human rights provisions than its predecessor, the OAU Charter. We shall revert to this argument later.

Meanwhile, it is worthy to note, besides the emergence of new institutions and restructuring of the old ones, the continent, during this period, experienced a flood of conferences, seminars and workshops, convened to look for ways to articulate human rights in its agenda. These include: the Grand Bay (Mauritius), Kigali (Rwanda), Cairo (Egypt) and Algiers (Algeria) conferences. The Grand Bay Conference, which was the first ever Ministerial Conference on human rights in Africa, was a pointer to the direction that the OAU/AU ought to follow when articulating human rights in its agenda.⁴⁷ The

⁴⁶ See Kithure K, '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*, p. 99.

⁴⁷ This Conference was held in 1999 in Grand Bay Mauritius.

conference concluded with a Declaration and a Plan of Action that reaffirmed Africa's commitment to human rights, the rule of law, and democracy.⁴⁸

The declaration 'urges all African states to work assiduously towards the elimination of discrimination against women and the abolition of cultural practices which dehumanise or demean women and children.'⁴⁹ It also called on African states to eradicate genocide on the continent and to ratify the African Charter on the Rights and Welfare of the Child, the Protocol on the African Court on Human and Peoples' Rights, the Four Geneva conventions, the UN Statute of the International Criminal Court, and a number of other major UN human rights conventions.⁵⁰ In recognition that the promotion and protection of human rights are primarily state responsibilities, the conference called on the African states to establish and adequately fund national human rights institutions and to engage in a process of continuous dialogue with the African Commission.⁵¹

In spite of the existing and previous efforts by states, individuals, NGOs and other groups, regional enforcement of human rights in Africa is still beset with a multiplicity of challenges. This study therefore investigates the nature and scope of these challenges and recommends how they can be addressed to foster the effective promotion and protection of human rights on the continent. The study is an added voice to the clamour for a more effective regional human rights system. It reviews and assesses the existing scholarly discourses on various issues concerning the African human rights system with a view to making a contribution to existing endeavours for the invigoration and reformation of the African human rights system.

⁴⁸ CONF/HRA/DECL (1), 16 April 1999.

⁴⁹ Ibid.

⁵⁰ For a detailed discussion on this Declaration see generally, Magnarella, J. 'Achieving human rights in Africa', note 41 above, pp. 5-10.

⁵¹ Ibid.

1.2 Research problem and subject matter of the study

The subject matter of this study is ‘investigating the challenges in enforcing international human rights law in Africa: Towards an effective regional system.’ It centres on a critical research problem namely: what challenges beset regional enforcement of human rights law in Africa and how can they be addressed to ensure the effective promotion and protection of human rights on the continent? The relevance of the research problem and its implications to the millions of African people makes this study one of the most interesting, fascinating and challenging intellectual projects.

Although the African Charter has been ratified by all OAU/AU member states, human rights abuses have nonetheless increased on the continent.⁵² This is to be expected, in the light of preponderance of violence as an instrument of governance by African governments since independence.⁵³ To perpetuate these acts, many African governments employ various tactics, besides violence, to manipulate and control their citizens, especially opposition elements. Likewise, torture is still prevalent in many African states.⁵⁴

Notably, the nineteenth and twentieth centuries experienced a wave of atrocities that swept across the continent. During this period when most African states were still unshackling themselves from colonialism, while others were experiencing strife for equitable distribution of power amongst their domestic ethnic communities, human rights were grossly violated with impunity. For example, African states such as Nigeria, Kenya, Ghana, Togo, Guinea, Uganda, Malawi, Burundi, Ethiopia, Liberia, Sierra Leone, Cameroon, Sudan, and Somalia witnessed enormous repression of opposition groups and parties and various kinds of human rights abuses.⁵⁵ Besides, some of these states have

⁵² See Alemika E, ‘Protection and realisation of human rights in Africa’, in Kalu A & Osinbajo Y, *Perspectives on human rights* (1992), p. 159.

⁵³ Ibid.

⁵⁴ See generally also, Human Rights Watch, *World Report on Human Rights* (2009).

⁵⁵ See generally Human Rights Watch Africa, *The scars of death: Children abducted by the Lord’s Resistance Army in Uganda*, Report of September 1997, available at

also continued to be politically unstable because of repeated military interventions and assassination of large numbers of (unsuccessful) coup plotters.⁵⁶ One would agree with Alemika's assessment that:

The chronic and worsening conditions of human rights in Africa have produced serious political, social and economic consequences. ... The violations of political and civil rights by rulers often either include or result in the denial of the citizens of full participation in the formulation and implementation of vital policies affecting them and their society. Human rights violations, therefore, produce a vicious circle of repression, economic stagnation and regression, and political instability. The challenge therefore is how to break the vicious chain, set in motion and enliven the forces of liberation, social democracy, economic and scientific-technological advancement, and the enjoyment of the full range of human rights by everyone in every African nation.⁵⁷

The democratic wave that swept across Africa since the mid-1990s and witnessed the demise of many authoritarian regimes only minimised the practice of human rights violations; it did not abate it. There are still reports of opposition activists being jailed without trial for daring to seek level playing fields in politics; journalists being detained or sometimes forced into exile for daring to expose corruption in high places; academics being threatened with arrests for daring to write about mis-governance; workers being dismissed for attempting to unionise or to ask for better remuneration in the face of currency devaluations and inflation.⁵⁸

Between 1970 and 1998, political instability and repressions in Africa resulted in more than 30 active armed conflicts and produced more than half of all war-related deaths

<http://hrw.org/hrw/reports97/uganda/index.html>, last accessed 13 June 2008; Abdul T, 'Human rights under the Armed Forces Revolutionary Council (AFRC) in Sierra Leone- A catalogue of abuse', (1998) 10 (3) *African Journal of International & Comparative Law*, p. 481; Kwakwa E, 'Internal conflicts in Africa: Is there a right to humanitarian action?', (1994) 2 *African Journal of International Law*, p. 9.

⁵⁶ Alemika E, 'Protection and realisation of human rights in Africa', note 52 above, p. 160.

⁵⁷ Ibid.

⁵⁸ Akokpari J, 'Policing and preventing human rights abuses in Africa: The OAU, the AU & the NEPAD Peer Review', (2004) 32/2 *International Journal of Legal Information*, p. 461.

world-wide, as well as eight million refugees, returnees and other victims of forcible displacement.⁵⁹ Moreover, it was during this period when the continent witnessed genocides in the Great Lakes region of Africa, the latest of which took place in 1994 in Rwanda.⁶⁰ The situation did not get any better even after the Rwandan genocide from which many African states were expected to draw viable lessons. Instead, in the first decade of the twenty-first century, many African states were engulfed in human rights and related crises. Countries such as Sierra Leone experienced a civil war that saw many people dead and others wounded, besides experiencing other forms of gross human rights violations.

This prompted the United Nations and the government of Sierra Leone under the leadership of President Ahmed Tijan Kaba to set up the Special Court for Sierra Leone in 2002.⁶¹ Additionally, Burundi, the Democratic Republic of Congo (DRC), The Gambia, Togo, Nigeria and Liberia have also had a share of trouble in the form of civil wars, political assassinations and other forms of gross human rights violations. The situation in northern Uganda is also perturbing because there is an incessant warfare between the government and rebel forces which has, over the years, led to kidnapping of children and recruiting them as soldiers, contrary to international norms.⁶²

⁵⁹ Annan K, 'The cause of conflict and the promotion of durable peace and sustainable development in Africa: Report of the Secretary General on the work of the Organisation of African Unity', Reprinted in (1998)10 *African Journal of International and Comparative Law*, p. 549, available at <http://www.un.org/ecosocdev/geninfo/afrec/sgreport/index.html>, last accessed 12 December 2007.

⁶⁰ The aftermath of the Rwanda genocide was the loss of approximately 800,000 lives. Following the UN General Resolution 955 of 1994, the ICTR was established to prosecute the perpetrators of the genocide. For more information on the ICTR, visit www.ictj.org, last accessed on 13 June 2008.

⁶¹ The UN Security Council adopted Resolution 1315 on 14 August 2000 requesting the UN Secretary General to start negotiations to create a special court to prosecute 'those most responsible for committing human rights violations' in the country during that period. On 16 January 2002, an agreement establishing the court was signed between the government of Sierra Leone and the UN. This court has adopted a statute that prosecutes both international and national crimes.

⁶² See 'Conflicts in Africa', available at <http://www.globalissues.org/Geopolitics/Africa.asp>, last accessed on 1 March 2007.

Additionally, Sudan is in a crisis as a result of the on-going war in its Darfur region. Although talks have been initiated in a bid to end the war, human rights have continued to be violated with impunity.⁶³ Somalia, which has just emerged from a war that lasted for more than a decade, is still staggering to have a stable government in place. Clan feuds instigated by the government and rebel forces are the order of the day in that country.⁶⁴ Some countries in southern Africa have also had their share of atrocities and violations of human rights. For example, before April 1994, when the first multi-racial democratic elections were held in the Republic of South Africa, the country was shackled in the bondage of apartheid and racial discrimination.

The end of the apartheid regime was indeed good news to many who had directed their efforts and resources to end it. But even so, the new democratic government is still fighting to gain ground on the residues of this brutish legacy.⁶⁵ The government is still battling to overcome racial discrimination, xenophobia and other related intolerance. Some government policies in South Africa have also been criticised as perpetrating discrimination of certain sections of the society. More particularly, its policies and legislation concerning ‘unfair discrimination’ have been received with a lot of suspicion.⁶⁶

Zimbabwe is also placed between the rock and a hard place under the autocratic rule of its ‘founding father’, President Robert Mugabe. President Mugabe, who has been in power since 1980, has joined the ranks of the world’s worst ten dictators.⁶⁷ Although

⁶³ See generally, Human Rights Watch, *World Report 2007* (2007).

⁶⁴ Ibid.

⁶⁵ See South African Human Rights Commission, ‘Shadow Report on South Africa’s compliance with the provisions of the International Convention against all Forms of Racial Discrimination (ICERD)’ (August 2006), (*Presented to the International Committee on the Elimination of All Forms of Racial Discrimination, Geneva, Switzerland*).

⁶⁶ Ibid.

⁶⁷ Wallechinsky D, ‘The world’s ten worst dictators’, available at http://archive.parade.com/2005/0213/0213_dictator.html, last accessed 11 June 2008. Those who were listed alongside Mugabe are: Omar Al-Bashir of Sudan, Kim Jong-il of North Korea, Than Shwe of Burma,

elections are held regularly, they are never free and fair and the ruling ZANU/PF party, except in March 2008, has invariably retained political power.⁶⁸ Its human rights record is an embarrassment to the AU and the continent at large. Additionally, having adopted land policies that have largely attracted criticism from all and sundry, the country is under economic sanctions that have contributed to its high inflation rates and currency devaluation.

Today, in Zimbabwe, there is not much difference between a pauper and a millionaire because both cannot engage in any meaningful commercial transaction for the lack of commodities to buy. Moreover, the opposition in the country has been gagged and frustrated, the press censored and the judiciary reduced to a tool of oppression in the hands of the executive, just to mention a few incidents. At the moment, in spite of having lost the just concluded 2008 elections, Mugabe has refused to relinquish power in the pretext that the situation warrants a ‘run-off’ poll. It is highly suspected that, like in the previous elections, he will rig in order to retain himself in office. As a result of the deteriorating situation, many Zimbabweans have been reduced to ‘economic refugees’ in other countries, such as South Africa. The situation in the country has gradually been deteriorating from bad to worse.

Other countries in southern Africa, such as Swaziland, Lesotho, Namibia, Angola and Mozambique are recovering from either the long spells of civil wars or other forms of human rights violations. Poverty, which originates not only from the vestiges of colonialism but also from economic plunder by the post-colonial leaders, has been the hallmark of the lives of the citizens of these countries. There are countless instances of gross human rights abuses throughout the continent, which cannot be recounted here because of time constraints. Generally, the continent is still wallowing in a miasma of confusion, while trying to remain afloat in the sea of turmoil.

Islam Karimov of Uzbekistan, Hu Jintao of China, King Abdullah of Saudi Arabia, Saparmurat Niyazov of Turkmenistan, Seyed Ali KhamaneI of Iran and Teodoro Obiang Nguema of Equatorial Guinea.

⁶⁸ See ‘Zimbabwe: Is a fair vote possible?’, available at http://news.bbc.co.uk/2/hi/talking_point/debates/african_debates/798820.stm, last accessed 1 March 2007).

The complexity of the situation is that human rights violations within African states produce consequences which when carefully considered run counter to the interest of regional enforcement of human rights law. Thus, there is the need for Africans and their governments, in alliance with human rights organisations within and outside the continent to work together to create conditions for development, equity, democracy and freedom on the continent.⁶⁹ When these are attained motivations for human rights violations, instability and rebellion would likely be drastically reduced and the regional enforcement of human rights law would more likely become a reality.⁷⁰ Not only would Africa benefit from this initiative, but also the world community will advance towards the realisation of the global quest for peace and order.

On the basis of the above stated facts, it is now largely appreciated that the most effective arena for human rights protection and promotion in the continent would be the regional platform.⁷¹ However, the African human rights system has suffered great opposition and challenges. These challenges take various forms and stem from different quarters.⁷² It is therefore needful to investigate them in order to determine how they can be addressed to ensure the effective promotion and protection of human rights in the continent. What these challenges are and what should be done to overcome them is an issue worthy of scholarly investigation.

⁶⁹Alemika E, 'Protection and realisation of human rights in Africa', note 52 above, p 168.

⁷⁰ Ibid.

⁷¹ See in this regard, Benedek W & Heinz (eds.), *Regional systems of human rights protection in Africa, America and Europe: Third Afro-Americo-European Conference, Strasbourg, June 1992* (1992); Nowak M, *Introduction to the international human rights regime* (2003), p. 26; Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', in Viljoen F (ed.), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006), p. 16.

⁷² Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', (2001) 1 *African Human Rights Law Journal*, 1; Heyns C, 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal*, pp. 157-158.

1.3 Importance and aims of the study

1.3.1 Importance of the study

The main motivation for this study is to underscore and contribute towards an understanding of the challenges that beset regional enforcement of human rights law in Africa. The study is important to the extent that it will secure the future of international human rights law in the region by recommending suitable reforms that would help to surmount the challenges. Thereby, it will contribute to legal certainty, and, hopefully, assist states to bring their human rights practices in line with international standards. This is because, the level of human rights compliance at the national level influences their enforcement at the regional level. For instance, because of their lack of commitment to human rights protection at the national level, many African governments and their agencies have acted and continue to act in ways that are inconsistent with their obligations as stipulated in the various international human rights treaties.⁷³

This situation therefore calls for an in-depth study and investigation of the African human rights system— its institutional and normative mechanisms— and its challenges, in order to give meaning to human rights law in Africa. Moreover, the steps taken, problems encountered as well as the prospects and opportunities for the regional enforcement of human rights law in Africa will be illuminated. In this regard, the historical dimensions of human rights law and its enforcement mechanisms instituted in Africa, particularly at the regional level, will be the most important part of the inquiry. As Umozurike argued, ‘an appreciation of the development of human rights in different societies calls for the study of history ...’⁷⁴

The study therefore traverses through historical epochs in order to explain the origins, scope and evolution of human rights law in Africa. This analysis would help to uncover the challenges as well as emphasise the future prospects in enforcing human rights in the region. One of its objectives is to prepare the future, although it is not to offer a blueprint,

⁷³ Mugwanya G, *Human rights in Africa*, note 18 above, p. XV.

⁷⁴ See Umozurike U, *The African Charter on Human and Peoples’ Rights* (1997), p. 1.

to the effective regional enforcement of human rights law in Africa. While research on challenges in enforcing international human rights law has been undertaken, this has concentrated mainly on the universal,⁷⁵ Inter-American⁷⁶ and European human rights systems.⁷⁷

More studies need to be conducted on the African human rights system, not only with regard to its enforcement mechanisms, but also to the general challenges it encounters in the course of enforcing its human rights norms. This, however, is not to say that no study has been conducted on the inadequacies of the African human rights system. It only intimates a further intense study, which will not only shed some light on the current human rights trends and challenges in Africa, but also bring to the limelight those that might have not been properly underscored in previous studies.

A comprehensive study on the challenges in regional enforcement of human rights law in Africa is also important particularly in light of the fact that the continent seems to lack, well established and effective enforcement mechanisms, yet it accounts for a large number of the egregious human rights violations in the world. Africa stands poised between hope and despair because of the gap that exists between the recognition of human rights and their enforcement in the region.⁷⁸ The system needs to strive to surmount certain challenges that undercut its effectiveness.⁷⁹

⁷⁵ See, for example, Robertson H & Merrills J, *Human rights in the world* (1996); United Nations, *The United Nations & human rights 1945-1995* (1996); Alston P, *The United Nations and human rights* (1992); Hannum H (ed), *Guide to international human rights practice* (1999).

⁷⁶ See, for example, Pasqualucci J, 'Advisory practice of the Inter-American Court of Human Rights: Contributing to the evolution of international human rights law', (2002) 38/2 *Stanford Journal of International Law*, pp. 241-288; Harris & Livingston (eds.), *The Inter-American system of human rights* (1998); Shelton D, 'Improving human rights protections: recommendations for enhancing the effectiveness of the Inter-American Commission and Inter-American Court of Human Rights', (1998) 3/ *Fall American University Journal of International Law and Policy*, pp. 323-37; Buergenthal T, 'The OAS and the protection of rights', (1988) 3 *Emory Journal of International Dispute Resolution*, pp. 1-24.

⁷⁷ See Clements, Mole & Simmons, *European human rights: Taking a case under the Convention* (1999); Mowbray A, *Cases and materials on the European Convention on Human Rights* (2001).

⁷⁸ Mugwanya G, *Human rights in Africa*, note 18 above, p 343.

Accordingly, the study critically reviews and revisits the discourses and scholarly arguments on the crucial issue of regional enforcement of international human rights law in Africa. In the process, the study is expected to be thought provoking, stimulating and an added voice to the scholarly clamour for an effective regional human rights system. It is hoped that this study will incite African states and scholars to critically reflect on ways to improve the regional enforcement of human rights law in the continent. It builds on what already exists with the hope that it will not quench the reforms debate.

This study is also important in that it contributes to the development of better knowledge and understanding of the African human rights system. As stated earlier, the African human rights system is the youngest and least developed of the three regional human rights systems in the world. Additionally, there have been various contradictory perceptions on the system, which need to be reconciled through a comprehensive study. As Joiner observed, when the African Charter was adopted and the commission established, Africa was the continent with the worst human rights records in the world.⁸⁰ Although this position might not have changed significantly, particularly at the national level, it must be appreciated that the regional human rights landscape has drastically changed.⁸¹

Some developments of historical proportions have taken place on the regional human rights landscape with the likelihood of impacting the future of Africans. For example, the Organisation of African Unity (OAU) has since been replaced by the African Union (AU). Further, in July 2002 the New Partnership for Africa's Development (NEPAD) was inaugurated and was later joined by its linchpin, the African Peer Review Mechanism (APRM), in February 2004.⁸² In January 2004, the Protocol to the African Charter on

⁷⁹ Ibid.

⁸⁰ Joiner J, 'Beyond commitments, towards practical action', in Sall E & Wohlgenuth L (eds.), *Human rights, regionalism and the dilemmas of democracy in Africa*, (2006), p.19.

⁸¹ Ibid. See also generally the argument in Mangu A, 'The Changing human rights landscape in Africa: Organisation of African Unity, African union, New Partnership for Africa's Development and the African Court', (2005) 23/3 *Netherlands Quarterly of Human Rights*, p. 380.

⁸² Ibid.

Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights came into operation.⁸³ These developments have created challenges and opportunities for the enhancement of human rights on the continent which need to be unearthed through a study of this magnitude.

The study is also important in that it will lead to a better understanding and appreciation of the fact that protection and respect for human rights are *sine qua non* for development, peace and African renaissance. Democratisation and development in Africa are untenable without respect for human rights. In fact, human rights violations have been the main cause of the governance crises on the continent and the impediment to the much anticipated African renaissance. Because respect for human rights is a prerequisite for peace, development and African renaissance, the effective enforcement of international human rights law would serve as evidence that African leaders are committed to good governance. The prospects for peace and development on the continent would be bleak without the effective enforcement of international human rights law at the regional level.

1.3.2 Aims of the study

As the title indicates, this study aims at investigating the challenges in enforcing international human rights law in Africa. It seeks to unveil what has been hindering the effective enforcement of human rights in the region. Specifically, the study aims at underscoring a number of concerns that fall within the scope of its subject matter. First, it aims at analysing the philosophical and historical foundations of human rights in Africa. This is essential because, as shall be discussed later, human rights have been said to be foreign and irrelevant in Africa and to Africans. Appreciating that human rights are relevant to Africa, and indeed not foreign to Africans as purported in certain quarters, will therefore go a long way to emphasise the need to strengthen their enforcement on the continent, particularly at the regional level.

⁸³ See the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples Rights, adopted 10 July 1998, entered into force on 25 January 2004.

Secondly, this study aims to unveil the theoretical and historical origin and development of the African human rights system. As shall be shown in chapter two of this study, the system is a product of prolonged negotiations and activities that took place over a long period of time. It is therefore imperative to underscore the journey taken to bring the system to its present status. This will also enable us to gauge whether or not the system is progressing or retrogressing. Thirdly, the study aims to review the normative and institutional mechanisms of the regional human rights system. Notably, at the centre of the debate on the challenges to the effectiveness of the system lies the alleged inadequacy of its normative and institutional mechanisms.⁸⁴ Further, the study aims at investigating the challenges in enforcing human rights law in Africa at the regional level. Finally, the study aims to recommend possible ways on how to deal with the challenges in enforcing human rights under the African system in order to constitute an effective regional human rights system.

1.4 Scope and limitation of the study

As already emphasised, this study is on the challenges in regional enforcement of human rights law in Africa, with the particular aim of proposing suitable reforms to the regional human rights system. Notably, despite the adoption of the African Charter by the OAU Assembly of Heads of State and Government in 1981, and its subsequent entry into force in 1986, the demand for the reform of the African human rights system began within five years of the existence of the Charter.⁸⁵ This demand has been motivated by, among other factors, the inadequacy or inherent normative flaws of the Charter and the lack of effective enforcement institutions.⁸⁶ In the course of this study therefore, three major

⁸⁴ See the arguments advanced in, among others, Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 72 above, p. 1; and Heyns C, 'The African regional human rights system: In need of reform?', note 72 above, pp. 157-158.

⁸⁵ See Mutua M, 'The African human rights system in a comparative perspective,' note 26 above, p. 7; Anthony A, 'Beyond the paper Tiger: The challenge of a human rights court in Africa,' (1997) 32 *Texas International Law Journal*, p. 518; Buergenthal T, *International human rights* (1995), p. 234.

⁸⁶ Anthony A, *ibid*, p. 518.

periods that mark the history of Africa— pre-colonial, colonial and post-colonial— shall be of great essence.

This is in recognition of the fact that human rights, which are entitlements that accrue to all people by virtue of being human, were also known on the continent even prior to colonialism.⁸⁷ They were observed and even violated in pre-colonial Africa just like in any other continent.⁸⁸ To explain the extent of the inculcation of human rights in the political, social and economic lives of a people, it is therefore necessary to have recourse to their cultural, traditional and religious history.⁸⁹ The controversial debate on the existence of human rights as a concept in pre-colonial Africa hinges on another controversial subject: whether law existed during this period.⁹⁰

Some Western scholars disputed the existence of law and human rights in pre-colonial Africa.⁹¹ To them, pre-colonial societies were lawless and savage. This has been attributed to the historical obscurity given to Africa by early Western historians.⁹² Hegel, for example, in his *Philosophy of History* ignorantly positioned Africa outside history and

⁸⁷ See generally the arguments advanced in Mbondenyi M, ‘The potential of Taita customary law in the promotion and protection of human rights in Kenya: A critical survey’, (2003) *LLB Dissertation: Moi University*, pp. 13-15.

⁸⁸ Mutua M, ‘The African human rights system in a comparative perspective,’ note 26 above, p. 7.

⁸⁹ Umozurike U, *The African Charter on Human and Peoples’ Rights*, note 74 above, p. 1.

⁹⁰ Nmehielle O, *The African human rights system* (2001), p 7.

⁹¹ See Howard R, ‘Group versus individual identity in the African debate on human rights’, in An-na ‘im A & Deng F, (eds.), *Human rights in Africa: Cross-cultural perspectives* (1990), p. 159; Howard R, ‘Evaluating human rights in Africa: Some problems of implicit comparisons’, (1984) 6 *Human Rights Quarterly*, p. 160; Donnelly J, ‘Human rights and Western liberalism’, in An-na ‘im A & Deng F (eds.), *Human rights in Africa: Cross-cultural perspectives, supra*, p. 159; Donnelly J, *Universal human rights in theory and practice* (1989).

⁹² Nmehielle O, *The African human rights system*, note 90 above, p 7.

civilisation.⁹³ This positioning is not correct because there is ample historical evidence that depicts Africa as the cradle of mankind and civilisation.⁹⁴

Nmehielle correctly pointed out that the lack of recognition of the existence of law in early African societies could be attributed to the fact that African societies in the pre-colonial era were traditional in nature, governed by custom.⁹⁵ Thus, he argued that nineteenth century scholars tried to distinguish between custom and law.⁹⁶ Accordingly, custom was absolutely rigid, and obedience was ensured by the overwhelming power of group sentiment which found fortitude in magic.⁹⁷ Under such circumstances, ‘it was impossible to make any distinction between legal, moral or religious rules, which were all interwoven into the single rule of customary behaviour.’⁹⁸

The study of human rights in Africa during the pre-colonial period is therefore an essential component of this research since the realisation of respect for human rights in Africa depends, to a large extent, on how the historical and philosophical foundations of the concept are perceived. It is therefore needless to emphasise that:

We are in an era in Africa where there is the need to emphasise that the accountability that existed in governance in the pre-colonial era should be observed by the present African leadership. The writing off of African pre-colonial societies as primitive, pre-capitalist societies without any notion of the concept of human rights will only go to defeat the present African struggle to achieve a greater degree of respect for human rights and good governance.⁹⁹

⁹³ See this argument in ‘Alternative histories and non-Written sources: New perspectives from the South’ (Proposal for an International Seminar organised by the South-South Exchange Programme for Research on History of Development (SEPHIS), Amsterdam, at La Paz, 12-15 May 1999).

⁹⁴ See in this regard, Diop A, *The African origin of civilisation: Myth or reality?* (1974).

⁹⁵ See Nmehielle O, *The African human rights system*, note 90 above, p. 7. See also, Eze O, *Human rights in Africa: Some selected problems*, note 1 above, p. 10.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Lloyd *Introduction to jurisprudence* (1972), p. 566.

⁹⁹ Nmehielle O, *The African human rights system*, note 90 above, pp 16-17.

This study shall also indulge in a broad discussion on the nature of human rights in colonial Africa, emphasising the specific systems and mechanisms of colonial administration adopted by the various European powers. The major colonial systems that will be examined are: British, Belgian and French. The study of human rights in colonial-Africa is of great importance because:

The relative dignity and human value enjoyed by Africans in the pre-colonial era became negatively impacted by colonialism as an aspect of foreign intervention in Africa. ...Also, colonialism presented an enormous potential for the plunder, abuse misrule and mistreatment of African natives without much check.¹⁰⁰

The effects of the occupation of Africa by the colonialists were varied and depended on the practice of the particular power.¹⁰¹ Generally, however, there was an attempt at total annihilation of the African customary legal order.¹⁰² Accordingly, the slave trade and colonialism had such a devastating effect on human rights that it required decades of redemptive work to revive the tradition of respect for human rights in Africa.¹⁰³ The colonial period witnessed a systematic subjugation and exploitation of the African people for the benefit of the European metropolitan powers.¹⁰⁴ Tendentious treaties were extorted from African rulers, in some cases by sheer military force.¹⁰⁵

Further, the study shall examine the status of human rights in post-colonial Africa. It should be recalled that the process of decolonisation which gathered momentum after the Second World War had both negative and positive repercussions on the human rights

¹⁰⁰ Nmehielle O, *The African human rights system*, note 90 above, pp 17 -18.

¹⁰¹ See Eze O, *Human rights in Africa*, note 1 above, p 14.

¹⁰² Nmehielle, *The African human rights system*, note 90 above, p. 18.

¹⁰³ Umzurike U, 'The significance of the African Charter on Human and Peoples' Rights', in Kalu A & Osinbajo Y, (eds.), *Perspectives on human rights* (1992), p. 44. See also Umzurike U, *International law and colonialism in Africa* (1979); 'International law and the African slave trade, (1971) 16(2) *Howard Law Journal*, pp. 334-349.

¹⁰⁴ Nmehielle, *The African human rights system*, note 90 above, p. 18.

¹⁰⁵ See Ayittey G, *Africa betrayed*, (1992), p. 83.

situation in Africa.¹⁰⁶ The early sixties, for example, saw a large number of colonies emerging as ‘independent’ political entities.¹⁰⁷ The fight for independence was predicated on a fundamental human rights principle that rejected foreign domination of nations and peoples and emphasised the right to self-determination.¹⁰⁸ These newly emerging states, which were eager adherents to the UN Charter as well as to other international instruments,¹⁰⁹ intended to enhance the promotion and protection of human rights.¹¹⁰ As Eze rightly observed:

In spite of the adherence to and apparent commitment to the protection of human rights, the experience in most African countries ranges from anarchy to modest progress in the field of human rights protection and promotion. For the most part a gap exists between declaration and actual practice.¹¹¹

Although this observation was made in the early eighties, it is still a reality in Africa today. The position is vindicated by the ongoing atrocities in some parts of the continent such as in Sudan, DRC, Sierra Leone and Somalia, to mention but a few examples. Most of these states have signed or ratified international human rights treaties, whose provisions they have been violating with impunity. This, in a way, puts to question their commitment to human rights. This study’s analysis of the place and status of human rights law in post-colonial Africa will therefore include the emergence of institutions and mechanisms such as the OAU, AU, NEPAD, APRM and the African Commission and Court on Human and Peoples’ Rights. Other instruments and mechanisms that influence regional enforcement of human rights in Africa will also be examined.

¹⁰⁶ Eze O, *Human rights in Africa: Some selected problems*, note 1 above, p. 23.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Such as International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted by General Assembly Resolution 2200 (XXI) of 16 December 1966. The former entered into force on 23rd March 1976 and the later on 3rd January 1976. See UNDOC. ST/HR/1, pp. 1 & 8.

¹¹⁰ Eze O, ‘Prospects for international protection of human rights in Africa’, (1974) Vol. V/1 *The African Review*, p. 82.

¹¹¹ Eze O, *Human rights in Africa: Some selected problems*, note 1 above, p 23.

While the study will analyse the three periods mentioned above, it must be noted that the historical survey will not be very detailed because any attempt towards that end would make the study gigantic and impossible to complete. The historical survey will be limited to those aspects of Africa's history that would assist in highlighting the challenges in enforcing international human rights law in Africa. Additionally, the research topic confines the scope of the study to specific parameters of the vast human rights law discipline. The key focus areas are 'challenges', 'enforcement' and 'the African system.' International human rights law is a multi-dimensional discipline, encapsulating vast procedural, jurisdictional and institutional parameters. It can be enforced both nationally and internationally.

To conduct research on all the existing national and international mechanisms for the promotion and protection of human rights law would therefore be both a formidable and monumental task. Thus, the research is confined to the African human rights system and shall not endeavour to examine the enforcement of international human rights law at the national jurisdiction. Further, even though the study shall concentrate on the African human rights system, it is not possible to review all its normative and institutional mechanisms herein. As a result, our focus shall be limited to the African Charter on Human and Peoples' Rights and its enforcement mechanisms—the African Commission and Court. Other institutional and normative mechanisms shall be highlighted to the extent of their relevance to the scope and subject matter of the present study.

Arguably, Africa's human rights discourse has assumed a new dimension with the adoption of the African Charter,¹¹² and the establishment of the African Commission and Court. Some commentators saw the African Charter as impressive and unique in its provisions, and as breaking new grounds in the area of peoples' rights and the incorporation of economic, social and cultural rights, as well as other such progressive

¹¹² African Charter on Human and Peoples' Rights, adopted 27 June 1981 in Nairobi, Kenya, OAU, Doc. CAB/LEG/67/3, Rev 5, reprinted in (1981)21 *ILM*, p. 59.

provisions.¹¹³ This notwithstanding, it is important to illuminate the areas this normative instrument and its enforcement mechanisms are lacking in order to have the basis on which to propose suitable reforms.

In the course of reviewing these normative and institutional mechanisms, it is expected that a number of difficulties might be encountered. In the main, the ongoing developments in Africa, generally, and the African human rights system, in particular, may affect some of the findings in this study. The continent and its human rights system have not been static. The system has been evolving with time and new institutions and norms are being initiated in order to facilitate its efficiency. In such circumstances, it may be quite difficult for some of the findings to be as accurate as in, for example, a study where all factors remain constant. By extension, the evolution of the existing institutions and norms, as well as the emergence of new ones, could also impact on some of our recommendations.

Further, there is the ongoing debate on the merger of the African human rights court with the AU's Court of Justice. Whatever recommendations are made in this study may be affected by the outcome of the proposed merger. Again, the African human rights court is still busy with the drafting of its rules of procedure. It is believed that the drafting process is at an advanced stage and the rules could be published and adopted any time soon. Additionally, the court is yet to assume its seat in Arusha, Tanzania. This of course may also have some implications on its initial operations and, by extension, may affect the findings and recommendations of this study one way or the other.

¹¹³ See Benedek W, 'Peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights', in Kunig P, Benedek W & Mahalu C (eds.), *Regional protection of human rights by international law: The emerging African system* (1985), p. 59; Umozurike U, *The African Charter on Human and Peoples' Rights*, note 74 above, pp. 87-96; Odinkalu C, 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights', in Evans M & Murray R, *The African Charter on Human and Peoples' Rights: The system in practice*, note, 43 above, p. 185.

1.5 Justification of the study

The research consists of different components which together form a very interesting subject worthy of scholarly justification.

1.5.1 Justification for ‘investigating challenges’

The ineffectiveness of the African human rights system is deep-seated and without a thorough investigation into the challenges besetting it, it would absolutely be too ambitious for scholars to recommend suitable reforms. An ‘investigation’ principally involves an examination or an inquiry into something (or the cause of something).¹¹⁴ In the case of this study in particular, the investigation calls for an inquiry into the challenges besetting the regional enforcement of human rights in Africa.

‘Challenges’ in the context of this study refers to the setbacks and hurdles Africa faces (or has been facing) in its quest for an effective regional human rights system. These challenges may be historical, political, social, economic, institutional, and normative, among others. On the political plane, there is the general reluctance on the part of states to submit to international supervision or adjudication. This attitude has led them to cling to the principle of state sovereignty and its counterpart, the ‘non-interference with internal affairs’ doctrine. By virtue of these two concepts, and despite the recent developments in the regional system, Africa still lags behind in the regional enforcement of human rights.

It is thus necessary to examine the causes of Africa’s unsatisfactory progress in this field and ascertain to what extent the challenges can be eliminated or their effects minimised. In examining these issues, the relevance of conflicting ideologies, the dependence of African states, the low level of interaction between them and underdevelopment, assume an all-important role. The enforcement of human rights with undue regard to other social,

¹¹⁴ See Hornby A, *An English-reader’s dictionary* (1982), p 219.

political and economic factors may in some cases be counter-productive.¹¹⁵ Human rights are not an end unto themselves but a means to protect human dignity. Any attempt to investigate the challenges to their enforcement is therefore justified.

1.5.2 Justification for studying enforcement of international human rights law in Africa

Human rights enforcement takes place at two levels— national and international. As stated earlier, the national level, by the very nature of its organisation, is better equipped and placed to ensure that human rights are effectively enforced. However, the need for international (or regional) enforcement arises because the existing agencies, policies and laws in many states have most often proved inadequate or the state authorities have altogether abandoned their roles as defenders or protectors of human rights.

The failure of African states to enforce or even respect human rights in their respective national jurisdictions was the cause for the search for international human rights mechanisms on the continent.¹¹⁶ With the liberation of Sub-Saharan Africa, there were high hopes for the promotion and protection of human rights and for the restoration of African dignity; however, the hopes never materialised.¹¹⁷ As human rights protection at the national level worsened, counter-forces emerged to instigate their enforcement at the regional level. These efforts could be traced to the early 1960s, when the first inter-African lawyers meeting took place to discuss the possibility of evolving a workable regional human rights system for the continent.¹¹⁸

This study of human rights enforcement under the African human rights system is therefore justified by the fact that since most African states have either ignored or altogether neglected their obligation to promote and protect human rights in their

¹¹⁵ Baah R, *Human rights in Africa* (2000), p 90.

¹¹⁶ Sall E & Wohlgemuth L (eds.), *Human rights, regionalism and the dilemmas of democracy in Africa* (2006), p. 4.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

respective national jurisdictions, the regional human rights system must be strengthened by all means possible to alleviate the human rights crisis that is already affecting the continent adversely. As Mugwanya correctly noted:

States have the obligation of giving effect to human rights, but inter-governmental instruments, institutions, mechanisms, structures and procedures at the global and regional levels are indispensable as a last resort or safety net for individuals when governments fail to respect international human rights norms.¹¹⁹

1.5.3 Justification of the aim of addressing the challenges: ‘Towards an effective regional system’

The African human rights system has not been static since its establishment.¹²⁰ It has been, as it still is, in the process of transformation. However, to date changes within the system, though significant, remain minimal.¹²¹ The essence of an extensive study on challenges to effective enforcement of international human rights law in Africa is therefore to give direction and recommendations on how the system could possibly be reformed. This component of the research is also indicative of the fact that the system is dynamic and directional.

The world system to which Africa belonged in the early 1980s when the African Charter was promulgated was different from the one today. A lot has happened that has altered or affected both the objective material conditions and subjective factors such as values and relations among people and nations.¹²² Likewise, the African human rights system has undergone a multi-dimensional evolution since its establishment. As Gutto rightly observed:

¹¹⁹ Mugwanya G, *Human rights in Africa*, note 18 above, p. xvi.

¹²⁰ See Gutto S, ‘The reform and renewal of the African regional human rights system’, (2001) 2 *African Human Rights Law Journal*, p. 175.

¹²¹ *Ibid.*

¹²² *Ibid.*, p. 181.

Every social institution, like every living organism, undergoes changes necessitated either by subjective self-will and initiative or by objective circumstances and pressures lying outside of the social institution or living organism itself. The point is therefore not whether reform or change is desirable. The question to be asked relates to the extent of the change and whether the reform or change embarked upon leads to the renewal and reinvigoration of the institution, or to degeneration and ruin.¹²³

Gutto's observations find support in the positive developments registered in Africa since the establishment of the African human rights system. Over the years, there has been evidence of an approach towards incorporating human rights in the activities, declarations and resolutions of the OAU/AU.¹²⁴ This reflects the will to entrench human rights in the continent's agenda. Unfortunately, the same degree of attention has not been paid to the enforcement of these standards in practice.¹²⁵

The transformation of the OAU to AU was a positive step towards strengthening human rights promotion and protection in the region. The AU is keener on human rights than the OAU. The provisions of its Constitutive Act attest to this fact. These provisions, which shall be discussed more extensively elsewhere in this thesis, are a sign of the apparent change of perception on human rights issues by African leaders. The Act also makes provision for a number of organs and institutions that will eventually ensure that human rights are adequately protected, promoted and enforced in the region.¹²⁶ Additionally, through its NEPAD and APRM initiatives, the AU has tried to showcase its commitment to human rights promotion and protection in the region.

¹²³ Ibid, p. 175.

¹²⁴ Murray R, *Human rights in Africa: From the OAU to the African Union*, note 27 above, p. 267.

¹²⁵ Ibid.

¹²⁶ See the Constitutive Act of the African Union, Article 5 (a) – (i). These organs include the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representative Committee (PRC), the Specialised Technical Committees (STCs), the Economic, Social and Cultural Council and the Financial Institutions.

In the journey ‘towards an effective regional system’, positive progress has been registered through the establishment of the African Court. The clamour for a regional court for the protection of human rights has been going on for long.¹²⁷ However, some African states not only resented the idea of a court that would challenge their judicial sovereignty but also sought the excuse that African culture gave reconciliation primacy over judicial settlement of disputes.¹²⁸ This notwithstanding, it was inevitable that a court would eventually be created. The adoption of its Protocol on 9 June 1998 and its entry into force on 25 January 2004 were, therefore, major steps towards reinforcing the African human rights system.¹²⁹

On 2 July 2006, during the meeting of the AU Assembly of Heads of State and Government, the first eleven judges of the African Court were sworn in.¹³⁰ Since then, the court has held several meetings that have dealt with drafting its rules of procedure, as

¹²⁷ See Kannyo E, *Human rights in Africa: Problems and prospects*, note 26 above, pp. 17-18; Lindholt L, *Questioning the universality of human rights: The African Charter on Human and Peoples Rights in Botswana, Malawi and Mozambique*, note 43 above, p. 73; Benedek W & Heinz (eds.), *Regional systems of human rights protection in Africa, America and Europe: Third Afro-Americo-European Conference*, note 71 above.

¹²⁸ Dieng A, ‘Introduction to the African Court on Human and Peoples’ Rights’, note 44 above, p. 3.

¹²⁹ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, OAU Doc OAU/LEG/EXP/AFCHPR/ PROT (III), available at <http://www.achpr.org>, last accessed 12 June 2008, and reprinted in *inter alia*, Evans M & Murray R (eds.), *Documents of the African Commission on Human and Peoples’ Rights*, (2001). The Protocol was signed in June 1998 and, 30 days after the requisite 15th ratification (Art 34 (3) of the Protocol) by the Union of the Comoros on 26 December 2003, it entered into force on 25 January 2004.

¹³⁰ They are: Mr. Fatsah Ouguergouz (Algeria) (elected for a 4 year term), Mr. Jean Emile Somda (Burkina Faso) (2 year term) Mr. Gerard Niyungeko (Burundi) (6 year term), Ms Sophia Akuffo (Ghana) (2 year term), Mrs. Kelello Justina Masafa-Guni (Lesotho) (4 year term), Mr Hamdi Faraj Fanoush (Libya) (4 year term), Mr. Modibo Tounty Guindo (Mali) (6 year term), Mr. Jean Mutsinzi (Rwanda) (6 year term), Mr. El Hadji Guisse (Senegal) (4 year term), Mr. Bernard Ngoepe (South Africa) (2 year term), Mr. George Kanyiehamba (Uganda) (2 year term). See Viljoen F (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights*, note 71 above.

well as discussing its budget and possible location.¹³¹ The issue of the location of the court is itself a challenge because of the intended complementarity between it and the African Commission.¹³² This issue shall be revisited later when we examine the court in detail.

The mere establishment of the regional court, however, is no guarantee of success. An effective human rights protection mechanism requires more, such as the accessibility of the court to victims of human rights violations, independent and impartial judges who are willing to give human rights maximum effect, financial resources that enable it to fulfil its tasks adequately, and enforceability of its judgments.¹³³ In other words, the court is expected to overcome the inherent flaws or weaknesses associated with the African Commission. Some commentators have rightly warned that the court will have no or only minimal added value if it were to suffer from the same or comparable shortcomings as the commission.¹³⁴

¹³¹ Murray R, 'Human rights news: Africa', (2007) 24/4 *Netherlands Quarterly of Human Rights*, p. 656.

¹³² This is in view of the fact that the court has been established to complement the commission. See the last Preambular paragraph of the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights.

¹³³ Murray R, 'Human rights news: Africa', note 131 above, p. 656.

¹³⁴ See, for example, Harrington J, 'The African Court on Human and Peoples' Rights', in Evans and Murray, note 43 above, p. 305; O'Shea A, 'A Critical reflection on the proposed African Court on Human and Peoples' Rights', note 43 above, p. 285; Udombana N, 'Toward the African Court on Human and Peoples' Rights: Better late than never', (2000) 3 *Yale Human Rights and Development Law Journal*, p. 45; Mubaggizi J and O'Shea A, 'An African Court on Human and Peoples' Rights', (1999) 22 *South African Yearbook of International Law* p. 256; Mutua M, 'The African Human Rights Court: A two-legged stool?', (1999) 21 *Human Rights Quarterly* p. 342; Naldi G and Magliveras K, 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights', (1998) 16 *Netherlands Quarterly of Human Rights* p. 431; Stemmet A, 'A future African court for human and peoples' rights and domestic human rights norms', (1998) 21 *South African Yearbook of International Law* p. 233; and Naldi G and Magliveras K, 'The Proposed African Court on Human and Peoples' Rights: Evaluation and comparison', (1996) 9 *African Journal of International and Comparative Law*, p. 944.

The process of establishing the court has been slow and somewhat encumbered with some challenges. These challenges are discussed comprehensively elsewhere in this thesis. However, it took until 25 January 2004 (that is, longer than five years) to ensure the fifteen ratifications required for the entry into force of the Protocol.¹³⁵ This is not very encouraging, given the fact that its creation was mooted for more than thirty years.¹³⁶ This suggests that the African system still has some weaknesses, failures and challenges that need to be addressed with a sense of urgency for human rights enforcement to become more effective.

However, despite its apparent weaknesses, failures and challenges, the system has made some positive contributions to the international human rights law domain. What is now left is to ensure that the human rights principles and standards already laid down are accompanied with adequate institutional support and effective enforcement mechanisms. The existing institutional and normative mechanisms also need to be strengthened or reinvigorated. This invites all the stakeholders and role-players to embark on the journey ‘towards an effective regional system.’

This can only be achieved through a thorough study of the weaknesses, strengths and possible ways to reinvigorate the African system. Direction and movement are very crucial aspects which could only be ignored to one’s peril.¹³⁷ The same could be said of this study, which evaluates the direction the African human rights system has taken, how far it has gone since its inception and the distance that is left to complete the journey towards its effectiveness.

¹³⁵ Viljoen F (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights*, note 71 above, p. iii.

¹³⁶ Sall E & Wohlgemuth L (eds.), *Human rights, regionalism and the dilemmas of democracy in Africa*, note 116 above, p. 4.

¹³⁷ Mangu A, ‘The Road to Constitutionalism and Democracy in Post-Colonial Africa: The case of the Democratic Republic of Congo’ (2002), *LLD Thesis University of South Africa*, p. 21.

1.6 Literature review

Any attempt to review the existing literature on the African human rights system is a formidable task, given the numerous articles, papers, reports and books that have been written on various aspects of this subject in the past decades. This subject has drawn scholarly interests from many perspectives and disciplines including international law, international relations, sociology and political science, among others. This section will therefore highlight the features and major trends in the reviewed literature and as far as is practicably possible, point to the neglected questions or questions insufficiently addressed in the literature.

1.6.1 The features and major trends in the reviewed literature

The present research identified the features and major trends in the literature which can be a useful basis upon which the study could be conducted. The first feature relates to the disagreement among scholars on the proper definition and perhaps the scope of the African human rights system. The conventional discourse of the African human rights system is torn between two conceptions. Gutto argued that a distinction should be made between the broader African human rights system and the narrower African Charter system.¹³⁸

According to Gutto, the reason for this distinction ‘rests on the fact that there are a number of African regional human and peoples’ rights instruments or generalised instruments that incorporate important rights issues but which do not fall directly within the promotion and protection mandates of the commission’.¹³⁹ Thus, whereas the African Charter system centres around two enforcement institutions; namely, the African

¹³⁸ Gutto S, ‘The reform and renewal of the African regional human and peoples’ rights system’, note 120 above, p. 176.

¹³⁹ Ibid, p. 176.

Commission and Court, the African human rights system goes beyond to include the political institutions and other organs created under the AU.¹⁴⁰

Odinkalu, on the other hand, contended for a much broader definition of the African human rights system.¹⁴¹ According to him, the system encapsulates not only regional human rights mechanisms but also supra-national, pan-continental systems and mechanisms and the domestic legal systems in Africa.¹⁴² This depiction, however, is overbroad and misleading. This is because, whereas supra-national and domestic systems in Africa may enforce regional human rights norms, the regional system cannot enforce supra-national or domestic laws. It may only enforce the human rights norms created under it.

The second feature of the discourse is its overall Afro-pessimism and Euro-centrism. The literature is Afro-pessimistic in the sense that Africa is depicted as a place of doom and despair in as far as human rights are concerned. Consequently, the analysis of its level of compliance with human rights focuses more on its failure to adopted western standards.¹⁴³ Euro-centrism, on the other hand, construes the concept of human rights in Africa against the background of Western ‘models.’ In this case, Africa is not primarily studied in terms of its own dynamics, but is rather ‘an appendix or a periphery to the centre (the West) and considered valuable only by its submission to the West and its conformity to Western standards.’¹⁴⁴

The two trends of scholarship generally perpetuate the differences between Western ideals and African realities.¹⁴⁵ However, while earlier literature on human rights in

¹⁴⁰ Ibid.

¹⁴¹ Odinkalu C, ‘The role of case and complaints procedures in the reform of African regional human rights system’, (2001) 2 *African Human Rights Law Journal*, p. 227.

¹⁴² Ibid.

¹⁴³ See this argument in Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 137 above, p. 36.

¹⁴⁴ Ibid.

¹⁴⁵ See Mudimbe Y, *The invention of Africa* (1998), p. 36.

Africa, especially the writings from the early 1960s to late 1980s, took the general 'Afro-pessimistic' and 'Euro-centric' trends, later writings were a marked departure from this pattern.¹⁴⁶ Generally, literature displaying the Afro-pessimism-Eurocentric trend principally hinged on the discussion on whether or not Africa has had a tradition of human rights, an academic debate that has endlessly pitted African against Western scholars.¹⁴⁷

¹⁴⁶See generally, Brendalyn A, *Democratisation and the protection of human rights in Africa* (1995).

¹⁴⁷ For a detailed discussion on this debate see generally, Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa', note 81 above, p. 235-257; Mamdani M, 'Social movements and constitutionalism in the African context', in Shivji I, *State and constitutionalism: An African debate on democracy*, note 26 above, p. 237; Wiseman J, *Democracy in black Africa*, pp. ix-xi; Nzongola-Ntalaja M, *The state and democracy in Africa*, note 26 above, p. 10; Busia K, 'The status of human rights in pre-colonial Africa: Implications for contemporary practices', note 26 above, p. 49; Appiagyei-Atua K, 'A rights-centred critique of African philosophy in the context of development', (2005) 5 *African Human Rights Law Journal*, pp. 335-357; Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', (1992) *Journal of Human Rights Law and Practice*, pp. 22-38; Wiredu K, 'Democracy and consensus in African traditional politics: A plea for a non-party polity', in Eze O, *Postcolonial African philosophy: A critical reader* (1997), p. 303; Hountondji P, 'The master's voice: The problem of human rights in Africa', in Ricoeur P (ed), *Philosophical foundations of human rights* (1986), p. 319; Anthony E, 'Beyond the paper Tiger: The challenges of a human rights court in Africa', note 85 above, pp. 519-521; Diganke O, 'Protection of human rights in Africa', (2000) 10 *Transnational law & Contemporary Problems*, pp. 374-378; Shivji I, *The concept of human rights in Africa II* (1989), p. 34; Cobbah J, 'African values and the human rights debate: An African perspective', (1987) 9 *Human Rights Quarterly*, pp. 309-331; Swanson J, 'The emergence of new rights in the African Charter', note 26 above, pp. 324-329; Motola Z, 'Human rights in Africa: A cultural, ideological and legal examination', (1989) 12 *Hastings International & Comparative Law Review*, pp. 408-409; Gittleman R, 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International law*, p. 671; Okere J, 'Human rights and the African Charter' (1984) 6 *Human rights quarterly*, pp. 153-156; Pollis A & Schwab P (eds.), *Human rights cultural and ideological perspectives*; Berger H, 'Are human rights universal?', (1977) *Commentary*, p. 62; Welch C, 'Human rights as a problem in contemporary Africa' in Welch C & Meltzer R (eds.), *Human rights and development in Africa* (1984), p. 16; El-Obaid A & Appiagyei-Atua K, 'Human rights in Africa: A new perspective of linking the past to the present', (1996) 41 *McGill Law Journal*, pp. 829-836; Donnelly J, *The concept of human rights* (1985), p. 8; Mojekwu C, 'International human rights: The African perspective' in Nelso J & Green V (eds.), *International human rights: Contemporary issues* (1980); Marashinge L, 'Traditional conceptions of human rights in Africa', in Welch

Those in support of the African perspective have argued, for example, that Africa has had a tradition of human rights and that the concept is not unique to the West.¹⁴⁸ Further, although Africa's pre-colonial societies differed in a number of ways, there is ample information to prove that there not only existed legal systems but also some measure of protection of human rights in pre-colonial Africa.¹⁴⁹ The failure of Eurocentric Western scholars to locate human rights in African cultures has been criticised by a number of African scholars who laboured to vindicate that African cultures were after all not devoid of the concept. These scholars include, but are not limited to, Quashigah, Cobbah, Hountondji, Shivji and Wiredu.¹⁵⁰

Quashigah analysed the emergence of the concept of human rights in the Western world through the application of the methodologies of philosophical idealism and philosophical materialism.¹⁵¹ His analysis served to acknowledge that both Western and African traditions are similar because each contains an inherent contradiction of respecting and violating human rights at the same time. Wiredu and Hountondji attempted to locate human rights in some African cultures. While Wiredu dwelt more on Africa's past

C & Meltzer R (eds.), *Human rights and development in Africa* (1984), p. 37; Legesse A, 'Human rights in African political culture', in Thompson K (ed.), *The moral imperatives of human rights: A world survey* (1980), p. 125.

¹⁴⁸ See M'Baye K & Ndiaye B, 'The OAU' in Alston P. (ed), *The international dimensions of human rights* (1982), p.583; Wai D, 'Human rights in Sub-Saharan Africa', in Pollis A & Schwab P (eds.), *Human rights: Cultural and ideological perspective* (1979), pp 115-144.

¹⁴⁹ Eze O, *Human rights in Africa*, note 1 above, p. 9.

¹⁵⁰ Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique' note 147 above, p.22-38; Shivji I, *The concept of human rights in Africa II*, note 147 above; Cobbah J, 'African values and the human rights debate: An African perspective', note 147 above, p. 331; Wiredu K, 'Democracy and consensus in African traditional politics: A plea for a non-party polity' note 147 above, p. 303; Hountondji P, 'The master's voice: The problem of human rights in Africa' note 147 above, p. 319.

¹⁵¹ Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', note 147 above, p. 30.

cultural experiences in the evolution of an Akan conception of rights,¹⁵² Hountondji underscored the colonial and post-colonial periods of Africa.¹⁵³

On his part, Shivji attempted to contrast the philosophical foundations of human rights in Africa and the Western world.¹⁵⁴ He explained that the philosophical basis of Western human rights conceptions is contrary to the African way of thinking. According to him, in Africa, the collective is given more emphasis than the individual.¹⁵⁵ His views were similar to those of Cobbah who concluded that:

Africans do not espouse a philosophy of human dignity that is derived from natural rights and individualistic framework. African societies function within communal structure whereby a person's dignity and honour flow from his or her transcendental role as a cultural being.... We should pose the problem in this light, rather than assuming an inevitable progression on non-Westerners toward Western lifestyle.¹⁵⁶

Nyerere and Wai attested to this when they argued, separately, that pre-colonial societies emphasised respect for individuals' dignity and did not allow gross inequalities between members.¹⁵⁷ This position was confirmed by studies conducted by a number of other scholars, including Busia, Wilks and Rattray.¹⁵⁸ Nzongola-Ntalaja condemned the Euro-centric attitude of perceiving Africans as being incapable of determining their own affairs

¹⁵² Wiredu K, 'Democracy and consensus in African traditional politics: A plea for a non-party polity', note 147 above, p. 303-305.

¹⁵³ Hountondji P, 'The master's voice: The problem of human rights in Africa', note 147 above, pp. 319-321.

¹⁵⁴ Shivji I, *The concept of human rights in Africa II*, note 147 above, pp. 24-30.

¹⁵⁵ Ibid.

¹⁵⁶ Cobbah J, 'African values and the human rights debate: An African perspective', note 147 above, p. 331.

¹⁵⁷ See generally Wai D, 'Human rights in Sub-Saharan Africa', in *Human rights perspectives*, note 147 above, p. 115-144; Nyerere J, *Essays on socialism* (1968), p. 33.

¹⁵⁸ See Busia K, *Africa in search of democracy* (1967); Busia K, *The position of the chief in modern political system of Ashanti* (1951), chapter 3; Wilks I, *Ashanti in the nineteenth century: The structure and evolution of political order* (1975), Rattray R, *Ashanti law and constitution* (1969).

and, by extension, having no history of democracy and human rights. He emphasised that:

Such an approach not only glosses over the impact of the Atlantic slave trade on political institutions and practices in West and Central Africa but also minimises the role of colonial despotism as a school of post-colonial rulers.¹⁵⁹

Further, Mamdani ruled out the Western ‘paternity’ of the concept of human rights. According to him:

It is difficult to accept, even in the case of Europe, that human rights was a concept created by 17th century Enlightenment philosophy. True, one can quote Aristotle and his ideological justification of slavery as evidence that the idea of human rights was indeed foreign to the conscience of the ruling classes in ancient Greece... What was unique about Enlightenment philosophy, and about the writings of the French and American Revolutions, was not a conception of human rights, but a discussion of these in the context of a formally articulated philosophical system.¹⁶⁰

Fernyhough is one of the few non-African scholars to objectively claim the existence of human rights in pre-colonial Africa.¹⁶¹ According to him:

... there is a fundamental rejection of this as a new, if rather subtle, imperialism, and explicit denial that human rights evolved only in Western political theory and practice, especially during the American and French revolutions, and not in Africa. Behind this protest is the very plausible claim that human rights are not found in western values alone but may also have emerged from very different and distinctive African cultural milieus.¹⁶²

¹⁵⁹ Nzongola-Ntalaja G & Lee M (eds.), *The state and democracy in Africa* (1997), p.11-12.

¹⁶⁰ Mamdani M, et al (eds.), *Social movements, social transformation and the struggle for democracy in Africa* (1988), pp. 236-237.

¹⁶¹ Fernyhough T, ‘Human rights and pre-colonial Africa’, in Cohen R, et al (eds.), *Human rights and governance in Africa* (1993), p. 40-41.

¹⁶² Ibid.

From the foregoing, it is inevitable to observe that no country has the monopoly of human rights respect or abuses. Nor can any society claim to be a paradise for human rights. Dismissing the Western ‘paternity’ of democracy and constitutionalism, Mangu rightly noted that Athens and Rome that allegedly ‘invented’ democracy ended up in authoritarianism and dictatorship, while Greece, the supposed ‘mother of Western democracy’, was still a dictatorship in the 1970s.¹⁶³ Unfortunately, it is too easy for Western scholars to give lessons and present themselves as the ‘model’ for human rights.¹⁶⁴

Following this argument, it seems possible to conclude that indeed the concept of human rights emanated naturally from human existence. It is therefore inconceivable that Africa would lack a culture of human rights whereas it was inhabited by people, even prior to foreign intrusion. The sincerity of the proponents of the ‘Western origin’ of human rights should therefore be questioned in as far as it purports to dismiss the existence of the concept in pre-colonial Africa. Busia was therefore right in discrediting the Westernised analyses of the concept of human rights as ‘facile generalisations not reflecting the entire reality of human rights in pre-colonial social formations of Africa.’¹⁶⁵

Those Western scholars who deny the existence of human rights in pre-colonial Africa have hence been accused of advancing imperialistic (Euro-centric) scholarly views which do no more than bring back pictures of colonialism.¹⁶⁶ It has been argued that Western scholars failed to appreciate the existence of the human rights in pre-colonial Africa because of the ‘unique’ ways in which different communities observed the concept.¹⁶⁷ The insistence on a ‘unique African human rights concept’ is, however, problematic to a

¹⁶³ Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 137 above, p. 249.

¹⁶⁴ Ibid, p. 250.

¹⁶⁵ Busia K, ‘The status of human rights in pre-colonial Africa: Implications for contemporary practices’, note 147 above, p. 49.

¹⁶⁶ See Nmehielle O, *The African human rights system*, note 90 above, p. 15.

¹⁶⁷ For detailed discussions on this, see generally, An-Na’im A & Deng F (eds.), *Human rights in Africa: cross-cultural perspectives*, note 91 above.

certain extent. This argument, which is largely prescriptive of an autochthonous African human rights concept, is at best an exaggeration aimed at countering the universalism concept. Consequently, it dilutes, or altogether nullifies, the argument about the existence of human rights in pre-colonial Africa.

It should be recalled that the human rights concept is dynamic and not all that are considered today as human rights were recognised as such, in the formative years of the evolution of the concept. No wonder some African authors such as Baah, after attempting to draw parallels between certain indigenous African traditions that allegedly enhanced human dignity in the pre-colonial epoch, and the primary objective of human rights of protecting human dignity, concluded that Africans have had human rights all along.¹⁶⁸ This view, however, failed to impress those who conceptualised the origin of human rights from the 'Western' perspective.¹⁶⁹ According to Shivji, such a conclusion 'fails to understand the correct material and philosophical basis of certain community-oriented conceptions and practices in some of the more or less classless societies in Africa... and endeavours to prove that they are similar to Western human rights.'¹⁷⁰

Tibi dismissed the assertion that African societies have had human rights all along as the confusion of African societies' indigenous means of securing human dignity among a particular people, with the concept of human rights.¹⁷¹ By simply following the evolution of the modern human rights concept, Tibi further contended, one should be able to tell

¹⁶⁸ Baah R, *Human rights in Africa*, note 115 above, p 29. See also Mbondenyi M, 'The potential of Taita customary law in the promotion and protection of human rights in Kenya', note 87 above, p. 24.

¹⁶⁹ See, for example, Howard R, *Human rights in Commonwealth Africa* (1986), pp. 1-36; Donnelly J, 'Human rights and Western liberalism', in An-Na'im A & Deng F (eds.), *Human rights in Africa*, note 91 above, pp. 31-58.

¹⁷⁰ Shivji I, *The concept of human rights in Africa*, note 147 above, p. 44.

¹⁷¹ See, for example, Tibi B, 'The European tradition of human rights and the culture of Islam', in An-Na'im A & Deng F (eds.), *Human rights in Africa*, note 91 above, pp. 104-132, where the author states 'Non-Westerners tend to confuse human rights with... human dignity. If one is talking about the latter, there is no doubt that fully developed notions of human dignity exist in many non-Western cultures.'

that the concept is a Western idea.¹⁷² According to this assertion, the philosophical foundation of human rights can be traced directly to the historical experiences of France, England, and the United States. Pollis and Schwab posit,

the Western political philosophy upon which the (UN) Charter and the Declaration are based provides only one particular interpretation of human rights, and that this Western notion may not be successfully applicable to non-Western areas.... Efforts to enforce the provisions of the Universal Declaration on Human Rights in states that do not accept its underlying values are bound to fail.¹⁷³

Howard and Donnelly, for example, are some of the Western scholars in the forefront of the argument that human rights did not exist as a concept in pre-colonial Africa.¹⁷⁴ Donnelly asserted that recognition of human rights simply was not the way of traditional Africa.¹⁷⁵ Howard stretched this view further when she contended that African proponents of the concept confuse human dignity with human rights. Accordingly:

The African concept of human rights is actually a concept of human dignity, or what defines the inner (moral) nature and worth of the human person and his or her proper (political) relations with society. Despite the twinning of human rights and human dignity in the preamble of the Universal Declaration of Human Rights and elsewhere, dignity can be protected in a society not based on rights. The notion of African communalism, which stresses the dignity of membership in, and fulfilment of one's prescribed social role in a

¹⁷² Ibid.

¹⁷³ Pollis A & Schwab P, 'Human rights: A Western construct with limited applicability', note 26 above, p 1.

¹⁷⁴ See Howard R, 'Group versus individual identity in the African debate on human rights, in An-Na'im A & Deng F, *Human rights in Africa*, note 91 above, p. 159; Howard R, 'Evaluating human rights in Africa: Some problems of implicit comparisons (1984) 6 *Human Rights Quarterly*, p. 160; Donnelly J, 'Human rights and Western liberalism' in An-Na'im A & Deng F, (eds) *Human rights in Africa*, note 91 above, p. 243; Donnelly J, *Universal human rights in theory and practice* (1989).

¹⁷⁵ Donnelly J, *Universal human rights in theory and practice*, Ibid.

group (family, kinship group, tribe), still represents how accurately how many Africans appear to view their personal relationship to society.¹⁷⁶

Some scholars who harbour similar views contend that even democracy and constitutionalism, which are fundamental in the promotion and protection of human rights, are also foreign to Africa.¹⁷⁷ These concepts have been said to have no future in the continent because they are unsuitable, especially in Black Africa.¹⁷⁸ Thus, the West has been perceived as the model of human rights, constitutionalism and democracy.¹⁷⁹ This perception is not only championed by European and American scholars but also some African scholars.¹⁸⁰ Simiyu, for example, insisted that democracy had no roots in Africa no matter how organised the traditional political systems were.¹⁸¹ This position was also echoed by Akindes who considered the ancient Dahomey as typical of the authoritarianism of pre-colonial Africa.¹⁸² Kedourie also argued that ‘Africa and Asian societies are victimised by their own despotic traditions.’¹⁸³

Despite all the arguments advanced in some of the ‘Western-inclined’ literature, it is evident that indeed there are certain elements that reveal the existence of a human rights tradition in Africa. The assertion that European ‘liberalism’ is the foundation of the concept of human rights in Africa therefore destroys the claim that human rights are

¹⁷⁶ Howard R, ‘Group versus identity in the African debate on human rights’, note 91 above, pp. 165-166.

¹⁷⁷ For a detailed discussion on the existence, or otherwise, of constitutionalism and democracy in pre-colonial Africa, see generally, Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 137 above, chapter 3.

¹⁷⁸ See Wiseman J, *Democracy in black Africa*, note 26 above, p. ix & xi.

¹⁷⁹ Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 137 above, p. 236.

¹⁸⁰ See the criticism in Nzongola-Ntalaja M, *The state and democracy in Africa*, note 147 above, p. 10.

¹⁸¹ Simiyu, ‘the democratic myth in African traditional societies’ cited in Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 137 above, p. 237.

¹⁸² Akindes F, *Les mirages de la transition democratique ...178-179* cited in Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 137 above, p. 237.

¹⁸³ Kedourie E, quoted by Mangu A, note 137 above.

universal.¹⁸⁴ The universality of human rights does not derive from Western imposition of the concept on colonised societies. After all, human beings share certain common moral values.

The literature reviewed in this study also comprises historical features. Some authors have endeavoured to trace the historical origins of the African human rights system as well as the origin of the human rights concept. Numerous anthropological, sociological, economic and historical works have unravelled the mysteries surrounding Africa's past and have greatly contributed in providing useful information on her past human rights situations.¹⁸⁵

The historical origin, scope and evolution of human rights law in Africa have been documented in a number of studies.¹⁸⁶ Eileen McCarthy-Arnolds and others, for example,

¹⁸⁴ See Mutua M, 'The Banjul Charter and the African cultural fingerprint: An evaluation of language of duties', note 26 above, p. 339.

¹⁸⁵ See, for example, Rodney W, *How Europe underdeveloped Africa*, (1972); Davidson B, *Old Africa rediscovered*, (1970); Amin S, *The class struggle in Africa*, (1985); Meek C, *A Sudanese Kingdom*, (1937); Dike K, *Trade and politics in the Niger Delta, 1830-85*, (1956); Gluckman M, *The judicial process among the Barotse of Northern Rhodesia*, (1967); Ghai Y & McAuslan B, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present* (1970); Elias T, *The nature of African customary law* (1962); Elias T, *British colonial law* (1962); Salacuse J, 'An introduction to law in French-speaking Africa', *Vol 1 Africa South of the Sahara* (1969); Hooker M, *Legal pluralism: An introduction to colonial and neo-colonial Laws* (1975) .

¹⁸⁶ See, for example, Umozurike U, 'The African Charter on human and people's rights', note 4 above, p. 902; Hopkins K, 'A new human rights era dawns on Africa?', note 37 above, p. 360; Dlamini C, 'The OAU and the protection of human Rights in Africa' (1991) *Obiter*, p. 68; Kannyo E, *Human rights in Africa: Problems and prospects* (1980), p. 15; Venter D, 'Black Africa and the apartheid issue: A South African response?', (1981) *Journal of Contemporary African studies*, p. 84; Othman H, 'Africa and the protection of rights', (1995) 6/1 *African Law Review*, p. 51-55; Seriti W, 'The African Charter on Human Rights', (1995) 6/1 *African Law Review*, p. 13; Dlamini C, 'Towards a regional protection of human rights in Africa: The African Charter on Human and Peoples' Rights', (1991) *XXIV Comparative and International Law Journal of Southern Africa*, p. 189; D'Sa R, 'Human and peoples' rights: Distinctive features of the African Charter', (1985) *Journal of African Law*, p. 73; Gittleman R, 'The Banjul Charter on Human and Peoples' Rights: A legal analysis', in Welch C, Jr and Meltzer R (eds.), *Human rights and development in*

briefly discussed philosophical foundations of human rights then proceeded to introduce an attractive historical background on evolution of human rights in pre-colonial and colonial Africa.¹⁸⁷ Some of the literature bearing historical components discussed theories of human rights in the African context.¹⁸⁸ Generally, however, the historical texts that were reviewed in the course of this study were found to be limited. In the main, they lacked ample legal information. Consequently, they could not be relied on when analysing the various African legal systems or even the promotion and protection of human rights on the continent, more so, from the legal perspective.

In addition to being historical, most of the literature reviewed in this study tended to be descriptive in nature.¹⁸⁹ They described, for example, the origin, scope and evolution of the African human rights system, its enforcement mechanisms as well as the procedural and other parameters. Some scholars have also described the myriad of limitations of the African Commission. Welch, who points out a number of shortfalls associated with the commission, concluded that the abilities of the commission are restricted by the fact that it was envisaged almost exclusively as a body to promote rather than protect human

Africa (1984), p. 152; Takirambudde P, 'Six years of the African Charter on Human and Peoples' Rights: An assessment', (1991) 7/2 *Lesotho Law Journal*, p. 41; Gittleman R, 'The African Charter on Human and Peoples' Rights: A legal analysis', (1982) 22 *Virginia Journal of International Law*, p. 667; Ankumah E, *The African Commission on Human and Peoples' Rights* (1996), p. 176; Kunig P, 'The Protection of human rights by international law in Africa' (1982) 25 *German Yearbook of International Law*, p. 138; Viljoen F, 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997', in Heyns C (eds.), *Human rights in Africa 1997* (1999), p. 47; Gaer F, 'First fruits: Reporting by states under the African Charter on Human and Peoples' Rights', (1992) 10 *Netherlands Quarterly of Human Rights*, p. 29.

¹⁸⁷ McCarthy-Arnolds E, et al, *Africa, Human rights and the global system* (1994), chapter 1.

¹⁸⁸ See generally, Shepherd G, Jr, & Mark A, (eds.), *Emerging human rights: The African political economy context, studies in human rights, number 8* (1990).

¹⁸⁹ See, for example, Viljoen F, *International human rights law in Africa* (2007); Onguergouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable development in Africa* (2003).

rights.¹⁹⁰ He conceded that the commission's effectiveness has been confronted with severe limitations.¹⁹¹

Others, who admit this fact, opine that the commission is besieged in a situation where national legislation, including the constitutions of states parties, has been at variance with the express provisions of the African Charter.¹⁹² In many other cases, states parties had not provided for the domestic application of the Charter.¹⁹³ One of the major descriptive works reviewed in this study is the survey of the International Commission of Jurists on how to address a communication to the African Commission.¹⁹⁴ This study discusses the procedure on how to lodge a communication with the African Commission.¹⁹⁵

Another feature of the literature reviewed in this study is its comparative nature. Since the 1970s, many academics have become concerned with the comparative measure and analysis of human rights.¹⁹⁶ Comparative studies have been conducted on, for example, the human rights situations in pre-colonial, colonial and post-colonial Africa.¹⁹⁷ Numerous sociological, economic, historical and anthropological studies in the last few decades have resulted in works that have shed more light and provided useful information

¹⁹⁰ Welch C Jr, 'The African Commission on Human and People's Rights: A five year report and assessment', note 26 above, pp. 43-61.

¹⁹¹ Ibid.

¹⁹² Pityana B, 'Challenge of culture of human rights in Africa', in Evans M & Murray R, note 43 above, p. 234.

¹⁹³ Ibid.

¹⁹⁴ International Commission of Jurists, *How to address a communication to the African Commission on Human and People's Rights* (1992).

¹⁹⁵ See also generally, Eno W, 'The African Commission on Human and Peoples' Rights as an Instrument for the protection of human rights in Africa', (1998) *LLM Dissertation, UNISA*.

¹⁹⁶ Howard R, 'Evaluating human rights in Africa: Some problems of implicit comparisons', note 91 above, p. 160.

¹⁹⁷ See Nmehielle O, *The African human rights system*, note 90 above, chapter 1; Umzurike U, *The African Charter on Human and Peoples' Rights*, note 74 above, pp. 9-28; Mugwanya G, *Human rights in Africa*, note 18 above, Chapter 2; Eze O, *Human rights in Africa*, note 1 above, pp. 9-21.

on Africa's past political, social and economic formations which are instrumental in the study of Africa's human rights trends.

Further, there has been a proliferation of literature which attempts to compare the African human rights system with other regional systems. The predominant trend in a majority of this kind of literature has been to judge the African human rights system against the achievements of the European or American systems.¹⁹⁸ This has partly been attributed to the commendable volume of literature on the European and American systems, commensurate to their long experience in regional enforcement of human rights.¹⁹⁹ However, some scholars, when conducting comparative studies, seem to ignore the fact that the European and American experiences are not similar to those of Africa because the former embody 'liberal values which crystallise centuries of political development.'²⁰⁰

Similarly, Western democracies allow high levels of individual civil and political rights, and can afford a high level of social security guarantees of basic economic needs, as well as social and cultural rights.²⁰¹ Evaluation of human rights standards in Africa against those of the Western democracies has, therefore, to say the least, painted a poor image of the continent's commitment to human rights values. This, however, is not to say that Africa's human rights record is excellent and needs not to be criticised in the light of other jurisdictions.

Some scholars have also attempted to compare the enforcement of human rights law in national and international jurisdictions.²⁰² Maina, for example, provided an extensive

¹⁹⁸ Bello E, 'Human rights: The rule of law in Africa', (1981) 30 *International and Comparative Law Quarterly*, p. 628.

¹⁹⁹ See this argument in Jacobs F, *The European Convention on Human Rights* (1975), p. v

²⁰⁰ Ibid.

²⁰¹ Howard R, 'Evaluating human rights in Africa: Some problems of implicit comparisons', note 91 above, p. 166.

²⁰² See generally, Maina C, *Human rights in Africa: A comparative study of the African Charter on Human and Peoples' Rights and the new Tanzanian Bill of rights*, (1990); Byre A & Byfield Y (eds.), *International*

comparison between the Tanzanian Bill of Rights and the African Charter.²⁰³ He critically compared the rights and enforcement mechanisms provided for in the two instruments. Maina conceivably acknowledged that for effective enforcement of human rights to be realised, harmonisation of the existing enforcement mechanisms is essential.²⁰⁴

Other scholarly works also compared different states to establish their levels of human rights promotion and protection.²⁰⁵ Viljoen attempted to gauge the extent to which domestic courts have applied the African Charter across the continent.²⁰⁶ The study was, however, not a comprehensive survey of the application of the African Charter by all

human rights in the Commonwealth Caribbean (1991); Delmas-Marty M (ed.), *The European Convention for the Protection of Human Rights: International protection versus national restrictions*, (1991); Botha N, 'The role of international law in the development of South African common law', (2001) 26 *South African YearBook of International Law*, pp. 148-156; Department of Economics & Social Affairs Division for the Advancement of Women, *Bringing international human rights law home: Judicial colloquium on the domestic application of the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child* (2000); Dugard C, *International law: A South African perspective* (2000); Hatchard J, 'Reporting under international human rights instruments by African countries' (1994) 38 *Journal of African Law*, p. 61; Maluwa T, 'International human rights norms and the South African Interim Constitution', (1993-4) *South African YearBook of International Law*, pp. 4-42; Martinus H, *Enforcing international human rights law in domestic courts* (1997); Tshaosa O, *National and international human rights law: Cases of Botswana, Namibia and Zimbabwe* (2001).

²⁰³ Maina C, *Human rights in Africa: A comparative study of the African Charter on Human and Peoples' Rights and the new Tanzanian Bill of rights*, note 201 above.

²⁰⁴ Ibid.

²⁰⁵ See generally, Bello E, 'Human rights: The rule of law in Africa', (1981) 30 *International & Comparative Law Quarterly*, p. 628; David B, 'Assessing human rights violations: A comparison of the contemporary South African and Ugandan regimes', in MacDonald C (ed), *Human rights and educational responsibility* (1979), pp. 179-214; Viljoen F, 'The application of the African Charter on Human and Peoples' Rights by domestic courts in Africa', (1999) *Journal of African Law*, p. 43; Viljoen F, *International human rights law in Africa*, note 189 above.

²⁰⁶ Viljoen F, 'The application of the African Charter on Human and Peoples' Rights by domestic courts in Africa', *ibid*, p. 43.

domestic courts across Africa because the relevant sources were hardly accessible.²⁰⁷ It instead covered only 16 countries on the basis of sub-regional divides and the major legal systems of the continent.²⁰⁸ In another work, Viljoen discusses, more or less in a comparative approach, the links between certain institutional mechanisms responsible for human rights promotion and protection in Africa.²⁰⁹ The study is a survey of the UN mechanisms, the African human rights system and sub-regional human rights institutions in Africa.

Apart from the major trends and features of the literature that were identified and discussed above, the reviewed literature has also addressed some key issues and concepts pertaining to the subject matter of the present study. One of the issues relates to the definition of human rights. The apparent difficulty in identifying human rights has reduced their definition to a subject of great controversy among scholars.²¹⁰ Some scholars identify human rights as those that are ‘important’, ‘moral’ and ‘universal’.²¹¹ Others conceptualise them as the entitlements individuals possess by virtue of being human.²¹²

Despite numerous attempts to find a composite definition of the concept, it is now accepted that the province of human rights cannot easily be determined.²¹³ This means that human rights are continually evolving, lending credence to Laski’s observations that ‘a legal system is surrounded by the penumbra of an attainable ideal which it must reach

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Viljoen F, *International human rights law in Africa*, note 189 above.

²¹⁰ See generally the arguments by Brendalyn A, *Democratisation and the protection of human rights in Africa* note 146 above, p. 29; Humana C, *World human rights guide* (1983), p. 7; Cranston M, ‘Human rights: Real or supposed’, in Raphael D (ed.), *Political theory and the rights of man* (1967), p. 52.

²¹¹ See Shestack J, ‘The philosophic foundations of human rights’ in McCorquodale R, *Human rights* (2003), p. 4.

²¹² Brendalyn A, *Democratisation and the protection of human rights in Africa*, note 146 above, p. 7.

²¹³ Laski H, *A grammar of politics* (1967), p. 91-92; Eze O, *Human rights in Africa*, note 1 above, p. 5; Henkin L, ‘Human rights’, in Bernhardt R (ed.), *Encyclopaedia of international law* (1985), p. 268.

as the price of its preservation.²¹⁴ To understand the concept of human rights, it is important to unveil its philosophical foundations.

Thus, some of the literature that was reviewed discussed philosophical bases and theories of law and human rights. The theories highlighted in the literature include the: naturalist,²¹⁵ positivist²¹⁶ and Marxist²¹⁷ theories. The common thread that cuts across these theories is that the concept of human rights originated and evolved as a way of protecting a person's inherent dignity as a human being. The preservation of social relationships has also been highlighted as one of the roles of human rights in society.²¹⁸

Further, some studies address the internationalisation of human rights.²¹⁹ The point of departure is that the concept of human rights as an international legal obligation of states is of recent origins. Apart from some isolated controversies over the concept,²²⁰ there is a certain degree of consensus in the literature that human rights are universal, inalienable, and inherent to every human being in every society.²²¹ Further, all rights are

²¹⁴ Laski H, *A grammar of politics*, ibid, pp. 91-92.

²¹⁵ See, for example, Rommen H, *The natural law: A study in legal and social history and philosophy*, (1948); Locke J, *The second treatise of government*, (1952); John F, *Natural law and natural rights* (1980); Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa', note 194 above, p. 6.

²¹⁶ See, for example, Shestack J, 'The philosophic foundations of human rights', note 211 above, p. 208; Kroeze I, 'Legal positivism', in Roederer C & Moellendorf D, *Jurisprudence* (2006), pp. 62-83.

²¹⁷ See for example, Hart L.A, 'Positivism and the separation of law and morals', (1955) *Harvard Law Review*, p. 17; Austin J, *The province of jurisprudence determined* (Rumble W (ed), (1985)); Berlin I, *Two concepts of liberty* (1958); Marx K, *The economic and philosophic manuscript 1844* (1969).

²¹⁸ Donnelly J, 'Human rights and human dignity: An analytical critique of non-Western conceptions of human rights, (1982) 76 *American Political Science review*, p. 303.

²¹⁹ Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa', note 194 above, p. 9; Viljoen F, *International human rights law in Africa*, note 189 above, pp 3-46.

²²⁰ On some of the controversies, see generally Cranston M, 'Human rights, real or supposed', note 210 above, p. 43; Dowrick F, *Human rights: Problems, perspectives and texts* (1979); Campbell T, et. al. (eds.), *From rhetoric to reality* (1986).

²²¹ On this consensus see the *Vienna Declaration*, Part I, paras. 1-5.

interdependent notwithstanding the fact that different measures may be required to implement them.²²²

It emerged from some of the reviewed literature that, as a result of the divergence in conceptions and perceptions of human rights, internationalisation of human rights has turned to be more effective through regional initiatives.²²³ This somehow has a bearing on the emergence and evolution of regional human rights systems. There is a considerable amount of scholarly work that has been conducted on the three regional systems; namely, the European,²²⁴ Inter-American²²⁵ and African systems.²²⁶

The African human rights system has also been given considerable attention in the reviewed literature. Scholars have addressed many issues pertaining to the system, including: its genesis and evolution; its normative and enforcement mechanisms; its strengths, weaknesses and challenges; and possible ways of reinvigorating it. Okafor, for example, provides a detailed discussion on the conventional conceptions of the system.²²⁷ From the bulk of the literature, one would definitely agree with Murray that no regional human rights system attracts as much criticism, contempt or disdain as the African

²²² Ibid.

²²³ Onguergouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable development in Africa*, note 189 above, pp. 2-3.

²²⁴ See generally, note 24 above.

²²⁵ See generally, Harris D & Livingstone S (eds.), *The Inter-American system of human rights*, (1998); David S, *The Inter-American human rights system* (1997); Vander Wilt H, 'The OAS system for the protection of human rights', in Hanski R & Suksi M (eds.), *An introduction to the international protection of human rights: A textbook* (1997); Buergenthal T, *Human rights in a nutshell* (1995); Buergenthal T, 'The advisory practice of the Inter-American Human Rights Court (1985) 79 *American Journal of International Law*, p. 1; Shelton D, 'The jurisprudence of the Inter-American Court of Human Rights', (1994) 10 *American University Journal of International Law and Policy*, p. 333.

²²⁶ See generally, note 26 above.

²²⁷ Okafor C, *The African human rights system, activist forces and international institutions* (2007), pp. 63-90.

regional system.²²⁸ Criticism has been leveled, for example, on the normative provisions of the Charter as well as its enforcement mechanisms the African Commission and Court on Human and Peoples' Rights.

According to some authors, the African Charter was from its inception beset with legitimacy crisis.²²⁹ Others perceived it as 'the product of the ideological cleavages of the Cold War and post-independence and 'nation-building' projects in post-independence Africa.'²³⁰ According to Dankwa, it reflects a compromise between the various ideological and belief systems, including 'atheists, animists, Christians, Hindus, Jews and Muslims; and over 50 countries and islands with Marxist-Leninist, capitalist, socialist, military, one-party and democratic regimes.'²³¹

Initially, it was doubted that the Charter would ever come into force²³² and if so, whether it could be enforceable.²³³ Gittleman thought that it gave African states 'wide latitude for repressive human rights exceptionalism.'²³⁴ According to Mutua, the Charter was '... a yoke that African leaders have put around our necks.' Generally, the Charter was regarded as problematic because, among other allegations, it is 'opaque and difficult to

²²⁸ Murray R 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 72 above, p. 1.

²²⁹ See, for example, Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 72 above, p. 1; Mutua M, 'The African human rights system in a comparative perspective', note 26 above, p. 5 11.

²³⁰ Asante K, 'Nation building and human rights in emergent African nations', (1969) 2 *Cornell International Law Journal*, p. 72.

²³¹ Dankwa V, 'The African Charter on Human and Peoples' Rights: Hopes and fears', in African Law Association (eds.) *The African Charter on Human and Peoples. Rights: Development, context, significance* (1991), p. 18.

²³² See, for example, Ojo O & Sesay A, 'The OAU and human rights: Prospects for the 1980s and beyond (1986) 8 *Human Rights Quarterly*, p. 101.

²³³ Bondzie-Simpson E, 'A Critique of the African Charter on Human and Peoples' Rights', (1988) 31 *Howard Law Journal*, p. 643.

²³⁴ Gittleman R, 'The African Charter on Human and Peoples' Rights: A legal analysis', (1982), note 147 above, p. 689.

interpret.²³⁵ Further, it is a document that ‘might honestly have been entitled the African Charter for keeping rulers in power.’²³⁶ However, some moderate scholars, such as Heyns, thought the Charter’s provisions were adequate enough to fulfil the objectives of human rights promotion and protection.²³⁷ According to this argument, the Charter system is not perfect, but at least in reality, it is operational.²³⁸

The African Commission has also been lambasted with the same fervency as the Charter. Naldi and Magliveras, for instance, pointed out that it has relatively weak enforcement and investigation powers.²³⁹ Welch doubted that the commission would ever have the power, resources and willingness to fulfil its functions.²⁴⁰ He lamented that ‘the political will to interpret the wording of the African Charter broadly has not been present.’²⁴¹ Additionally, the commission has been accused of lack of capacity to consider petitions alleging human rights violations²⁴² and to award remedies for such violations.²⁴³ The commissioners, it is said, are not independent of their governments,²⁴⁴ and their meetings ‘are always disorganised and often verge on the absurd.’²⁴⁵

²³⁵ Odinkalu C, ‘The individual complaints procedure of the African Commission on Human and Peoples’ Rights: A preliminary assessment’ (1998) 8 *Transnational Law and Contemporary Problems*, p. 398.

²³⁶ Robertson G, *Crimes against humanity: The struggle for global justice* (2000), p. 63.

²³⁷ Heyns C, ‘African regional human rights system: In need of reform?’ note 72 above, p. 157.

²³⁸ Ibid.

²³⁹ See Naldi G & Magliveras K, ‘Reinforcing the African system of human rights: The Protocol on the establishment of a regional court of human and peoples’ rights’, note 43 above, p. 432.

²⁴⁰ Welch C, ‘The African Charter and freedom of expression in Africa’, (1998) 4 *Buffalo Human Rights Law Review*, p. 114.

²⁴¹ Ibid, p. 113.

²⁴² Murray R, ‘Decisions by the African Commission on Human and Peoples’ Rights on individual communications under the African Charter on Human and Peoples’ Rights’, (1997) 46 *International and Comparative Law Quarterly*, p. 413.

²⁴³ Benedek W, ‘The African Charter and Commission on Human and Peoples’ Rights: How to make it more effective’, (1993) 11 *Netherlands Quarterly of Human Rights*, p. 31.

²⁴⁴ Robertson G, *Crimes against humanity: The struggle for global justice* (2000), p. 63.

²⁴⁵ Ibid.

In their 1998 study, Naldi and Magliveras concluded that ‘the commission does not give hope for optimism’²⁴⁶ because, in their opinion, it adopts ‘a generally pusillanimous approach too respectful of state sovereignty.’²⁴⁷ Further, the African Court, which is not yet in operation, has also already had a share of criticism. Some scholars are sceptical of its potential to improve the human rights situation in the region.²⁴⁸ Those aspects of the court that have contributed to this scepticism include its jurisdiction²⁴⁹, access²⁵⁰ and its relationship with the commission, AU and other relevant human rights bodies in the region.²⁵¹ These and other aspects shall be discussed in detail elsewhere in this thesis.

Suffice it to state that, the image of the African human rights system, at least on the basis of the reviewed literature, is not inspiring. One would therefore agree with Odinkalu that the perception of the system that is often conveyed in much of the available literature is that the system is a juridical misfit, with a treaty basis and institutional mechanisms that

²⁴⁶ Naldi G & Magliveras K ‘Reinforcing the African system of human rights: The Protocol on the establishment of a regional court of human and peoples’ rights’, note 43 above, p. 432.

²⁴⁷ Ibid.

²⁴⁸ See Heyns C, ‘African regional human rights system: In need of reform?’, note 72 above, pp. 166-171; Udombana N, ‘Toward the African Court on Human and Peoples’ Rights: Better late than never’, note 43 above, p. 90.

²⁴⁹ Mutua M, ‘The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties’, note 26 above, p. 339.

²⁵⁰ See for example, Kaguongo W, ‘The questions of *locus standi* and admissibility before the African Court on Human and Peoples’ Rights’, in Viljoen F (ed), *The African Human Rights System: Towards the co-existence of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights*, note 71 above, pp. 81-85.

²⁵¹ O’Shea A, ‘A Critical reflection on the proposed African Court on Human and Peoples’ Rights’, note 43 above, p. 293; Badawi I, ‘The future relationship between the African Court and the African Commission’, (2002) *African Human Rights Law Journal*, p. 253; Viljoen F & Baimu E, ‘Courts for Africa: Considering the co-existence of the African Court on Human and Peoples’ Rights and the African Court of justice’, (2004) 22/2 *Netherlands Quarterly of Human Rights*, pp. 241-267.

are dangerously inadequate.²⁵² The perceived inadequacy of the system has led to the call for its reform.²⁵³

The reviewed literature, however, indicates some prospects for a reinvigorated and efficient human rights system. For instance, so far the passive OAU has been replaced by the AU, whose Constitutive Act, as already stated, attaches more significance to human rights than its predecessor, the Charter of the Organisation of African Unity (OAU).²⁵⁴ The progressive attitude of the AU towards human rights promotion and protection is clear in the Preamble of the Constitutive Act and in its objectives and guiding principles.²⁵⁵ The Act also provides for the creation of organs within the AU framework, some of which could be used to enhance the promotion and protection of human rights in the continent.²⁵⁶

Additionally, the AU has also adopted programmes and initiatives that further its role in human rights promotion and protection in the region. These are, for example, the New

²⁵² Odinkalu C ‘Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples’ Rights’, (2001) 23 *Human Rights Quarterly*, p. 328.

²⁵³ See generally, Heyns C, ‘The African regional human rights system: In need of reforms?’, note 72 above, pp. 155-174; Gutto S, ‘The reform and renewal of the African regional human and peoples’ rights system, note 120 above, pp. 175-184; Acheampong K, ‘Reforming the substance of the African Charter on Human and Peoples’ Rights: Civil and political rights and socio-economic rights, (2001) 2 *African Human Rights Law Journal*, pp. 185-204; Murray R, ‘A feminist perspective on reform of the African human rights system, (2001)2 *African Human Rights Law Journal*, pp. 205-224.

²⁵⁴ See Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the Union in Lomé, Togo on 11 July 2000; entered into force on 26 May 2001. According to the Preamble of the Act, member states have pledged their determination to promote and protect human and peoples’ rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law.

²⁵⁵ Constitutive Act of the African Union, Article 3 (g)-(h), 4 (m)-(l). See also Baimu E, ‘The African Union: Hope for a better protection of human rights in Africa? (2001) 2 *African Human Rights Law Journal*, p. 311.

²⁵⁶ CAAU, Art. 5 (1) & (2).

Partnership for Africa's Development (NEPAD), African Peer Review Mechanism (APRM) and the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA). Scholars have reviewed the prospects of these institutions in enhancing human rights enforcement in the region.²⁵⁷

Some of the reviewed literature also highlighted the possible ways to reinvigorate the African human rights system. The aspects of the possible reforms of the system that have been given attention in the literature include: the normative²⁵⁸, institutional²⁵⁹ and non-

²⁵⁷ See, for example, Mangu A, 'The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa's Development and the African Court', note 81 above, pp. 379-408; Mashood B, 'Recent developments in the African regional human rights system', (2005) 5/1 *Human Rights Law Review*, pp. 117-149; Murray R & Lloyds A, 'Institutions with responsibility under the African Union', note 45 above, pp. 165-186; Curtis F & Doebbler J, 'A Complex ambiguity: The relationship between the African Commission on Human and Peoples' Rights and other African Union initiatives affecting respect for human rights', (2003) 13/1 *Transnational Law & Contemporary Problems*, pp. 7-31; Manby B, 'The African Union, NEPAD, and human rights: The missing agenda', (2004) *African Human Rights Quarterly*, pp. 983-1027; Baimu E, 'Human rights in NEPAD and its implications for the African human rights system', (2002) 2 *African Human Rights Law Journal*, p. 303.

²⁵⁸ See, among others, Heyns C, 'The African regional human rights system: In need of reform?', note 72 above, p. 159; Nmehielle O, *The African human rights system*, note 90 above, p. 110; Heyns C, 'Civil and political rights in the African Charter', in M Evans & Murray R (eds.), *The African Charter on Human and Peoples' Rights: The system in practice*, note 113 above; Ankumah E, *The African Commission on Human and Peoples' Rights* (1996); Howard R, 'The Full-Belly Thesis: Should economic rights take priority over civil and political rights? Evidence from sub-Saharan Africa', (1983) 5 *Human Right Quarterly*, pp. 467-490; Busia K, Jr & Mbaye K, 'Towards a framework for the filing of communications on economic, social and cultural rights under the African Charter, Phase I', (1994) *East African Journal of Peace and Human Rights*.

²⁵⁹ See, for example, Rembe S, *The system of protection of human rights under the African Charter on Human and Peoples' Rights: Problems and prospects* (1991), p. 25; Ankumah E, *The African Commission on Human and Peoples' Rights*, note 147 above, pp. 18-19; Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000', note 72 above, p. 7; Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', in Viljoen F (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*, note 71 above, p. 19.

institutional, among others. The nature of reforms suggested in these texts is illuminated systematically in the course of the present study. As stated earlier, this study, which focuses on these aspects, constitutes an advancement of knowledge on the African human rights system as it will also address some questions that have been neglected or insufficiently addressed in the literature.

1.6.2 Neglected questions or questions insufficiently addressed in the reviewed literature

There are a number of questions that have been neglected or are insufficiently addressed in the literature reviewed in this study. The first question relates to whether Africa has made any positive contribution in the field of international human rights law. Some scholars opine that Africa's contribution in this field of law has been neglected or altogether ignored.²⁶⁰ According to Viljoen:

Africa is associated more with human rights problems and humanitarian crises than with their solutions, more with the need for international human rights law than its applications, and more with the failure of international law than with its success. If Pliny had the opportunity of writing today, he would probably have coined the phrase: 'Out of Africa, always something terrible.'²⁶¹

In spite of its contribution to the development of international human rights law, Africa has often been viewed in terms of its poor human rights record, and its regional human rights system has always been contemptuously dismissed.²⁶² For example, the African Commission has been accused of not being independent.²⁶³ The Charter is also purported

²⁶⁰ See, for example, Viljoen F, 'Africa's contribution to the development of international human rights and humanitarian law', (2001) 1 *African Human Rights Law Journal*, p. 18.

²⁶¹ Ibid.

²⁶² Heyns C, 'The African regional human rights system: In need of reform?', note 72 above, p. 156.

²⁶³ Murray R, *Human rights in Africa*, note 27, p. 52.

to have ushered in a weaker regional normative regime than was initially anticipated.²⁶⁴ Some of the norms are allegedly out of tune with municipal legislation in some member states, making their enforcement difficult and even impossible.²⁶⁵

While it cannot be gainsaid that the system is lacking in a number of areas, the efforts towards a more effective regional human rights system should also be appreciated.²⁶⁶ An uncritical attitude to the African human rights system ‘is as damaging as the cynical approach that one sometimes encounters, according to which nothing good can be expected ...’ from Africa.²⁶⁷ There is the need for engaged, positive criticism of the system to enable it to overcome its shortcomings. This solicits for extensive research in order to show that the exclusive negativity on the African human rights system is misplaced.²⁶⁸

According to Heyns, ‘only after the full magnitudes of potential problems have been established in a ‘no punches pulled’ fashion, could an appropriate response be devised.’²⁶⁹ The potential problem areas or challenges should be traced from the time the system was established. At the moment, the piecemeal diagnosis of the challenges besetting the system, conducted by different scholars, may not be very productive for a system which may need comprehensive reforms. Only a detailed investigation could lead to the conclusion on whether and how the system could be reformed.

²⁶⁴ Reisman W, ‘Through or despite governments: Differentiating responsibilities in human rights programs’, (1987) 72 *Iowa Law Review*, p. 392; Hopkins K, ‘A new human rights era dawns on Africa?’ note 37 above.

²⁶⁵ Mbondenyi M & Sifuna N, ‘A review of procedural and jurisdictional challenges in enforcing international human rights Law under the African Charter regime’, note 8 above, p. 14.

²⁶⁶ Acheampong K, ‘Reforming the substance of the African Charter on Human and Peoples’ Rights: Civil and political rights and Socio-economic rights’, note 253 above, p. 185.

²⁶⁷ *Ibid.*

²⁶⁸ Viljoen F, ‘Africa’s contribution to the development of international human rights and humanitarian law’, note 261 above, p. 18.

²⁶⁹ Heyns C, ‘The African regional human rights system: In need of reform?’ note 72 above, p. 158.

Another question is whether the discussions on the African human rights system should be posited on the general definition of human rights as given by the United Nations, notwithstanding the ideological and philosophical expressions of disquiet to the contrary.²⁷⁰ There has been an ongoing debate concerning the universality of human rights. As stated earlier, some scholars have argued for the contextual application of human rights while others have insisted that human rights are universal in content and context.²⁷¹

The existence, validity and content of human rights in Africa have therefore continuously been the subject of unending debate although human rights are defined in international law and covenants, and further, in the domestic laws of many states.²⁷² Some cultural relativists, such as Aka, dispute the universalism concept by arguing that, to be acceptable, human rights must first recognise cultural or regional peculiarities.²⁷³ Hence, any insistence on universal human rights standards is, according to this perception, a Western imposition.²⁷⁴

Kofi Annan, the former UN Secretary-General criticised the relativism notion at an OAU Summit meeting, maintaining that human rights are ‘fundamental to humankind itself that belong to no government and are limited to no continent.’²⁷⁵ He strongly disagreed with the African leaders who viewed concern for human rights as a conspiracy imposed by the

²⁷⁰ Acheampong K, ‘Reforming the substance of the African Charter on Human and Peoples’ Rights: Civil and political rights and Socio-economic rights’, note 253 above, p. 186.

²⁷¹ Those inclined to the universal school of thought generally define human rights as the entitlements afforded to all human beings regardless of legal jurisdiction or other localised factors such as ethnicity, nationality and sex.

²⁷² See generally, Aidoo K, ‘Africa: Democracy without human rights?’, (1993) 15 *Human Rights Quarterly*, p. 703.

²⁷³ Aka P, ‘The military, globalisation and human rights in Africa’, (2001/2002) 19 *New York Law School Journal of Human Rights*, p. 366.

²⁷⁴ Ibid.

²⁷⁵ Gaer F, ‘Human rights: What role in U.S Foreign Policy?’, *Great decisions, special issue*, (1998), p. 33.

industrialised West.²⁷⁶ Similar sentiments had been expressed earlier by Annan's predecessor Boutros-Ghali at the 1993 World Conference on Human Rights held in Vienna when he categorically stated:

The human rights that we proclaim and seek to safeguard can be brought about only if we transcend ourselves, only if we make a conscious effort to find our common essence beyond our apparent divisions, our temporary differences, our ideological and cultural barriers. In sum, what I mean to say, with all solemnity, is that the human rights we are bound to discuss here at Vienna are not the lowest common denominator among all nations, but rather what I should like to describe as the 'irreducible human element', in other words, the quintessential values through which we affirm together that we are a single human community. As an absolute yardstick, human rights constitute the common language of humanity.²⁷⁷

Arguably, the 'common language of humanity' contemplated by Boutros-Ghali could still be formulated within the context of ideological and cultural diversity and still maintain its essence. In other words, human rights could still be applied contextually without compromising their universal character, which is to protect human dignity. Whether this 'common language of humanity' should be the premise when discussing the African human rights system, notwithstanding the ideological and philosophical expressions of disquiet to the contrary, has therefore not been sufficiently addressed in the existing literature. There is the need, therefore, to know, in no uncertain terms, the philosophical basis of the African human rights system.

Another issue that has not been sufficiently addressed is the nexus between democracy and the regional enforcement of human rights in Africa. Studies have been conducted on the relationship between democracy and human rights in individual African states. However, such studies fail to sufficiently address the role of democracy in the African

²⁷⁶ Aka P, 'The military, globalisation and human rights in Africa', note 273 above, p. 367.

²⁷⁷ Quoted in Acheampong K, 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights', note 253 above, p. 188.

regional human rights system. If the African system is to be reformed, such reformation should consider the concept of democracy and the rule of law.²⁷⁸

Generally, human rights are tied to democracy²⁷⁹ and ‘it is difficult to bypass a discussion of democracy in relation to human rights in the contemporary world.’²⁸⁰ The concept of democracy remains universally popular. In the words of Dahl ‘in our times, even dictators appear to believe that an indispensable ingredient for their legitimacy is a dash or two of the language of democracy.’²⁸¹ Accordingly, democracy and human rights have interlinked facets ‘and might be considered twins, though not identical.’²⁸² This is because, ‘the quest for democracy is the quest for freedom, justice, equality and human dignity.’²⁸³ These values, freedoms, equality and justice are all necessarily entailed in the concept of human rights and find a common root in human dignity.

At the Vienna World Conference on Human Rights, Boutros-Ghali emphasised the linkage and interplay between the concept of human rights and democracy:

The process of democratisation cannot be separated, in my view, from the protection of human rights. More precisely, democracy is the political framework in which human rights can best be safeguarded. This is not merely a statement of principle, far less a concession to a fashion of the moment, but the realisation that a democracy is the political system which best allows for the free exercise of individual rights. It is not possible to separate the ... promotion of human rights from the establishment of democratic systems within the international community.²⁸⁴

²⁷⁸ Ibid, p. 192.

²⁷⁹ Steiner H & Alston P, *International human rights in context-law, politics, morals* (1996), p. 207.

²⁸⁰ Ibid, p. 659.

²⁸¹ Dahl A, *Democracy and its critics* (1992), p. 2.

²⁸² African Centre for Democracy and Human Rights Studies, ‘Human rights and democracy’, (1992) *African Human Rights Newsletter*, p. 5.

²⁸³ Gitonga A, ‘The meaning and foundations of democracy’ in Oyugi W, et al (eds.), *Democratic theory and practice in Africa*, (1988), p. 2.

²⁸⁴ Quoted in Acheampong K, ‘Reforming the substance of the African Charter on Human and Peoples’ Rights: Civil and political rights and socio-economic rights, note 253 above, p. 188.

According to the above observation, it can be argued that democracy and effective regional enforcement of human rights in Africa go hand in hand. Although the present study will not delve deeper into this nexus, it should be noted that the success, or otherwise, of the African human rights system has much to do with how serious democratic values and principles are upheld by states at the domestic level. Put differently, whatever takes place at the domestic level has implications on the regional human rights system.

Another neglected question is the contribution made by the Western countries towards the inefficiency of the African human rights system. The fact that some of the Western countries assisted their 'African agents' to seize power and remain in office for many years, cannot be overlooked.²⁸⁵ The Western powers most often granted support to these African leaders, or 'simply used the silence language when massive human rights violations were being committed against African democracy and freedom fighters.'²⁸⁶ However, Western and Africanist discourses have the tendency to absolve the West and former colonial powers from responsibility for African crises and failure to promote and protect human rights. Thus, the negative role of the international community, especially the West, has not been addressed sufficiently in the literature.

The reviewed literature also failed to sufficiently address the position of women in Africa's regional human rights system.²⁸⁷ In fact, some feminist writers, such as Murray, have argued that international law is male biased and thus fails to take account of those outside its parameters, particularly women.²⁸⁸ International human rights law, it is argued, is based on opposing dichotomies, an approach which fails to take account of the

²⁸⁵ See in this regard, Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo', note 137 above, p. 63.

²⁸⁶ Ibid.

²⁸⁷ Charlesworth H, et al, 'Feminist approaches to international law', (1991) 85 *American Journal of International law*, p. 613.

²⁸⁸ Murray R, 'A feminist perspective on reform of the African human rights system', note 253 above, p. 210.

much wider experience beyond traditional male perspectives.²⁸⁹ According to Harding, ‘feminine views name what is absent in the thinking and social activities of [men], what is relegated to ‘others’ to think, feel and do.’²⁹⁰ Murray observed:

...human rights has been posited in contrasting terms such as state/individual, war/peace, public/private as though these were clear divides into which issues could clearly be separated. The argument is that such an approach neglects the position and experience of women.²⁹¹

The role and potential of the other regional human rights systems in influencing the effectiveness of the African human rights system has also not been sufficiently addressed in the reviewed literature. Indeed, some comparison has been conducted between the African system and the other regional human rights systems.²⁹²

There is, however, the need to examine in greater detail the influence these systems have on the African system. It cannot be gainsaid that the African human rights system is the youngest of the three systems as well as the least developed. In the quest to develop the system, the African Commission has begun to draw inspiration from the European and Inter-American systems.²⁹³ While this should be encouraged, it is imperative to establish

²⁸⁹ Ibid.

²⁹⁰ Harding S, *The science question in feminism*, (1986) p. 186.

²⁹¹ Murray R, ‘A feminist perspective on reform of the African human rights system’, note 253 above, p. 210.

²⁹² See, for example, Mutua M, ‘The African human rights system in a comparative perspective’, note 26 above; Heyns C, Padilla D & Wolfgang S, ‘A schematic comparison of regional human rights systems’, (2003) 3 *African Human Rights Law Journal*, pp. 76-87; Padilla D, ‘An African human rights court: Reflections from the perspective of the Inter-American system’, (2002) 2 *African Human Rights Law Journal*, pp. 185-194; Murray R, ‘A comparison between the African and European courts of human rights’, (2002) 2 *African Human Rights Law Journal*, pp 195-222.

²⁹³ Article 60 of the Charter allows the African Commission to ‘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 from the provisions of various instruments

the criteria for such an approach. It should be appreciated that the backgrounds of these three systems are very different and the African Commission needs to be cautious when drawing inspiration from the other two systems.

Another question that is not sufficiently addressed in the reviewed literature relates to the role of individual African states in ensuring the effectiveness of the regional human rights system. Further, scanty information is available on how states promote the human rights values and standards propagated by the African human rights system. This is rather strange because many African leaders and governments have not lived up to the promise of human rights protection in spite of the proliferation of human rights legislations, policies and institutions on the continent. Additionally, the role played by the global community in the context of globalisation of laws and politics and how they affect the African human rights system, is insufficiently addressed in the literature. Understanding the role of the global community is essential because of its relevance to the realisation of effective regional human rights protection.

This study shall therefore attempt to address some of these issues and fill the gaps in the existing literature. This shall be done within the remits of the scope, objectives and aims of the study. It must be noted, however, not all questions can be answered and gaps filled in a study of this magnitude. Some of the questions shall therefore be left for further investigation or research.

1.7 Research questions

This research endeavours to address the following critical questions:

1. What are human rights? Are human rights Western or universal? What is human rights law and international human rights law? What are the philosophical and

adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.’

- conceptual origins of human rights law in Africa? Did human rights exist in pre-colonial Africa? What was the status of human rights in Africa during the pre-colonial, colonial and post-colonial eras? Is the concept of human rights law feasible in Africa? Should it be construed as contextual or universal? How did the human rights law concept in Africa evolve to attain its present regional status? What is the African human rights system? Did the Organisation of African Unity play any instrumental role in the promotion and protection of human rights at the regional level?
2. What is the twenty-first century status of human rights promotion and protection in Africa, particularly at the regional level? What regional mechanisms subsist to enforce international human rights law in Africa? To what extent are these mechanisms effective? Are the normative and institutional frameworks of the African human rights system adequate to redress the prevailing human rights violations on the continent? What are the salient features of the African Charter on Human and Peoples' Rights? What are the rights and duties in the Charter?
 3. What is the place of the African Union among the institutional mechanisms to protect and promote human rights in Africa? Does the Constitutive Act of the African Union contain any human rights provisions? How is the Constitutive Act different from its predecessor, the Charter of the Organisation of African Unity (OAU)? Does it have any prospects of promise for better enforcement of human rights in the region? What institutions or organs does the Constitutive Act of the African Union create and how are they relevant to the regional enforcement of human rights in Africa?
 4. What is the jurisdiction of the African Commission on Human and Peoples' Rights? Has this jurisdiction been exercised fully? If not, what factors have inhibited the commission from exercising its jurisdiction? What is the promotional mandate of the commission? How has it exercised this mandate?

What limitations does the commission face in the exercise of its promotional mandate? What can be done to overcome such limitations?

5. What is the commission's protective mandate? How has it exercised this mandate? What procedural requirements must a complainant fulfil when approaching the commission with a complaint? From the time the commission began to receive communications, has the jurisprudence contextually improved, if not, why? Does the commission have the power to grant remedies when it finds a violation of the Charter? If any, what is the nature of the commission's remedies? What limitations does the commission face in exercising its protective mandate?
6. What factors contributed to the establishment of the African Court on Human and Peoples' Rights? When was the court established and what is its composition? Who can access the court? What is its jurisdiction? What is the intended relationship between the court, the commission, the AU and other relevant human rights bodies (organs) in the region? What is the procedure of the court with regard to admissibility and consideration of cases, judgements and remedies?
7. What promise is offered by the court in redressing human rights violations on the continent? Are there any particular provisions in the Protocol on the Establishment of the African court on Human and Peoples' Rights that need to be re-examined to make the court more effective when it commences its proceedings? How far has the quest to operationalise the court gone?
8. Given that the effective enforcement of human rights law, particularly at the regional level, is not an *ad hoc* but a gradual process, how far is Africa in its journey towards this goal? In practice, how have the institutions and mechanisms for the enforcement of human rights law in Africa worked and what has been their impact? If any, what has been the influence and roles of other regional human rights systems in the advancement of the African human rights system? Do these regions present useful lessons that can be emulated by the African system?

9. What are the challenges besetting regional enforcement of human rights law in Africa? Can these challenges be overcome? If not, what should be done to reduce their impact on the effective enforcement of human rights law in the continent? Are there any prospects for an effective regional human rights system in Africa? What are they, if any? What assurance justifies one to conclude that the future of regional protection and promotion of human rights in Africa is promising? What scholarly proposals have been made to enhance the efficacy of the African human rights system? How viable are these proposals?

10. What should be done to enhance the effective regional enforcement of human rights in Africa? What factors should be considered when proposing a reformed regional human rights system? Does the status of human rights protection and promotion at the national level have any implications on the regional human rights system?

1.8 Hypotheses, expected findings and conclusions

The study investigates, tests and verifies a number of hypotheses. The major working hypothesis of this study, albeit a truism, is that regional enforcement of human rights law in Africa has been faced with many and tremendous challenges. The emergence of international human rights law and its enforcement at the regional level has encountered numerous challenges, not only in Africa but also in other regions.²⁹⁴ However, although the role and efficacy of regional human rights systems in Europe and the Americas in ensuring the observance of human rights by states is widely acclaimed, the adequacy of the African regional system is still very much in doubt.²⁹⁵

²⁹⁴ For a detailed survey of the European and Inter-American human rights systems and the challenges they have since encountered in the enforcement of international human rights law, see generally, Jacobs E, 'The European Convention on Human Rights', note 24 above; Castberg F, *The European Convention on Human Rights*, note 24 above; Morrison C, *The developing European law of human rights*, (1967); Wright J, *The European Convention on Human Rights: An Analysis and appraisal*, note 24 above; Fawcett J, *The Application of the European Convention on Human Rights*, (1987).

²⁹⁵ Mugwanya G, *Human rights in Africa*, note 18 above, p. 26.

In the main, the normative, institutional and procedural adequacies of the African Charter on Human and Peoples' Rights are surrounded by many controversies.²⁹⁶ This is compounded by the claim that the Charter is based on 'African philosophy' which therefore raises the issue whether it retreats from 'universalism'.²⁹⁷ Other commonly cited challenges associated with the Charter's normative, institutional and procedural inadequacies are its incorporation of duties as well as group or solidarity rights, its claw-back clauses and the mandate and functioning of the Commission.²⁹⁸

Another hypothesis that shall be tested in this study is that the status of human rights protection and promotion at the national level has implications on the performance of the regional human rights system. In spite of the clamour for human rights, many governments in Africa have failed to comply with international human rights norms.²⁹⁹ The study shall confirm that 'the gap between the international recognition of human

²⁹⁶ See in this regard Heyns C, 'Civil and political rights in the African Charter', in Evans M & Murray R, *The African Charter on Human and Peoples' Rights: The system in practice*, note 43 above, p. 176; Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 72 above, p. 1; Ankumah E, *The African Commission on Human and Peoples' Rights*, note 147 above, pp. 179-186; Murray R, *The African Commission on Human and Peoples' Rights and International Law* (2000), chapter 2; Bondzie-Simpson E, 'A critique of the African Charter on Human and Peoples' Rights', (1988) 31 *Howard Law Journal*, p. 643-645.

²⁹⁷ Mugwanya G, *Human rights in Africa*, note 18 above, p. 26.

²⁹⁸ See Steiner H & Alston P, *International human rights in context: Law, politics and morals*, note 147 above, p. 689; Ankumah E, *The African Commission on Human and Peoples' rights*, note 147 above, p. 176; D'sa R, 'The African Charter on Human and Peoples' Rights: Problems and prospects for regional action', (1981/83) 10 *Australian Yearbook of International Law*, p. 110; Gittleman R, 'The African Charter on Human and Peoples' Rights: A legal analysis', note 147 above, p. 694; Kunig P, 'The protection of human rights by international law in Africa', note 147 above, p. 155; Murray R, *The African Commission on Human and Peoples' Rights and international law*, (2000), p. 127.

²⁹⁹ See Mugwanya G, *Human rights in Africa*, note 18 above, p. 4. Mugwanya cites a number of human rights violations in Africa, including: 'the recent carnage in Rwanda, reports of extra-judicial executions in several African countries, the on-going political strife in southern Sudan, northern and western Uganda, the Democratic Republic of Congo (DRC), Congo Brazzaville, Sierra Leone, Somalia, Burundi and recent repression in Lesotho, Nigeria (during the Abacha regime), Kenya, Liberia and the Comoros, to mention but a few, have left millions dead and have widely violated many other rights and fundamental freedoms.'

rights and their national and local implementation is the most problematic aspect of the international effort to ensure universal respect for human dignity.³⁰⁰ The effective enforcement of human rights law at the regional level has thus been hampered by the failure of governments and civil servants to comply with the obligation to promote and protect human rights at the national level. Indeed, there is a close nexus between respect for human rights at the national level and their enforcement at the regional level.

Violation of human rights at the national level depicts the lack of seriousness among states and non-state actors to uphold the values and rights entrenched in the African Charter. Further, it is very likely that a state that is not committed to the promotion of human rights at the national level would treat regional enforcement efforts with equal contempt. This partly explains why, in spite of there being a regional human rights Charter that seeks to protect and promote the rights of individuals in African states, countries such as Uganda, for example, still experience massive human rights violations in the forms of killings, abductions, mutilations and wanton destruction of property.³⁰¹ Other states, such as Sierra Leone³⁰², Chad³⁰³, Burundi, Sudan and Somalia, just to mention but a few, still experience wars between government and rebel forces.³⁰⁴

These are just but few examples of how the Charter is being violated with impunity at the national level, under which circumstances it would be difficult to enforce it at the regional level. It is obviously impracticable for a country that is in the middle of a civil or political strife to contribute to the advancement of the regional human rights system

³⁰⁰ Ibid.

³⁰¹ See generally, Uganda Human Rights Commission, *1997 Annual Report* (July 1998), p. 51-52; Human Rights Watch (Africa), *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda*, Report of September 1997, available at <http://hrw.org/hrw/reports97/uganda/index.html>, last accessed on 12 April 2008.

³⁰² Where many people were massacred when the ECOMOG, led by Nigeria, unseated the military junta that had taken over power at the beginning of 1998. See Mugwanya G, *Human rights in Africa*, note 18 above, p. 56.

³⁰³ Where the rebel fighters are still hoping to oust the existing political regime.

³⁰⁴ Mugwanya G, *Human rights in Africa*, note 18 above, p. 56.

given that during crises, human rights are either being violated or are derogated from. Suffice it to state that the instability of many African countries has led to poverty and loss of human and material resources which could otherwise be useful in strengthening the regional human rights system.

This study also tests the hypothesis that the divergence in conceptual and philosophical understanding of human rights contributes to the challenges besetting their enforcement under the African system. Human rights were universalised soon after World War II when leaders from the West, such as Harry Truman and Winston Churchill, conceived it as the way to prevent atrocities of the war from happening again.³⁰⁵ Ironically, some of the nations that pretended to champion human rights were the chief perpetrators of vices such as slavery, colonisation, discrimination, genocide, conquest and other forms of inhuman and degrading treatment.

This suggested, at least to the African elites at that time, that the concept was a convenient tool for achieving selfish interests.³⁰⁶ Consequently, the universalisation of the concept was construed with lots of suspicion. This study therefore seeks to test the hypothesis that the divergence in conceptual and philosophical understanding of human rights law acted as a catalyst in, for example, resisting the establishment of powerful regional human rights enforcement mechanisms. Arguably, the idea of establishing powerful regional human rights mechanisms was, at that time, perceived by most African leaders as an attempt by the West to interfere with the sovereignty of African states in the guise of human rights protection.³⁰⁷

Another hypothesis to be tested, which is linked to what is stated above is, that regional promulgation and enforcement of human rights norms in Africa is increasingly influenced by the human rights standards established by the general international

³⁰⁵ Baah R, *Human rights in Africa*, note 115 above, Prologue.

³⁰⁶ Ibid.

³⁰⁷ See Marks P, 'Social and humanitarian Issues', in Tessitore J & Woolfson, (eds.), *A Global agenda: Issue before the 51st General Assembly of the United Nation* (1996), p. 56.

community. It is important to note that the African system cannot be studied in isolation from the universal and other regional human rights systems. Human rights, in spite of people's cultural, political, economic, social and other differences, remain the same throughout the world. Thus, they are universal, inherent, inalienable and indivisible.

Another hypothesis that this study shall test is that effective regional enforcement of human rights law in the continent is challenged by the persistence of socio-economic crises. Underdevelopment and the need to create viable nations have been the hallmark of the continent for many centuries now. In spite of the many experiments in the manner of government and the emergence of new institutions and tribunals for dealing with issues of human rights violations, there is a gap between declarations on protection of human rights and actual implementation.³⁰⁸

In many African states, human rights are more of a myth than reality. For the starving persons in the rural area, for example, human rights are empty abstractions if human rights cannot address their immediate needs.³⁰⁹ Similarly, in many societies where abject poverty still persists, income from child labour may mean the difference between one square meal a day and a roof over their family's heads or starvation and homelessness.³¹⁰ Thus, it may not be enough to casually state that children should enjoy their childhood.³¹¹ Similarly, children cannot enjoy the right to education when there are no schools.³¹²

Another hypothesis that will be verified in this study is that the effectiveness of the African human rights system depends, to a large extent, on the relevant enforcement mechanisms and their proper functioning. This study will show that the under-performance of the African system has mainly been due to the inefficiency of its

³⁰⁸ Baah R, *Human rights in Africa*, note 115 above, p. 2.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ For a catalogue of rights entitled to the African child see the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

³¹² Baah R, *Human rights in Africa*, note 115 above, p. 2.

enforcement mechanisms. As already stated, the African Commission has been accused of inefficiency. The same can be said of its former political body, the OAU. With the emergence of the AU and the establishment of the African Court, there is optimism that the system will perform much better than before. However, this will only be possible if all the loopholes for potential inefficiency are sealed.

The study will also confirm that the normative mechanisms of the Africa human rights system need to be reformed for effective human rights enforcement in the region to be realised. The Charter is an innovative human rights instrument that incorporates into one document all the three generations of rights: civil and political rights; economic, social, and cultural rights; and group (peoples') rights. Sadly, however, the Charter's norms have a number of shortcomings, including their numerous claw-back clauses, their non-binding character and their failure to provide for adequate remedies. These shortcomings have therefore hampered the effective enforcement of human rights at the regional level.

The study will further verify that the effectiveness of the African human rights system depends on the political commitment and will of the African leaders, as well as the people. The lack of political will is one of the contributing factors to the poor performance of the African system. Even prior to the inception of the African Charter, African leaders were reluctant to accept human rights in their agenda. This is clearly reflected in how long the Charter took to be adopted; the scanty human rights provisions in the domestic legislation of many states; the resistance to have a powerful continental human rights court that would challenge them on human rights violations committed in their domestic circles...the list is endless.

In tandem with the commitment of the African leaders to human rights protection is the role of the international community in the human rights agenda of the continent. This thesis shall show that the effectiveness of the system also depends on the commitment of the international community to the promotion of human rights in Africa. Indeed, the international community has contributed to a large extent in bringing the continent's compliance with human rights to the level it has reached. However, it has also played a

negative role in ensuring some leaders stay longer in power so as to safeguard their interests. Some of the chief violators of human rights in the continent got a helping hand from some Western countries.

Another hypothesis that shall be tested, but which also stands as a truism, is that, with appropriate reforms, the African human rights system can be more effective. It is evident that the normative and institutional reforms undertaken in the European and Inter-American regional systems have greatly enhanced the promotion and protection of human rights in the concerned regions. In the same way, suitable reforms to the African system may go a long way to improve the promotion and protection of human rights in the region. Such reforms may be normative, institutional, procedural, jurisdictional, political, and financial, among others.

In line with this, the thesis contends that, for the system to operate effectively, institutional mainstreaming and rationalisation is necessary. Currently, there are a number of institutions and initiatives (or programmes) on the continent with the mandate to promote and protect human rights. As a result, they either overlap or duplicate each others' efforts. For example, the African Commission has now been joined by the African Committee of Experts on the Rights and Welfare of the Child,³¹³ and the African human rights court. The Constitutive Act of the African Union has also provided for the establishment of the African Court of Justice, among other organs.

While it is encouraging to note that the African system is registering a positive impact, institutional mainstreaming is necessary. This is because, the existing and emerging institutions tend to overlap and duplicate the functions which could otherwise be performed by fewer and better resourced institutions.³¹⁴ It does not make sense, for

³¹³ Established under the African Charter on the Rights and Welfare of the Child which came into force in November 1999.

³¹⁴ Kithure K, 'Overlaps in the African human rights system' in Viljoen F, (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*, note 71 above, p. 135.

example, that the African Charter on the Rights and Welfare of the Child should have its own enforcement mechanism that duplicates the African Commission.³¹⁵

At another level, the African Court of Justice (ACJ) and the African human rights court tend to duplicate each others efforts. For instance, while the human rights court has jurisdiction over the interpretation of the African Charter,³¹⁶ the ACJ has a broader jurisdiction extending over all AU treaties and conventions and other issues concerning international law, including bilateral issues between AU member states.³¹⁷ Clearly, the ACJ also has a role in enforcing human rights in the region. Moreover, the Assembly of the Union may confer jurisdiction on the court over any other dispute.³¹⁸ Hence, there is a broad symmetry in both courts in relation to their composition and jurisdiction.³¹⁹ Beyond these broadly stated hypotheses, it is expected that the thesis shall discuss more issues than those highlighted above. The expected findings and conclusions in this study shall confirm a number of these hypotheses.

1.9 Research methods

A number of approaches were deemed appropriate in the furtherance of the objectives of this research. These include: the legal, juridical or normative approach; the comparative approach; secondary data analysis approach; historical approach; and philosophical approach. These approaches are examined below, their strengths and weaknesses highlighted and the reasons why they were preferred in the present study stated.

³¹⁵ Gutto S, 'The reform and renewal of the African regional human and peoples' rights system', note 120 above, p. 178.

³¹⁶ Art 4 of the Protocol Establishing the court.

³¹⁷ See the Protocol Establishing the Court of Justice.

³¹⁸ Ibid, Art. 9.

³¹⁹ Both courts consist of eleven Judges, no more than one from each of the states parties and with the president serving full-time. See Baimu E, & Viljoen F, 'Courts for Africa: Considering the co-existence of the African Court on Human an Peoples' Rights and the African Court of Justice', note 251 above, p. 250.

1.9.1 The legal, juridical or normative approach

This approach is institutional, normative and exegetic insofar as its focus is upon institutions, norms or rules that are to be interpreted.³²⁰ Its primary concern is more with the rules enacted to regulate the functioning and the organisation of institutions than with their functioning. The relevance of this approach to the present study stems from the fact that this is primarily a legal study. Human rights is a legal concept and international human rights law implies the existence of institutions, norms or rules to protect and promote human rights at the international level. This approach is therefore essential when the enforcement mechanisms under the African human rights system are reviewed. The normative framework of the African human rights system will be analysed.

The African human rights system comprises a number of normative instruments and institutional mechanisms, whose parameters shall be discussed elsewhere in this study. However, the African Charter remains the main normative instrument under the system.³²¹ Similarly, the African Commission has, since its inception, been the sole institution that ensures state compliance with its norms. Additionally, the African Court has been established to complement the commission's protective mandate. The legal, juridical or normative approach will therefore be very useful in this study when analysing the above mentioned institutions and normative provisions of the African system. Noteworthy, however, the method has both strengths and weaknesses.

The main strengths of the approach lie in the fact that it deals with rules and institutions that are primarily of concern to any study on the African human rights system.³²²

³²⁰ See Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa', note 137 above, p 79.

³²¹ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', in Viljoen F, (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*, note 71 above, p. 16.

³²² See Mangu A, 'The road to constitutionalism and democracy in Africa', note 137 above, p. 84.

However, it suffers from a number of weaknesses as outlined in the massive criticism levelled against it and its legal champions by other social scientists, especially political scientists, economists, historians and sociologists. It is suggested that the legal or institutional approach is deficient; that ‘it cannot help apprehend the entire ebb-flux phenomenon that results from the tendency of law to capture the real world and that of the latter to break the legal framework and revolt against it.’³²³

1.9.2 The comparative approach

This approach focuses on the similarities and differences between groups or units of analysis. These may include individual organisations, cultures, countries, societies, institutions and even individuals.³²⁴ The African human rights system cannot be studied in isolation from other existing human rights systems. The systems contemplated here are the universal system for the protection and promotion of human rights created under the United Nations;³²⁵ the European system³²⁶ and the Inter-American system.³²⁷

³²³ Ibid.

³²⁴ Mouton J, *How to succeed in your Master's and Doctoral studies*, (2005), p.154.

³²⁵ See generally, Alston P, *The United Nations and human rights: 1945-1995* (1995); Lewis S, ‘Treaty-based procedures for making human rights complaints within the UN system’, in Hannun H (ed.), *Guide to international human rights practice* (1999), pp. 41-50; Rodley N, ‘United Nations non-treaty procedures for dealing with human rights violations’, in Hannun H (ed), *op. cit.*, pp. 461-82; Scheinin M, ‘Economic and social rights as legal rights’, in Eide, Krause and Rosas, (eds.), *Economic, social and cultural rights* (1995), pp 41-62.

³²⁶ This system is essentially important since it produced the first regional human rights mechanism and it is the latest to be substantially reformed with regard to its enforcement mechanism. For detailed discussions on this system see generally, Macdonald J, *et al*, *The European system for the promotion of human rights* (1993); Harris D, *et al*, *Law of the European Convention on Human Rights* (1995); Van Dyke P & Van Hoof G, *Theory and practice of the European Convention on Human Rights* (1990); Merrills G, *The development of international law by the European Court of Human Rights* (1993); Clements C, *et al*, *European Human rights: Taking a case under the Convention* (1999); Mowbray A, *Cases and materials on the European Convention on Human Rights* (2001).

³²⁷ See Pasqualucci J, ‘Advisory practice of the Inter-American Court of Human Rights: Contributing to the evolution of international human rights’, (2002) 38/2 *Stanford Journal of International Law*, pp. 241-288; Rescia & Seitles, ‘The development of the Inter-American human rights system: A historical perspective

Comparative analysis will help to determine the extent to which the African system has drawn upon and may further be inspired by the universal (global) and other regional human rights systems. This approach assigns primacy to comparison; it sees the systems in the eyes of interdependence and interconnectedness in their various facets and stages of development. Thus, besides merely juxtaposing the African with the other regional systems, the approach is also useful in emphasising social realities and analysing contradictory elements. Although this approach is necessary when comparing different theoretical viewpoints across different settings, it has its own unique limitations.³²⁸ In this case, the degree of comparability of cases cannot be overlooked. For example, the European and Inter-American systems of human rights bear unique historical, social, political and cultural aspects which may not tally with those that inform the African system.

Whereas it is appealing, at least in theory, to have homogenous human rights standards across the globe, it is evident from the prevalent conditions in various regions and derived from their historical and cultural experiences, that this is not tenable. This fact was acknowledged in the Cairo seminar of 1969 which encouraged a regional organ 'among groups of countries which shared, to a large extent, the same heritage and faced similar problems.'³²⁹ This position was also recognised by the member states of the Council of Europe when its then deputy secretary observed the following during the 1968 Tehran conference:

...What cannot be achieved at the world level may be accepted by a group of states. Having the same customs, usages and interests, the countries of a single region can more

and modern-day critique', (2000) 16/2 *New York Law School Journal of Human Rights* pp. 693-733; Shelton D, 'Improving human rights protection: Recommendations for enhancing the effectiveness of the Inter-American Commission on Human Rights', (1988) 3/Fall *American University Journal of International Law and Policy* pp. 323-37.

³²⁸ Mouton J, *How to succeed in your Master's and Doctoral studies*, note 324 above, p. 155.

³²⁹ See *Seminar on the Establishment of Regional Commissions on Human Rights with special reference to Africa*, Cairo, 2-15 September 1969, para. 20, cited in Eze O, *Human rights in Africa: Some selected problems*, note 1 above, p. 223.

easily bind themselves to each other by treaty obligations, just as they are better able to tolerate a control exercise within the same family.³³⁰

There is also the obvious divergence in regional interpretations accorded to similar rights.³³¹ Rules of law cannot always be interpreted in the abstract. They deal with concrete situations in a given socio-economic and political environment and would be reduced to absurdity and ineffectiveness if they do not reflect that environment.³³² Therefore, although it is no shame for Africa to draw lessons from the experiences of other regions, it is equally important that restraint is exercised in comparative study to avoid the re-invention of the European or Inter-American systems, something that may be completely at odds with Africa's realities.

1.9.3 The secondary data analysis approach

This approach aims at re-analysing existing data in order to test hypotheses or to validate existing models.³³³ This involves extensive survey of literature connected with or incidental to the present research topic. This study endeavours to intertwine theory and practice through an extensive review of the existing literature. It relies on the bulk of literature on international and regional human rights systems. The study also necessitates an in-depth analysis of legislation, treaties, conventions and the entire normative framework that would be pertinent to its findings. Thus, the secondary sources that are essential to this study include, but are not limited to, books, journal articles, conference papers, information from the internet, reports of national and international human rights commissions, newspapers and reports of international and national Non-Governmental Organisations (NGOs).³³⁴

³³⁰ E/CN.4/975/Add. 1, cited in Eze O, *Human rights in Africa: Some selected problems*, note 1 above, p. 223.

³³¹ Ibid.

³³² Ibid.

³³³ Mouton J, *How to succeed in your Master's and Doctoral studies*, note 324 above, p. 164.

³³⁴ These include the reports compiled by Amnesty International, Africa Watch, Lawyer's Committee for Human rights, among others.

In analysing the existing secondary data, the qualitative research technique will be preferred. Secondary data analysis generally provides insight into the conceptual, historical and empirical issues on the subject under enquiry as perceived by other authors.³³⁵ Thus, there is an apparent need to acknowledge both the strengths and limitations of these sources as far as fact-finding reporting and analysis of human rights issues are concerned.

When conducting research of this magnitude, it is reckoned that the topic is not the exclusive domain of legal institutions or lawyers. In fact there is an interdependence and interaction between the legal protection of human rights and non-legal factors such as the political, social, economic, geographical and demographic contexts and realities.³³⁶ The Secondary data analysis approach, therefore, demands that the observations and conclusions in this study should not be viewed exclusively in the legal sense but also in the non-legal contexts mentioned above. Hence, the information gathered is not confined to the views or opinions of legal scholars. Ultimately, this approach will ensure that the conclusions and findings in this research take a holistic approach that does not preclude the non-legal conceptualisation of human rights.

Like any other research method, secondary data analysis has both strengths and limitations. Its main strength is that it saves on time and costs because reliance is on existing data. It does not call for sophisticated techniques such as conducting oral interviews, experimentation or quantitative evaluation. The researcher is only required to reanalyse the previous findings of other researchers. On the other hand, the approach constrains a researcher from controlling data collection errors because the objectives of the secondary and primary studies may have been different. This normally arises when there is a misunderstanding of the original objects of the principal investigator.

³³⁵ See Kithure K, 'Humanitarian intervention in Africa: The role of Inter-Governmental Organisations', (2002) *LLD Thesis, University of Pretoria*, p. 38.

³³⁶ *Ibid.*

1.9.4 Historical approach

This study necessitates a historical approach that would assist in reconstructing the past and the chronology of events.³³⁷ The main purpose of the historical component here is to clarify issues relating to the genesis and evolution of human rights law in Africa. The approach shall be handy in the analysis of the three periods that define the history of human rights in Africa. These are pre-colonial, colonial and post-colonial periods.

A look at the history of the evolution of international human rights law in Africa will therefore reveal the progressive shift in the way human rights have been enforced from the time of the inception of the regional system. This is necessary because the intended progression of knowledge will bring to the surface the challenges besetting their effective enforcement in Africa. In order to be in a position to suggest reforms to the existing institutions and norms of the African human rights system, an approach which takes due account of the history of human rights in Africa is imperative.

This, by extension, requires the proper use of the existing historical techniques such as the historical-descriptive³³⁸, causal questions³³⁹ and historical case studies.³⁴⁰ The main questions that this approach will seek to demystify will therefore include: how and when did the African human rights system originate? How did the system evolve to attain its present form and status? The historical approach will also be imperative when clarifying the theoretical foundations of human rights.

Whereas the historical approach has been adopted in furtherance of this study, it is inevitable to note a number of limitations associated with it. As already stated earlier,

³³⁷ Mouton J, *How to succeed in your Master's and Doctoral studies*, note 324 above, p. 170.

³³⁸ This refers to a narrative analysis attempting to reconstruct the past as accurately as possible. For a detailed discussion of this technique see Mouton J, *How to succeed in your Master's and Doctoral studies*, note 320 above, p. 170.

³³⁹ Ibid. This technique is employed when one is attempting to reconstruct a chain of events and identifying those events that caused or triggered other significant events.

³⁴⁰ This involves a comparative analysis of historical events. It is also known as 'event history analysis'.

although the study's focus is on the regional enforcement of international human rights law in Africa, the existence of human rights on the continent will have to be traced from the pre-colonial period. This would be done primarily to vindicate our argument that human rights were not foreign to Africa and that the concept is relevant to Africa and Africans. Unless this is made clear through a historical study, the importance of the African human rights system will not be appreciated, especially by those who perceive the human rights concept as foreign imposition.

Research on human rights in pre-colonial Africa, however, would have to depend on the available scanty materials. It is acknowledged that there is a dearth of literature in the legal field 'which has dealt in a comprehensive manner with the various aspects of human rights protection and promotion in Africa, given her past experiences and her present predicament of underdevelopment.'³⁴¹ The research will therefore deduce information from non-legal materials. Brendalyn reinforces this argument by lamenting the 'paucity of materials on human rights education and literature on human rights' in Africa.³⁴² Another limitation to the historical approach is linked to the nature of the available data. Primarily, the nature of the historical data that is collected depends on the understanding and judgement of the historian.³⁴³

Thus, differences in theoretical perspectives, which at times may be very contradictory, are expected.³⁴⁴ For example, whereas some African scholars have argued that the conceptual foundation of human rights is imperialistic and does not promote the welfare of Africans, others claim that 'Africans have had human rights all along and that they don't need to be told about human rights.'³⁴⁵ In spite of the herein-discussed limitations,

³⁴¹ Eze O, *Human rights in Africa*, note 1 above, p. 8.

³⁴² Brendalyn A, *Democratisation and the protection of human rights in Africa: Problems and prospects*, note 146 above, p. XVI.

³⁴³ Mouton J, *How to succeed in your Master's and Doctoral studies*, note 324 above, p. 171.

³⁴⁴ Ibid.

³⁴⁵ See Baah R, *Human rights in Africa*, note 115 above, p. 6. See generally, Mojekwa C, 'The African perspective', note 147 above, p. 91; Hansungule M, *The African theory of human rights* (1995); Welch C, 'Human rights as a problem in contemporary Africa', in Welch C & Meltzer R (eds), *Human rights and*

the historical approach will be a useful emphasis on process and change, hence, an important tool for the achievement of the objectives of this research.³⁴⁶

1.9.5 Philosophical approach

This approach aims at analysing arguments in favour of, or against a particular position, sometimes of a normative or value-laden kind.³⁴⁷ There are various modes of philosophical analysis. The more prominent modes, however, are the normative analysis, ideological critique, deconstruction and phenomenological analysis.³⁴⁸ This study shall concentrate on the normative analysis and ideological critique of the African human rights system. In view of the fact that this research shall examine the normative and institutional framework of the African human rights system, a philosophical approach is necessary. The current position on the enforcement of human rights in Africa has generated an array of philosophical ideas, which need to be evaluated, scrutinised and expounded in the present research.

Almost every chapter of this study requires an in-depth philosophical analysis of the available information. This is mainly because, to answer certain questions, philosophical analysis is required. For example, it would take more than mere historical facts for one to conclude whether or not law was indeed an entity in pre-colonial Africa. This is compounded by the fact that even after it has been proved that pre-colonial African societies were governed by customs which were enforceable by sanctions,³⁴⁹ some scholars still insist that those customs were absolutely rigid, therefore, ‘it was impossible

development in Africa (1984), p. 11; Silk J, ‘Traditional culture and the prospect for human rights in Africa’, in An-Na’im A & Deng F (eds), *Human rights in Africa: Cross-cultural perspectives*, note 147 above, pp. 293-294.

³⁴⁶ Mouton J, *How to succeed in your Master’s and Doctoral studies*, note 324 above, p 171.

³⁴⁷ Ibid, p. 178.

³⁴⁸ Ibid.

³⁴⁹ Elias T, *The nature of African customary law*, note 147 above, p. 9.

to make any distinction between legal, moral or religious rules, which were all interwoven into the single rules of customary behaviour.³⁵⁰

This approach is equally fundamental when examining the enforcement of human rights in the continent. When analysing the enforcement mechanisms of African human rights system, good scholarship demands that one goes beyond the letter of the law entrenched in treaties or conventions, to the critical analysis of the arguments advanced in favour of, or against, particular positions by other scholars. Admittedly, therefore, the strengths of philosophical analysis, particularly in the present study, are varied.

In summary, this approach will enable us to clarify concepts; critique the existing ideologies on the regional enforcement of human rights law in Africa; and develop different philosophical positions from those prevailing in the existing bulk of literature.³⁵¹ The approach, however, has its own limitations.³⁵² According to Mouton,

Philosophical analyses sometimes tend to become very abstract and far removed from the concerns of everyday life. Some philosophical traditions have developed very esoteric conceptualisations and idiosyncratic forms of reasoning, which make them rather inaccessible to outsiders.³⁵³

Philosophical traditions also tend towards dogmatism and intolerance of other philosophies.³⁵⁴ This shall therefore be avoided as much as is practicably possible in the course of this study.

³⁵⁰ Lloyds D, *Introduction to jurisprudence* (1972), p. 566.

³⁵¹ For further illumination on the strengths of the philosophical approach, see Mouton J, *How to succeed in your Master's and Doctoral studies*, note 324 above, p. 178.

³⁵² *Ibid.*

³⁵³ *Ibid.*, p. 179.

³⁵⁴ *Ibid.*

1.10 Overview of chapters

This study consists of five chapters. **Chapter One** lays the foundations for the entire work in what has been referred to as the general introduction. It introduces the problem to be investigated and sets out the aims and scope of the study. It also describes the study methodology, reviews the available literature on the subject and outlines the limitations of the study, among other things.

Chapter Two is a historical survey of the emergence, evolution and scope of human rights law in Africa. This chapter principally responds to questions such as: when and how did the African human rights system originate? What factors led to its emergence? Was the concept of human rights recognised in Africa prior to foreign intervention? What is the present status of international human rights law in Africa? Generally, it, lays the foundation for a better understanding of the conceptual and philosophical origins and evolution of Africa's regional human rights system.

In **Chapter Three**, the regional enforcement of human rights law in Africa is discussed. This chapter examines the normative and institutional mechanisms for the enforcement of human rights under the African system. One of its aims is to analyse the African Commission and Court on Human and Peoples' Rights in the light of their contributions to the African human rights system. The chapter also reviews the African Charter on Human and Peoples' Rights and its protocol establishing the African Court on Human and Peoples' Rights.

Chapter Four, which is the backbone of this study, excurses the challenges and the possible ways to reinvigorate the African human rights system. A number of historical, conceptual, philosophical, institutional, jurisdictional, procedural, normative and other challenges are discussed. Possible reforms of the system are also suggested throughout the chapter. **Chapter Five** concludes the study with a summary of the findings and recommendations for further research in order to achieve a more effective human rights system on the African continent.

CHAPTER TWO

HISTORICAL AND PHILOSOPHICAL BACKGROUND OF HUMAN RIGHTS IN AFRICA

2.1 Introduction

International human rights law is a branch of public international law.¹ Alston correctly acknowledged that, while its antecedents lie in domestic legal, social and political developments, the process through which an authentic body of human rights law has emerged at the global level has been very much a top-down rather than a bottom-up one.² This is because it was the inclusion in the United Nations Charter of a commitment to human rights and the subsequent elaboration of more precisely defined obligations in international law that marked the transition of human rights from a field of philosophical inquiry and moral invocation to its present universal status.³ Currently, this branch of law has a definite personality, albeit one which is expected to change dramatically owing to its disputed philosophical foundations.⁴

At the moment, international human rights law has attracted some of the most sustained philosophical challenges, especially in Africa. This is certainly true in relation to the debate over cultural relativism against that of universalism. It is against this background that this chapter examines the historical and philosophical background of international human rights law in Africa. The objective here is to trace the historical origin and

¹ Alston P (ed.), *Human rights law* (1996), p. Xii. See also generally Viljoen F, *International human rights law in Africa* (2007), chapter 1.

² Ibid.

³ Ibid.

⁴ The disputed philosophical foundations largely centre on the argument whether the concept of human rights is universal or contextual and on its existence in pre-colonial African societies.

development of human rights law from pre-colonial to contemporary Africa. This is based on the premise that to understand the development of Africa's regional human rights system, the study of its history, philosophy and sociology is necessary.⁵ The bottom-line of this study are the arguments and counter-arguments on the place of human rights in the history of Africa. As discussed later in this chapter, some scholars have contended that human rights had no place on the continent prior to foreign intervention while others have countered this view.⁶

⁵ Umzurike O, *The African Charter on Human and Peoples' Rights* (1997), p. 1.

⁶ For arguments on the existence, or otherwise, of human rights in pre-colonial Africa, see generally, Mangu A, 'The Road to Constitutionalism and Democracy in Post-Colonial Africa: The Case of the Democratic Republic of Congo' (2002), *LLD Thesis University of South Africa*, p. 235-257; Mamdani M, 'Social movements and constitutionalism in the African context', in Shivji I, *State and constitutionalism: An African debate on democracy*, (1988), p. 237; Mutua M, 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly*, p. 342; Mutua M, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', (1995) 35 *Virginia Journal of International Law*, p. 342; Wiseman J, *Democracy in black Africa* (1990), pp. ix-xi; Nzongola-Ntalaja M, *The state and democracy in Africa* (1997), p. 10; Busia K, 'The status of human rights in pre-colonial Africa: Implications for contemporary practices', in McCarthy-Arnolds E, et al, *Africa, human rights, and the global system: The political economy of human rights in a changing world*, p. 49; Appiagyei-Atua K, 'A rights-centred critique of African philosophy in the context of development', (2005) 5 *African Human Rights Law Journal*, pp. 335-357; Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', (1992) *Journal of Human Rights Law and Practice*, pp. 22-38; Wiredu K, 'Democracy and consensus in African traditional politics: A plea for a non-party polity', in Eze O, *Postcolonial African philosophy: A critical reader* (1997), p. 303; Hountondji P, 'The master's voice: The problem of human rights in Africa', in Ricoeur P (ed), *Philosophical foundations of human rights* (1986), p. 319; Diganke O, 'Protection of human rights in Africa', (2000) 10 *Transnational law & Contemporary Problems*, pp. 374-378; Shivji I, *The concept of human rights in Africa II* (1989), p.; Cobbah J, 'African values and the human rights debate: An African perspective', (1987) 9 *Human Rights Quarterly*, pp. 309-331; Gittleman R, 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International law*, p. 671; Okere J, 'Human rights and the African Charter' (1984) 6 *Human rights quarterly*, pp. 153-156; Pollis A & Schwab P (eds.), *Human rights cultural and ideological perspectives*; Berger H, 'Are human rights universal?', (1977) *Commentary*, p. 62; Welch C, 'Human rights as a problem in contemporary Africa' in Welch C & Meltzer R (eds.), *Human rights and development in Africa* (1984), p. 16; El-Obaid A & Appiagyei-Atua K, 'Human rights in Africa: A new perspective of linking the past to the present', (1996) 41 *McGill Law Journal*, pp. 829-836; Donnelly J, *The concept of human rights* (1985),

An in-depth study of the historical origin of human rights law in Africa is therefore essential because of the relevance of the concept to the contemporary society. It should be recalled that this study is concerned with the enforcement of international human rights law at the regional level and not the national or domestic one. Any attempt to underscore human rights in pre-colonial Africa, as is done here, should, however, not be construed as a deviation from the scope and subject matter of the present study, but rather as a way of trying to establish their origin and basis in Africa.

Such an inquiry is imperative because, to appreciate that the concept of human rights was also recognised by Africans even before the advent of European colonialists will debunk the argument that denies the pre-colonial practice of human rights. Moreover, before human rights became an international concern, they were promoted, protected as well as violated at the national or domestic level. Consequently, we cannot blindly focus on human rights as an international concept and ignore their domestic background; otherwise the study would be partial and incomplete.

Further, before Africa became 'a region', which is undoubtedly the focus of the present study, it was a place inhabited by diverse communities, living more or less independently from each other. Ignoring this fact in a study of this magnitude would be to betray the fact that before Africa became 'regional', the various communities that inhabited it had their own historical and philosophical backgrounds and perceptions of issues pertaining to life, including human rights. By extension, these backgrounds and perceptions played a critical role, as they still do, in influencing the emergence and evolution of the regional human rights system.

p. 8; Mojekwu C, 'International human rights: The African perspective' in Nelso J & Green V (eds.), *International human rights: Contemporary issues* (1980); Marasinghe L, 'Traditional conceptions of human rights in Africa', in Welch C & Meltzer R (eds.), *Human rights and development in Africa* (1984), p. 37; Legesse A, 'Human rights in African political culture', in Thompson K (ed.), *The moral imperatives of human rights: A world survey* (1980), p. 125.

While the foregoing discussion attempted to vindicate the importance of underscoring the existence of human rights in pre-colonial Africa in this study, we will at the same time be cautious not to delve deep into the domestic concerns of human rights, save for the reason of establishing the background to international human rights law, generally, and the origin and evolution of the African human rights system, particularly. In doing so, this chapter will be forming a necessary link with chapter 3 that reviews the the normative and institutional mechanisms of the African human rights system, and chapter 4, which deals with the challenges and possible strategies on reforming the system.

This chapter shall therefore endeavour to answer a number of questions, including: what is human rights law? Is this branch of law Western or does it have a place within the African context? What arguments have been advanced for or against the existence of human rights in pre-colonial Africa? Are the arguments plausible? What are the philosophical and conceptual origins of the human rights concept? How did human rights evolve in Africa to attain their present regional status? Did the OAU/AU play any role in the evolution of regional protection of human rights in Africa? Should the concept of human rights in Africa be construed as contextual or universal? The end result would be a better understanding and appreciation of the historical, philosophical and conceptual foundations of human rights in Africa, generally, and the African human rights system, particularly.

2.2 Definition, classification and scope of human rights

2.2.1 Definition of human rights

One of the initial questions in any study of this magnitude relates to the definition of the term ‘human rights.’ Shestack attempted a definition by referring to attributes such as ‘important’, ‘moral’ and ‘universal’.⁷ Such an approach is, however, precarious because not all entitlements with such attributes qualify as human rights. Again, the terms ‘important’ and ‘moral’ may not necessarily have universal interpretations in the sense

⁷ Shestack J, ‘The Philosophic foundations of human rights’ in McCorquodale R, *Human rights* (2003), p. 4.

that what is 'important' or 'moral' to one community or person may not be the same to another. The apparent difficulty in identifying human rights has therefore reduced their definition to a subject of great controversy among scholars.⁸

According to Cassese, for example, human rights are generally 'based on an expansive desire to unify the world by drawing up a list of guidelines for all governments...an attempt by the contemporary world to introduce a measure of reason into its history.'⁹ If this observation is anything to go by, it would mean that human rights are not inherent in all human beings but are rather conferred through the so-called 'list of guidelines.' In other words, based on this observation, governments have the discretion to decide whether or not human rights are relevant to their people. This argument is based on the premise that there is nothing absolute about guidelines. Rather, they can be varied, depending on the prevailing circumstances, to suit the whims of those implementing them.

The perception of human rights as 'guidelines' is therefore myopic because it is antithetical to the understanding that human rights are inherent entitlements which cannot be granted to anyone nor be deprived without a great affront to justice.¹⁰ Hence, Cassese's assertion cannot be embraced uncritically because the promotion and protection of human rights goes beyond the desire to unify the world. Any suggestion in this regard should therefore not be entertained. It has further been suggested that human rights are those entitlements individuals possess by virtue of being human.¹¹ This implies that all human beings are equal and have rights in equal measures regardless of age, sex, race, social class, talent, or religion.¹²

⁸ Brendalyn A, *Democratisation and the protection of human rights in Africa* (1995), p. 29.

⁹ Cassese A, *Human rights in a changing world* (1990), p 3.

¹⁰ Cranston M, 'Human rights: Real or supposed', in Raphael D (ed), *Political theory and the rights of man*, (1967), p. 52.

¹¹ Brendalyn A, *Democratisation and the protection of human rights in Africa*, note 8 above, p. 29.

¹² Ibid.

Similarly, Henkin concluded that human rights are universal rights accruing on all human beings that are fundamental to human existence and can neither be transferred, forfeited, nor waived.¹³ This observation is proper because unless it is appreciated that human rights are inherent in all persons, it will not be possible to enforce them in Africa. It cannot be gainsaid that the concept of human rights has, at some point, been dismissed as a Western idea or creation having no bearing in Africa.¹⁴ The discussion on whether or not Africa has a history of human rights shall be revisited later in this chapter.

Legal positivism regards human rights as those entitlements which have become part of a positive legal system and derive either from the will of the state or the command of the sovereign.¹⁵ This proposition is not very appropriate to Africa because, if states are allowed to become the ultimate source of rights, it is not unlikely that such status would be used to suppress human rights with impunity.¹⁶ Legal positivism fails to appreciate the fact that the will of the state or the command of the sovereign can only give effect to rights that are inherent but not create them through legislation. This is to say, if human rights are legislated by a state, it simply means that the particular state can confer them only to the extent it acknowledges their importance to its people or to the extent of its available resources. In this regard, a state may choose to guarantee or violate human rights at whim without necessarily being called to question.

Further, legal positivism seems to perpetuate some negative cultural biases in as far as it seems to suggest that human rights were non-existent in classless societies that were governed by customs rather than law. This proposition is not correct because it ignores

¹³ Henkin L, *The Age of rights* (1990), p. 2.

¹⁴ See generally, Busia K, 'The status of human rights in pre-colonial Africa, note 6 above, p. 49; Appiagyeyi-Atua K, 'A rights-centred critique of African philosophy in the context of development', note 6 above, pp. 335-357; Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', note 6 above, pp. 22-38; Wiredu K, 'Democracy and consensus in African traditional politics', note 6 above, p. 303.

¹⁵ Brendalyn A, *Democratisation and the protection of human rights in Africa*, note 8 above, p. 29. See also Lloyds D, *Introduction to jurisprudence* (1972), pp. 291-292.

¹⁶ *Ibid.*

the very fact that wherever human beings existed, human rights were promoted, protected and even violated. Amid all these contradicting schools of thought, one would agree with Azinge's observation that, to postulate a precise definition of human rights is a highly elusive task.¹⁷ Justice Oputa of Nigeria alluded to this definitional problem when he posited:

If therefore we attempt to probe human rights in the political and legal culture of Nigeria without a clear idea of rights, a clear theory of rights in general, and of human rights, in particular, we shall not be right about human rights.¹⁸

Oputa seems to suggest that, for human rights to be properly defined, the starting point of the enquiry should be to define the term 'right'. Accordingly, the term 'right' could either be defined in the abstract or concrete sense. In the abstract, it refers to 'justice', 'ethical correctness', or 'consonance with the rule of law or the principles of morals'.¹⁹ In the concrete sense, it means 'power', 'privilege', 'faculty' or 'demand', inherent in one person and incidental upon another.²⁰ Accordingly, legal positivists defined 'legal right' as a legally protected interest,²¹ while natural law thinkers, after viewing the term in relation to nature, concluded it is something inherent in humanity.²²

It has therefore been contended that those claims which are based on, or are in accord with, some objective standards, be it a code of moral values or laws, can rightly be termed as 'rights'.²³ Eze therefore defined human rights as 'demands or claims which

¹⁷ Azinge E, 'Milestone decisions on human rights', in Kalu A & Osinbajo Y (eds.), *Perspectives on human rights* (1992), p. 196.

¹⁸ 'Human rights in the political and legal culture of Nigeria', Second Justice Idigbe Memorial Lecture, University of Benin, (1986), p. 2.

¹⁹ Ibid.

²⁰ See Black law dictionary (5th ed.).

²¹ See Fitzgerald P, *Salmond on jurisprudence* (1966), p. 217.

²² See Azinge E, 'Milestone decisions on human rights', note 17 above, p. 197; See also generally, Finnis J, *Natural law and natural rights*, (1980).

²³ Azinge E, 'Milestone decisions on human rights', *ibid*, p. 197. See also the arguments advanced in Dowrick F, (ed), *Human rights, problems, perspectives and texts* (1979), p.8.

individuals or groups make on society, some of which have become part of *ex lata* while others remain aspirations to be attained in future.²⁴ In Eze's understanding, only that which is recognised and protected by the legal system can be considered as a right. This perception is somewhat limited.

Arguably, while some rights are recognised and protected by law for various reasons, others are not; yet they are important, as they are inherent in man. The law or legal system should not be seen as a 'guarantor' but a 'protector' of rights. It is true that in most legal systems, especially those founded on the common law tradition, one cannot assert a claim unless it is recognised by the legal system. In the case of human rights, however, this fact should not be taken to mean that rights are conferred by the legal system. Rather, it should be an emphasis of the fact that the legal system enforces and protects what already exists inherently in human beings.

It is to underscore this argument that Cranston maintains, and rightly so, that 'a human right is something of which no one may be deprived without a great affront to justice.'²⁵ According to him, 'there are certain deeds which should never be done, certain freedoms which should never be invaded, some things which are supremely sacred.'²⁶ When this position is extrapolated further, one would arrive at the conclusion that if the deprivation of human rights would result in 'a great affront to justice', no institution or individual qualifies as a guarantor of human rights. At the same time, it could be argued that all institutions and individuals are expected to be protectors of human rights.

Despite numerous attempts to find a compromise definition of human rights, it is now accepted that the province of this concept cannot easily be determined. This means that human rights are continually evolving, lending credence to Laski's observations that 'a legal system is surrounded by the penumbra of an attainable ideal which it must reach as

²⁴ Eze O, *Human rights in Africa*, note 6 above, p. 5.

²⁵ Cranston M, 'Human rights: Real or supposed', note 10 above, p. 52.

²⁶ *Ibid.*

the price of its preservation.²⁷ In the context of this study therefore, human rights can be defined as the demands or claims individuals or groups make that are essential for individual well being, dignity, and fulfilment,²⁸ the deprivation of which may lead to a great affront to justice. Accordingly, they are demands or claims:

which stand above the ordinary laws of the land and which in fact [are] antecedent to the political society itself. It is a primary condition to a civilised existence and ...could be immutable to the extent of the non-immutability of the constitution itself.²⁹

As shall be argued elsewhere in this chapter, the definition of human rights cannot ignore the fact that they are inherent, indivisible, interrelated, universal and belong to every society regardless of geography, history, culture, ideology, political or economic system. It is easy to contest the authenticity of such a definition with respect to the rights of vulnerable persons in the society, such as women, children, the old and disabled.

Thus, as if motivated by the need to cater for these categories of persons, Humana defined human rights as laws and practices that have evolved over the centuries to protect ordinary people, minorities, groups, and races from oppressive rulers and governments.³⁰ This, however, is a narrow view which fails to take into account those persons who do not fall into any of these categories. If Humana's definition is anything to go by, then human rights may be confined, not to claims asserted and recognised 'as of right', but to claims based charity.³¹ This has never been the essence of human rights since their origin.

Instead, human rights have always been 'those liberties, immunities and benefits which by accepted contemporary values, all human beings [are] able to claim 'as of right' of the society in which they live.'³² They are not privileges granted by the state or society but

²⁷ Laski H, *A grammar of politics* (1967), pp. 91-92.

²⁸ Ibid.

²⁹ *Ransome Kuti v. Attorney-General of Nigeria*, cited in Azinge E, *ibid.*

³⁰ Humana C, *World human rights guide* (1983), p. 7.

³¹ Azinge E, 'Milestone decisions on human rights', note 17 above, p. 197.

³² Henkin L, 'Human rights', in Bernhardt R (ed.), *Encyclopaedia of international law*, (1985) 8, p. 268.

are the ideals and distinguishing marks of a civilised society.³³ Although the term ‘human rights’ as it is commonly used today is a twentieth century concept for what was referred to as ‘natural rights’ or ‘the rights of man’³⁴, its philosophical and historical foundations may be traced back to the existence of humankind. We shall revert to this debate at a later part of this chapter.

2.2.2 Classification of human rights

Human rights may be divided into different categories. These are: civil, political, social, economic and cultural.³⁵ Civil and political rights include the right to self-determination, the right to life, freedom from torture and inhuman treatment, freedom from slavery and forced labour, the right to liberty and security of the person, freedom of movement and choice of residence, right to fair trial, right to privacy, freedom of thought, conscience and religion, freedom of opinion and expression, the right to assembly, freedom of association, the right to marry and found a family, the right to participate in one’s government either directly or through freely elected representatives, the right to nationality and equality before the law.³⁶

Economic, social and cultural rights embrace, *inter alia*, the right to work; the right to just conditions of work; the right to fair remuneration; the right to an adequate standard of living; the right to organise, form and join trade unions; the right to collective bargaining; the right to equal pay for equal work; the right to social security; the right to property; the right to education; the right to participate in cultural life and to enjoy the benefits of scientific progress.³⁷

³³ Nsirimovu A, *Human rights education techniques in schools*, (1994), p. 24.

³⁴ Cranston M, *What are human rights* (1973), p. 1.

³⁵ See this classification in, for example, Aka C, ‘Military, globalisation and human rights in Africa’, (2002) *New York Law School Journal of Human Rights*, p. 371.

³⁶ *Ibid.* See also generally, the African Charter on Human and Peoples’ Rights, Art. 2-14, the Universal Declaration on Human Rights, The European Charter on Human Rights and Fundamental Freedoms and the American Convention on Human Rights.

³⁷ *Ibid.* See also the International Covenant on Economic, Social and Cultural Rights.

While political and civil rights impose restraints on the exercise of state power and are therefore negative rights, socio-economic rights tend to extend the scope of state activities, translating them into positive rights.³⁸ It is equally important to note that human rights are not static; their codification is an ongoing and never ending process both nationally and internationally. Sometimes they are codified in response to a specific threat or act of repression.³⁹ An example to be cited in this regard is freedom of religion, which was codified in reaction to the powerful Catholic Church in Europe and the religious wars and government coercions that the church provoked.⁴⁰

The classification of rights into the various categories listed above should not be construed as rigid because human rights are generally interrelated and interdependent.⁴¹ Moreover, human rights are not absolute and they may be limited or derogated from on the basis of, for example, state security, national survival or any other necessary circumstances.⁴² That is why some modern constitutions entrench limitation and derogation clauses that would enable them to limit the enjoyment of certain rights and derogate from others in cases of emergencies that threaten the life or security of a nation.⁴³

2.2.3 Scope of human rights

Human rights are of broad application; they are recognised in the constitutions of many states whose political principles are otherwise quite divergent.⁴⁴ Accordingly, they are applicable both nationally and internationally. Initially, human rights were purely a matter of national concern. However, the adoption of the U.N Charter, after the Second

³⁸ Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa', (1998) *LLM Thesis University of South Africa*, p. 7.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ See Article 5 of Vienna Declaration and Programme of Action.

⁴² Nowak M, *Introduction to the international human rights regime*, note 6 above, p. 2.

⁴³ See, for example, *The Constitution of the Republic of South Africa, 1996*, Arts. 36 & 37.

⁴⁴ Azinge E, 'Milestone decisions on human rights', note 17 above, p. 199.

World War, ushered in a process leading to their gradual universalisation.⁴⁵ The Charter after reaffirming, in the preamble, faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, pronounces in Article 1(3) that one of its purposes is to promote and encourage respect for human rights and fundamental freedoms. Thus, the UN has been able to consolidate the principle that human rights are a matter of international concern and that the international community is required to promote and protect them.⁴⁶

Internationalisation of human rights, however, cannot be effectively discussed without recognition of the efforts to enforce human rights at the regional level. Conspicuous regional achievements in this regard are the adoption of the European Convention on Human Rights and Fundamental Freedoms; the African Charter on Human and People's Rights; and the American Convention on Human Rights. Due to this, people from different regions of the world now have established institutionalised processes through which they can freely and unambiguously find recourse to the violation of their rights.

Consequently, human rights can now be regarded as the benchmark below which no national law may fall.⁴⁷ They can be enforced at the international level when they become a matter of treaty obligation or to the extent that their respect has become a customary rule of international law.⁴⁸ Those parts of a treaty that form part of customary law are relevant to parties and non-parties just as the principles of humanitarian treaties, such as

⁴⁵ Ibid, p. 200.

⁴⁶ Ibid.

⁴⁷ Umozurike O, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 6.

⁴⁸ See *Nationality Decrees of Tunis and Morocco* PCIJ Ser. B No. 4 1923. In this case, the Permanent Court of International Justice answered the question whether the extension of French nationality decrees in Tunis and Morocco to British citizens was a matter within domestic jurisdiction. Giving a negative answer, the court found that the status of a matter depended on the development of international relations. Accordingly, a matter was removed from the domain of domestic jurisdiction once it became the subject of treaty obligation.

the Genocide Convention 1948, the Geneva Red Cross Convention of 1949 and the Additional Protocols of 1977.⁴⁹

In the *Barcelona Traction Case*⁵⁰, the International Court of Justice found that the principles and rules concerning basic human rights were binding on all states. Principally, the protection and promotion of human rights is the fundamental purpose of governments.⁵¹ Hence, states are obliged to incorporate international human rights standards into their domestic systems. The level of a state's development is determined or even affected by the extent to which its citizens enjoy human rights in all their ramifications. It follows therefore, that peace, progress and stability are predicated at both national and international levels on the respect for human rights.

Consequently, human rights have become 'a potent instrument of diplomacy to which has been added democracy.'⁵² For instance, how a state treats nationals of another state residing in its territory would determine whether the two states may have a good diplomatic relationship or not. The yardstick used to determine or define such a relationship is usually predicated on the respect for human rights of the concerned individuals. However, the concern for human rights does not nullify the principle of non-interference in domestic affairs.⁵³ Unfortunately, the paradox in human rights is that their most effective protectors (governments) are also most often their worst violators.⁵⁴ The

⁴⁹ Umzurike O, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 6.

⁵⁰ ICJ Rep. 1970 p. 32, para. 34.

⁵¹ Umzurike O, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 7.

⁵² Ibid.

⁵³ See generally the arguments in Umzurike U, 'The domestic jurisdiction clause in the OAU Charter' (1979) 311 *African Affairs*, p. 197; Okongwu O, 'The OAU Charter and the principle of domestic jurisdiction in Inter-African affairs', (1973) 13 *Indiana Journal of International Law*, p. 589; Lalive A, 'The protection of human rights within the framework of existing regional organisations', in Robertson A (ed.), *Human rights in national and international law* (1986), p. 330; Markovic I, 'Implementation of human rights and domestic jurisdiction of states', in Eide A and Shou (eds.), *International protection of human rights* (1968), p. 47.

⁵⁴ Okongwu O, *ibid*, p. 589.

challenge has therefore not been to lay down standards for states but also to ensure, through effective enforcement mechanisms, that states carry out their human rights obligations.

2.3 Philosophical foundations of human rights

To understand the concept of human rights, it is important to unveil its philosophical foundations. The concept of human rights, having come this far legally, may prompt one to wonder why there should be any concern with its philosophical foundations. Why should the ink continue to be spilled in arguments over how and when the concept of human rights originated? Is it at all necessary in the contemporary world, and in a research of this magnitude, for one to delve into the philosophical origins of this concept? Sheshtack opines that philosophy plays an instrumental role in deepening understanding of truth.⁵⁵

Accordingly, there are a myriad of reasons for exploring the philosophical origins of the human rights concept. For example, unless the philosophies that shape human rights are unveiled, the understanding of the concept is likely to remain obscure.⁵⁶ Further, understanding the philosophical foundations of the concept will ‘help to devise a translation formula that will permit men and women to speak to each other across the gulf of creed and dogma, a necessary exercise for universal recognition of human rights principles.’⁵⁷ Thus this part of the study will examine some crucial philosophical theories relating to the origin of human rights. Focus shall be on three main theories that have also been linked with the philosophical foundations of law. These theories are naturalism, positivism and Marxism. It is important to emphasise that these theories shall not be analysed in great detail due to the defined scope of this study.

⁵⁵ Sheshtack J, ‘The philosophic foundations of human rights’, note 7 above, p. 202.

⁵⁶ Ibid.

⁵⁷ Ibid.

2.3.1 Natural law (rights) theory

Human rights were originally perceived as the natural rights of every individual. That is to say, they were determined by their author's perception of the nature and essential characteristics of the human person.⁵⁸ Hence, in their search for the philosophical foundations and meaning of law, some philosophers and jurists developed the theory of natural law (rights). This theory has its roots in Sophocles and Aristotle and was further developed by the stoics of the Greek Hellenistic period, and later by those of the Roman period.⁵⁹ Particularly, Thomas Aquinas perceived natural law as part of the law of God that confers certain immutable rights upon individuals.⁶⁰ The particular rights and freedoms that were thus thought to be natural concomitants of being human were identified by contemplating the condition of an individual in a stateless society.⁶¹

As feudalism declined, modern secular theories of natural law arose, particularly as enunciated by Grotius and Pufendorf. Their philosophy detached natural law from religion, laying the groundwork for the secular, rationalistic version of modern natural law. According to Grotius, a natural characteristic of human beings is the social impulse to live peacefully and in harmony with others. Whatever conformed to the nature of men and women, as rational, social beings was right and just; whatever opposed it by disturbing the social harmony was wrong and unjust. Grotius defined natural law as a 'dictate of right reason'.⁶²

⁵⁸ Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa' note 38 above, p. 6.

⁵⁹ Some of the chief early proponents of this theory include Callicles, Plato, Aristotle, Sophocles, St. Augustine, St. Thomas Aquinas, Stoic, William Ockham, Thomas Hobbes and John Locke. See Roux W, 'Natural law theories', in Moellendorf D & Roederer C, *Jurisprudence* (2006), pp. 25-61.

⁶⁰ Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa', note 38 above, p. 6, citing, St. Thomas Aquinas, *Summa Theologica*, Lib. II, pt. II (1475).

⁶¹ Centre for Human Rights Pretoria, *From human rights to human wrongs* (1995), p. 50.

⁶² Grotius H, *De jure belli et Pacis* (Book 1, 1689), cited in Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa', note 38 above, p. 6.

Natural law theory led to natural rights theory—the theory most closely associated with modern human rights.⁶³ The chief proponent of this theory was John Locke, who premised his philosophy on the imagination of the existence of human beings in a state of nature.⁶⁴ In that state, men and women were in a state of freedom, able to determine their actions, and also in a state of equality in the sense that no one was subjected to the will or authority of another.⁶⁵ The state of nature, however, suffered from certain limitations due to the absence of a superior power that would regulate the conflicting interests of individuals.⁶⁶ To ensure order and harmonious co-existence, the individuals entered into a ‘social contract’ by which they mutually agreed to form a civil society (*pactum unionis*) and set up a political authority to protect their respective natural rights.

In setting up that political authority, individuals retained the natural rights of life, liberty, and property.⁶⁷ Government was obliged to protect the natural rights of its subjects, and if government neglected this obligation, it forfeited its validity and force.⁶⁸ According to this theory, the civil government derived justification for its existence and continuous exercise of political power from the contractual duty to protect the natural rights of its subjects.⁶⁹

Locke’s theory was the basis for the principle that law should protect the basic human rights of the individual against the abuses of governments. This can at least be traced

⁶³ Cobbah J, ‘African values and the human rights debate: An African perspective’, note 6 above, p. 314.

⁶⁴ Ibid.

⁶⁵ Eno W, ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’, note 38 above, p. 6. For a detailed discussion of the natural law theory, see generally, John F, *Natural law and natural rights* (1980).

⁶⁶ Roux W, ‘Natural law theories’, in Moellendorf D & Roederer C, *Jurisprudence*, note 59 above, p. 41.

⁶⁷ Eno W, ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’, note 38 above, p. 7.

⁶⁸ Ibid.

⁶⁹ Ibid.

back to his *Two treatises of government*, published in 1690.⁷⁰ In his celebrated work, Locke believed that human beings, not governments, came first in the general order of things. He therefore argued that:

If man in the state of nature be so free, as has been said; if he be absolute Lord of his own person and possession, equal to the greatest and subject to nobody, why will he part with his freedom? Why will he give up his empire, and subject himself to the dominion and control of another power? To which 'tis obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others. For all being kings as much as he is, every man his equal, and the greater part no strict observer of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecured. This makes him willing to quit a condition, which however free, is full of fears and continual dangers: And 'tis not without reason, that he seeks out, and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates.⁷¹

Thus, under the natural law (rights) theory, human rights were originally perceived as the natural rights of every individual. Those rights were determined by their author's perception of the nature and essential characteristics of the human person.⁷² Human rights were therefore considered to be something which persons possess in their natural state, devoid of the intervention or support of society.⁷³ This simply means that a person brings rights with him or her into society which is created to protect these rights by enacting laws.

⁷⁰ Locke J, *Two treatises of government*, (Latest rev ed. 1963), p. 395. See also Roux W, 'Natural law theories', note 59 above, pp. 43-45.

⁷¹Roux W, 'Natural law theories', *ibid*, pp. 43-45.

⁷² Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa', note 38 above, p. 6.

⁷³ *Ibid*.

Natural rights theory is believed to have been the philosophical impetus for the wave of revolts against absolutism during the late eighteenth century.⁷⁴ It is visible in the French Declaration of the Rights of Man,⁷⁵ in the US Declaration of Independence,⁷⁶ in the constitutions of numerous states created upon liberation from colonialism, and in the principal UN human rights documents.⁷⁷ Hence, through various philosophical writings found in the works of Locke, Montesquieu and Jefferson, among others, the ideas of individual rights and popular sovereignty gained acceptance in Europe and America during the eighteenth century.⁷⁸

For example, in 1776 in Virginia, a bill of rights was adopted at a convention of delegates representing the thirteen original states of the United States of America (US)⁷⁹, which stated that all men are equally free and independent by nature and in possession of certain inherent rights of which they cannot be divested; namely, the right to life, liberty and property.⁸⁰ The US constitution later defined these rights in greater detail.⁸¹ The theory of natural rights, however, constituted a barrier between the individual and the

⁷⁴ Motola Z, 'Human rights in Africa: A cultural, ideological and legal examination' (1989) *Hastings International & Comparative law review*, p. 374.

⁷⁵ Declaration of the Rights of Man and of Citizens (France 1789).

⁷⁶ Motola Z, 'Human rights in Africa: A cultural, ideological and legal examination', note 74 above, p. 374. The Declaration of Independence (US 1776). Locke's prose was re-iterated in 1776 in the American Declaration of Independence which proclaimed:

we hold these truth to be self-evident that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed....

⁷⁷ See Motola Z, 'Human rights in Africa: A cultural, ideological and legal examination', note 74 above, p. 375.

⁷⁸ Ibid.

⁷⁹ Kenyon, 'Constitutionalism in revolutionary America', in Pennock J & Chapman J (eds.), *Constitutionalism* (1979), p. 93.

⁸⁰ The Virginia Declaration of Rights, adopted in Virginia on June 12, 1776.

⁸¹ Motola Z, 'Human rights in Africa: A cultural, ideological and legal examination', note 74 above, p. 376.

government.⁸² People demanded participation in the political process, and individual rights became a legal tool.

In US, for example, the settler mentality, which rewarded the virtues of competition and initiative, served to extend individualism that by then had become the customary norm throughout the Western world.⁸³ To ensure that the government did not penetrate this barrier, advocates of natural rights devised mechanisms to limit the government with regard to the individual.⁸⁴ The more important of these mechanisms were the theory of separation of powers and the notion of the rule of law to guarantee protection of each individual's natural rights.⁸⁵ Hence, Western political systems produced institutional arrangements in such a way as to ensure that the essential natural rights were not infringed upon by the government.⁸⁶

Be that as it may, the natural rights theory makes an important contribution to the human rights discourse. It identifies with and provides for human freedom and equality, from which other human rights easily flow. The natural rights theory, however, had some limitations. From a philosophical viewpoint, the critical problem that this theory faced is how to determine the norms that are to be considered as part of the law of nature and therefore inalienable.⁸⁷

Under Locke's view of human beings in the state of nature, all that was needed was the opportunity to be self-dependent; life, liberty, and property were the inherent rights that met this demand.⁸⁸ But what about a world unlike the times of Locke, in which ample resources are not available to satisfy human needs? Does natural law theory have the

⁸² Ibid.

⁸³ Swanson J, 'The emergence of new rights in the African Charter', note 6 above, p. 325.

⁸⁴ Ibid.

⁸⁵ Pollis A & Schwab P (eds.), *Human rights cultural and ideological perspectives*, note 6 above, p. 20.

⁸⁶ Swanson J, 'The emergence of new rights in the African Charter', note 6 above, p. 325.

⁸⁷ Eno W, 'The African Commission on Human and Peoples' Rights as an Instrument for the Protection of Human Rights in Africa', note 38 above, p. 8.

⁸⁸ Swanson J, 'The emergence of new rights in the African Charter', note 6 above, p. 325.

flexibility to satisfy new claims based on contemporary conditions and modern human understanding? As Shestack observed, the potential for flexibility has formed the basis for the chief criticism of natural rights theory.⁸⁹ In short, the principal problem with natural law is that the rights considered to be natural can differ from one theorist to another, depending on their conceptions of nature.⁹⁰

Because of this and other difficulties, natural rights theory became unpopular with philosophers such as Bentham, who termed the theory as a fallacy.⁹¹ However, natural rights philosophy had a renaissance after World War II. Cobbah noted that over the years, after World War II, it has been recognised that human rights are not just pious declarations,⁹² but are declarations that must be practicably enforceable. The recognition of the practicality and enforceability of human rights has meant that governments have to put in place limits both on the exercise of these rights by the individuals, as well as on the powers of their agents.⁹³ Human rights have to be enjoyed with due regard to the rights and freedoms of others. Limitations on the enjoyment of individual human rights have today found expression in a number of human rights instruments.⁹⁴

2.3.2 Positivist theory

Legal positivism is a theory of law that is typically founded on empiricism and the rejection of metaphysics.⁹⁵ The positive method in social sciences was first set out by August Comte in his *Cours de philosophie positive*.⁹⁶ Comte rejected metaphysical

⁸⁹ Shestack J, 'The philosophic foundations of human rights', note 7 above, p. 208.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Cobbah J, 'African values and the human rights debate: An African perspective', note 6 above, p. 309.

⁹³ Shestack J, 'The philosophic foundations of human rights', note 7 above, p. 210.

⁹⁴ See, for example, Art. 36 of the Constitution of the Republic of South Africa (1996), which provides for the limitation of rights under certain circumstances.

⁹⁵ Kroeze I, 'Legal positivism', in Roederer C & Moellendorf D (eds.), note 59 above, p. 63.

⁹⁶ See generally, Comte A, *Cours de philosophie positive* (1975), cited in Kroeze I, 'Legal positivism', in Roederer C & Moellendorf D (eds.), note 59 above, P. 63.

speculation and argued that science ought to concern itself with empirical facts. Once these facts are established, general rules or laws of nature can be abstracted by means of induction. In this way, the theory was premised on the need for man to control and rule over nature and not the other way round.⁹⁷ Hence, some early legal positivists opposed the natural law postulation due to its unscientific nature and its tendency to insist on the *status quo* rather than reforms.⁹⁸ They contended that natural law in its essence and form was against legal reforms.⁹⁹ It should be clear from the onset that legal positivism is neither a simple nor a single doctrine. This is essentially because it has undergone numerous changes in the course of time as a result of the numerous differences among its postulants.¹⁰⁰ What has remained constant in the theory is the insistence on a view of law as a product of human action.¹⁰¹

Classical positivists ascribed all authority to the state and its officials. They rejected any attempt to define and articulate law as a phenomenon that transcended from a source other than the existing legal systems. Accordingly, the source of human rights could only be in the enactments of a system of law with sanctions attached to it. Views on what the law 'ought to be' had no place in classical positive law and were therefore worthless.¹⁰² Regarded in this sense, the theory hinged on the need to distinguish 'law as it is' from 'law as it ought to be.' In the words of Austin, the 'science of jurisprudence... is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.'¹⁰³ On this premise, therefore, natural law and natural rights could not be used to deduce what law actually is because at best they provided a standard or ideal for what the law ought to be.

⁹⁷ Ibid.

⁹⁸ See this argument in Johnson D, Pete S & Du Plessis M, *Jurisprudence: A South African perspective* (2001), p. 64-65.

⁹⁹ Ibid.

¹⁰⁰ Kroeze I, 'Legal positivism', note 59 above, p. 73.

¹⁰¹ Ibid.

¹⁰² Shestack J, 'The philosophic foundations of human rights', note 7 above, p. 208.

¹⁰³ Austin J, *The province of jurisprudence determined* (1894), quoted in Kroeze I, 'Legal positivism', note 59 above, p. 68.

Put differently, not only is it a mistake to look to natural law in trying to establish what the law is, it is also a mistake to turn to natural law in order to evaluate what the law ought to be.¹⁰⁴ Other than this, some positivist scholars insisted on the separation of law and morals.¹⁰⁵ Kroeze argued that the influence of Bacon, Burke and Kant could have generated this kind of thinking among these scholars.¹⁰⁶ According to Kant, one of the scholars who insisted on this premise, terms like ‘rights’ and ‘duties’ meant different things in legal and moral contexts respectively.¹⁰⁷ In the legal context, these terms could only have a meaning determined by positive law. Similarly, Bentham dismissed ‘deontological morality’ or natural law as nonsense on stilts.¹⁰⁸ To him, whatever could not be established or verified empirically failed to exist. While this is the case, it has been argued that legal positivists never denied that morality influences the law.¹⁰⁹ Accordingly:

What they deny is the use of morality to determine whether a rule is a valid rule or not. The validity of a particular rule is one question, the morality of that rule is an entirely different question. The insistence on the separation of law and morality therefore deals with questions of validity and not with evaluation.... Hart’s view of the separation of law and morality is a much more nuanced one than of his predecessors. He accepts that natural law has a role to play. For a group of people to constitute a society, a number of basic rules must apply. This he calls the ‘minimum content of natural law.’... These minimum rules occur in both law and morality and, as such, there is an overlap between the two. But they are not the same. However, Hart does not believe that the validity of law is dependent on morality, because law does not derive its validity from such a higher source.¹¹⁰

¹⁰⁴ Kroeze I, ‘Legal positivism’, note 59 above, p. 66.

¹⁰⁵ See this view in Blerk A, *Jurisprudence: An introduction* (1998), p. 27.

¹⁰⁶ Kroeze I, ‘Legal positivism’, note 59 above, p. 65.

¹⁰⁷ Raz J, *The authority of law: Essays on law and morality* (1979), pp. 37-38.

¹⁰⁸ Bentham J, ‘Anarchical fallacies’, in Waldron J, *Nonsense upon stilts: Bentham, Burke & Marx on the rights of man* (1987), p. 53.

¹⁰⁹ Kroeze I, ‘Legal positivism’, note 59 above, p. 67.

¹¹⁰ *Ibid.*

As a result of its insistence on the separation of law and morals, legal positivism has been accused of negating the moral philosophical basis of human rights.¹¹¹ It is contended that, by divorcing a legal system from the ethical and moral foundations of society, positive law encourages the belief that the law must be obeyed, no matter how immoral it may be, whether or not it disregards the individual.¹¹² For instance, the anti-Semitic edicts of the Nazis although abhorrent to morality, were obeyed as positive law. The same could be said of the immoral apartheid practices that prevailed in South Africa for many years.¹¹³

Further, positivism has been criticised for its tendency to undermine an international basis for human rights because of its emphasis on the supremacy of national sovereignty.¹¹⁴ Positivism regards rules of international law as not being law but merely rules of positive morality set or imposed by opinion.¹¹⁵ This assumption has been one of the major impediments to the effective human rights protection in Africa. The doctrine of state sovereignty, which is a culmination of legal positivism, has hampered human rights promotion and protection at the regional level.

2.3.3 Marxist theory

Marxism, like the natural law theory, is also concerned with the nature of human beings in society. However, the theory's approach is rooted in the causal role of things such as the forces of production, relations of production, and political and legal arrangements.¹¹⁶ The proponent of this theory, Karl Marx, regarded the 'law of nature approach' to human rights as idealistic and ahistorical.¹¹⁷ He saw nothing natural or inalienable about human rights. In a society in which capitalists monopolised the means of production, Marx

¹¹¹ Shestack J, 'The philosophic foundations of human rights', note 7 above, p. 209.

¹¹² Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa' note 38 above, p. 10.

¹¹³ Ibid.

¹¹⁴ Shestack J, 'The philosophic foundations of human rights', note 7 above, p. 209.

¹¹⁵ Ibid.

¹¹⁶ See Moellendorf D, 'Marxism and the law', in Roederer C & Moellendorf D, note 59 above, *Jurisprudence* (2006), p. 138.

¹¹⁷ Shestack J, 'The philosophic foundations of human rights', note 7 above, p. 210.

regarded the notion of individual rights as a bourgeois illusion.¹¹⁸ Concepts such as law, justice, morality, democracy, freedom, and others, were considered historical categories, whose content was determined by the material conditions and the social circumstances of a people. Accordingly, as the conditions of life change, so the content of notions and ideas may change.¹¹⁹

Marxism sees a person's essence as the potential to use one's abilities to the fullest and to satisfy one's needs. Actualisation of potential, according to him, is contingent on the expression of men and women as social beings, which can only occur in a communist society devoid of class conflict.¹²⁰ The only rights are those granted by the state, and their exercise is contingent on the fulfilment of obligations to society and to the state. The Marxist theory has therefore been referred to as 'parental' with the authoritarian political body providing the sole guidance in value choice.¹²¹ The creation of such a 'special being' is a type of paternalism that not only ignores transcendental reason, but negates individuality.¹²²

The Marxist theory has been said to be inconsistent with the universal system of human rights because it does not recognise international norms.¹²³ This was evident in the days of Communism in that, while communist states conceded to the promulgation of international norms, they held the application of those norms to be subject to the exclusive domestic jurisdiction of states.¹²⁴ At the international fora, they repeatedly asserted that their alleged abuse of human rights was not just a matter of protecting sovereignty, but was an expression of the communist theory of the unlimited role of the state to decide what is good for the people.¹²⁵ Marxism was, therefore, associated with

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ See Cassese A, *International law in a divided world* (1986), p. 69.

¹²¹ Shestack J, 'The philosophic foundations of human rights', note 7 above, p. 211.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ See, for example, Chalidze V, *To defend these rights: Human rights and the Soviet Union* (1974), p. 15.

more good than bad and with the gross human rights violations that took place across the globe after World War II, particularly in the former Union of Soviet Socialist Republic.¹²⁶

Although the discussion of the philosophical foundations of human rights law focused on the natural, positivist and Marxist theories, it should be noted that social sciences have developed and begun to increase understanding about people and their cultures, their conflicts, and their interests. Consequently, a number of disparate theories have emerged— including the sociological and utilitarian— to build on the earlier theories. Within a human rights context, the evolution of such theories is useful because it identifies the empirical components of a human rights system; especially, in the context of the social process. Generally, human rights have been a product of social forces that instigated certain forms of responses from the society, as explained in the discussion above. This partly explains why the ongoing debate on the historical and philosophical origins of human rights still persists in academic circles.

As it is argued elsewhere below, although the above theories have tried to discuss the philosophical foundations of the human rights concept, no society has the monopoly of human rights respect or abuses; nor can any society claim to be a paradise for human rights.¹²⁷ The fact that the philosophical foundations of human rights in this study have been analysed on the basis of the natural, positivist and Marxist theories does not mean that human rights owe their origin in Europe or America. It should be recognised that even though a particular concept may be articulated or developed in a specific cultural system, it does not imply that the phenomenon does not or did not exist in other cultures.¹²⁸ African societies, for example, had a culture of human rights, whose

¹²⁶ See, Moellendorf D, 'Marxism and the law', note 59 above, pp. 150-153.

¹²⁷ See the argument advanced in Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa', note 6 above, p. 249.

¹²⁸ Busia K, 'The status of human rights in pre-colonial Africa: Implications for contemporary practices', note 6 above, p. 46.

philosophical foundations may be akin to some of the theories discussed above. We shall revert to this argument later below.

2.4 Internationalisation of human rights

The concept of human rights as a universal legal obligation of states is of recent origin and its historical antecedents can be traced to the events during and after the Second World War.¹²⁹ Mugwanya argued that the consequent awareness of the nexus between respect for human rights and dignity and peace motivated the World War II Allies to set in motion a revolution that culminated in the universalisation of human rights. This was epitomised by the inclusion of certain provisions in the UN Charter that made a qualitative leap towards the promotion and protection of human rights for all.¹³⁰ Soon after the universalisation of human rights through the UN and its organs, international protection of human rights devolved to the continental level in what latter came to be known as ‘regional human rights systems’.

Traditionally, international law granted states national sovereignty whereby every state had complete freedom to deal with its own nationals (personal sovereignty) within its own territory (territorial sovereignty).¹³¹ This principle dictated that in all matters falling within the domestic jurisdiction of any state, international law did not permit interference, let alone intervention, by another state. In other words, such matters did not fall within the concern of international law.¹³² Accordingly, as long as personal sovereignty continued to be regarded as exclusively within the domestic jurisdiction of sovereign states, ‘what a government did to its own citizens was its own affair and beyond the reach

¹²⁹ Mugwanya G, *Human rights in Africa: Enhancing human rights through the African regional human rights system*, (2003), p. 16.

¹³⁰ Ibid.

¹³¹ Eno W, ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’, note 38 above, p. 9.

¹³² Ibid.

of international law or legal interference by other states.¹³³ However, matters stood differently in the case of aliens.

As part of its national sovereignty, a state was always entitled to demand respect for its own nationals abroad as any maltreatment of them could constitute a violation of the personal sovereignty of the state to which they belonged.¹³⁴ This demand, however, was reciprocal in the sense that if a state fell short of the requirement of protecting another state's nationals, for example, by expropriating their property, the compensation was due to the other state whose personal sovereignty had been violated and not the individual whose property had been taken. In such a case, therefore, only states were allowed to claim compensation under international law.¹³⁵ Whether that state chose to pass the compensation on the injured individuals was entirely their own affair.¹³⁶

Thus, for centuries, one proposition remained unchallenged: by reason of the doctrine of national sovereignty, international law could not recognise any rights vested in any individual against any sovereign state whether his or her own or another.¹³⁷ Individuals featured only insofar as they were the subjects of states.¹³⁸ Thus, an injury to an individual by the nationals of another state could be interpreted as injury of one state by another.¹³⁹ This notion of the primacy of states and the relative insignificance of the

¹³³ Humphrey J, *The international law of human rights* (1973), p. 12. This principle was emphasised in the Covenant of the League of Nations, under section 15 which was categorical that nothing contained in the Covenant would authorise the League to intervene in matters that are 'exclusively within the domestic jurisdiction of states'. The same principle was subsequently reiterated in Article 2(7) of the UN Charter of 1945.

¹³⁴ See the *Mavromatis Palestinian Concession Case* PCIJ Series A No. 2, in which the court pointed out that 'by taking up the case of one of its subjects, and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right to ensure in the person of its subject, respect for international law...'

¹³⁵ Shaw M, *International law* (1986), p. 421.

¹³⁶ Seighart P, *The international law of human rights* (1982), p. 12.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Piotrowicz R & Kaye S, *Human rights in international and Australian law* (2000), p. 7.

individual runs deeply through international law and it is reflected in a number of contexts.

The best example can be seen in the jurisdiction of the International Court of Justice (ICJ). Even though described as the principal legal organ of the UN (popularly referred to as the ‘World Court’), the ICJ is expressly prohibited from having individuals commence actions or appear before it.¹⁴⁰ It is exclusively for the use of states and an extremely limited class of international organisations. The interests of an individual can only be brought to the notice of the court in the event that a state chooses to act on the individual’s behalf.¹⁴¹ Even when the state takes up the matter, the individual has no right of appearance, nor any ability to compel the direction of the state’s case.¹⁴²

Behind this state of affairs is the notion of the sovereign equality of states.¹⁴³ Since each state is equal, at least on the basis of this doctrine, no state can be allowed to impose its will on another.¹⁴⁴ International rules can only be adopted by consent and each state within its own territory is sovereign, with its freedom of action, ‘only fettered by some obligations as it, itself, chooses to assume.’¹⁴⁵ Accordingly, this concept permitted a state to:

¹⁴⁰ See Article 34 of the Statute of the International Court of Justice.

¹⁴¹ Piotrowicz R & Kaye S, *Human rights in international and Australian law*, note 139 above, p. 8.

¹⁴² Ibid.

¹⁴³ For a discussion on this notion, see generally, Cherif B, ‘Universal jurisdiction for international crimes: Historical perspectives and contemporary practice’, (2001) 42/1 *Virginia Journal of International Law* pp. 81-162; Lowenfield, ‘Sovereignty, jurisdiction and reasonableness: A reply to A V Lowe’, (1981) *American Journal of International Law*, pp. 629-638; Meessen K, ‘Anti-trust jurisdiction under customary international law’ (1984) 78 *American Journal of International Law*, pp. 783-810 and Maier G, ‘Extra-territorial jurisdiction at a crossroads: An intersection between public and private international law’, (1982) 76 *American Journal of International Law*, pp. 280-320.

¹⁴⁴ Eno W, ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’, note 38 above, p. 9.

¹⁴⁵ Piotrowicz R & Kaye S, *Human rights in international and Australian law*, note 139 above, p. 8.

Impose draconian measures on its own populace... provided it does not impact upon the sovereignty of any other state, or breach an obligation which it has voluntarily undertaken. While this principle has been modified over time, it is to a large extent still intact, and presents a significant obstacle to the advancement of human rights law in many states.¹⁴⁶

By the nineteenth century, however, international law developed a doctrine of 'humanitarian intervention' in cases where a state committed atrocities against its own nationals which 'shocked the conscience of mankind'.¹⁴⁷ At that time, there was a growing realisation of the inseparable link between individual liberty and international peace and security. It was therefore imperative for world leaders to discuss how to ensure the protection of these liberties, not only within their own territories but also internationally.¹⁴⁸ This humanitarian intervention doctrine was invoked largely against the Ottoman Empire in 1827 on behalf of the Greek people; by French in Syria in 1860-1861; and again in 1876 when a large number of Christians were massacred by irregular Ottoman troops in what is today Bulgaria.¹⁴⁹

It cannot be gainsaid, therefore, before the outbreak of the First World War in 1914, international law had a very different view of the manner in which force could be deployed against individuals, both within a state and against the nationals of another state. War was seen as a legitimate method of diplomacy; being referred as merely the extension of diplomacy by other means.¹⁵⁰ Territory could be acquired by conquest without regard to the inhabitants, whose property could be forfeited and who could be denied any role in the government of their land. Thus, by 1914, most of the earth's land territory was part of the various colonial empires, and other states such as China, Turkey

¹⁴⁶ Ibid.

¹⁴⁷ Seighart P, *The international law of human rights*, note 136 above, p. 13.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Piotrowicz R & Kaye S, *Human rights in international and Australian law*, note 139 above, p. 16.

and those of Central and South America were effectively dominated by the ‘Great Powers’.¹⁵¹

In that state of affairs concern over the rights of individuals within the colonial power did not apply to the same extent, if at all, in the colonised territory. Similarly, the core of rights that constituted international humanitarian law were in an extremely primitive state, with little regard being paid to the care of the wounded in the battle-field, and the methods by which force could be employed.¹⁵² Efforts to protect individuals under international law intensified after the First World War, during which period treaties were concluded to protect the rights of linguistic and ethnic minorities.¹⁵³ The protection of minorities took three main forms. First, there were five special treaties on minorities with the Allied or newly created states: with Poland (Versailles, 1919), with Czechoslovakia and Yugoslavia (St. Germain-en-Laye, 1919) with Romania (Trianon, 1920), and with Greece (Sevres, 1920).¹⁵⁴

Secondly, chapters on the rights of the minorities within borders were included in the peace treaties with the ex-enemy states such as with Austria (St Germain-en-Laye, 1919), Bulgaria (Neuilly, 1919), Hungary (Trianon, 1920) and later with Turkey (Lausanne, 1923).¹⁵⁵ Thirdly, certain states made declarations before the Council of the League of Nations as a condition of their admission to the League.¹⁵⁶ Generally, the various arrangements for the protection of the rights of minorities provided for equality before the law in regard to civil and political rights, freedom of religion, the right of members of

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Eno W, ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’, note 38 above, p. 11.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ These states included: Finland (1921, as regards the Aland Islands), Albania (1921), Lithuania (1922), Latvia (1923), Estonia (1923), and later Iraq (1932).

the minorities to use their own language, and the right to maintain their own religious and educational establishments.¹⁵⁷

Moreover, it was recognised that these various provisions protecting the rights of minorities constituted ‘obligations of international concern’, which were placed under the guarantee of the League of Nations and could not be modified without the consent of the Council of the League.¹⁵⁸ Members of minority communities could petition the League with complaints as to their treatment, which would in turn pass on the complaint to the state concerned.¹⁵⁹ Further, a minorities’ section was set up within the Secretariat of the League in 1920. The Permanent Court of International Justice was on the other hand asked by the League to give advisory opinions on various practices and laws in states with regard to minorities, to determine the scope of the protection contained in the treaties.¹⁶⁰

The period after the First World War also witnessed the intensification of international collaboration in the abolition of both the national and international slave trade.¹⁶¹ Noteworthy, many efforts had been made prior to this period, with a number of agreements between states entered in this regard.¹⁶² The *General Act* of the Brussels

¹⁵⁷ Robertson A & Merrills J (eds.), *Human rights in the world*, note 6 above, p. 21.

¹⁵⁸ Ibid.

¹⁵⁹ The usual procedure was that, if the Secretary-General considered the case admissible, the Council would appoint an *ad hoc* minorities committee to investigate the matter and try to reach a friendly settlement. If it failed, the complaint was referred to the full Council. The Council in turn could refer the matter to the Permanent Court of International Justice. See in this regard, Robertson A & Merrills J (eds.), *Human rights in the world*, note 6 above, p. 20.

¹⁶⁰ Ibid.

¹⁶¹ Eno W, ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’, note 38 above, p. 11.

¹⁶² By the treaty of Paris of 1814, the British and French governments agreed to cooperate in the suppression of the traffic in slaves. This undertaking was generalised and accompanied by a solemn condemnation of the practice by the major European states at the Congress of Vienna in 1815. Similarly, more than fifty bilateral treaties on the subject were concluded between 1815 and 1880, and the Conference of Berlin on Central Africa of 1885 was able to state in its *General Act* that ‘trading in slaves is forbidden

Conference was the most comprehensive instrument on this subject until the outbreak of the First World War.¹⁶³ Thereafter, the mandate system established by Article 22 of the League Covenant declared that the well-being and development of the peoples in the mandated territories should form a ‘sacred trust of civilisation’ and that the mandate powers should administer the territories under conditions ‘which will guarantee freedom of conscience and religion...and the prohibition of abuses such as slave trade.’¹⁶⁴ As a result of these efforts, the International Convention on the Abolition of Slavery and the Slave Trade was concluded under the auspices of the League of Nations in 1926.¹⁶⁵

Meanwhile, the doctrine of sovereignty of states still dominated the international law agenda and the relationship between states. The turning point and the subsequent downfall of this doctrine, at least as far as it relates to human rights, came in the late 1930s and early 1940s, when unprecedented atrocities were perpetrated by the regimes of Italy, Russia, Germany and other dictatorial regimes in Europe and Asia, against millions of their own citizens.¹⁶⁶ Sadly, many of these atrocities were sanctioned by the respective national legislation. At that time, domestic laws of many states authorised pernicious injustice against their nationals.¹⁶⁷ Up until the Second World War, international law did not regulate how sovereign states should treat their citizens or subjects.¹⁶⁸ As explained earlier, this was still by and large a matter within exclusive domestic jurisdiction.

in conformity with the principles of international law as recognised by the signatory powers.’ This led to the signing and ratification of the *Anti-Slavery Act* by eighteen states, which not only condemned slavery and the slave trade, but also drew up a list of agreed measures for their suppression both in Africa and on high seas. See Robertson A & Merrills J, *Human rights in the world*, note 6 above, p. 17.

¹⁶³ Ibid.

¹⁶⁴ Ibid

¹⁶⁵ Ibid. This Convention proclaimed, in part, the objective of the nations to completely suppress slavery in all its forms and of the slave trade by land and sea.

¹⁶⁶ Eno W, ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’, note 38 above, p. 11.

¹⁶⁷ Ibid.

¹⁶⁸ Nowak M, *Introduction to the international human rights regime* (2003), p. 21.

Although international law provided that prisoners of war had a right to be protected from torture and to be treated with human dignity, it did not preclude states from, for example, committing genocide on ‘their own’ people. A frequently cited example in this context is the passiveness of the international community during the Turkish genocide in Armenia in 1915.¹⁶⁹ The application of double standard was perhaps what instigated the dogma of state sovereignty and the principle of non-interference in national matters.¹⁷⁰

The double standard of international law was also made clear during the Second World War when many people were brutally and innocently assassinated and international humanitarian law was atrociously violated.¹⁷¹ This partly explains why at the end of the Second World War, shocked by the barbaric atrocities committed and sufferings caused by some states against their nationals, the victorious Allied powers were determined to introduce into international law new concepts designed to outlaw such events in the future, or to make their recurrence at least less likely.¹⁷²

The means adopted was the establishment of new inter-governmental organisations, such as the UN, and the development of a new branch of international law, specifically concerned with relations between governments and their own subjects.¹⁷³ This branch of international law eventually came to be known as international human rights law. The Allied Powers came to the conclusion that it was the gradual infringement of individual liberty within member states that had led to the Second World War.¹⁷⁴

¹⁶⁹ Nowak M, *Introduction to the international human rights regime*, note 168 above, p. 21.

¹⁷⁰ Eno W, ‘The African Commission on Human and Peoples’ Rights as an instrument for the protection of human rights in Africa’, note 38 above, p. 11.

¹⁷¹ Nowak M, *Introduction to the international human rights regime*, note 168 above, p. 21.

¹⁷² *Ibid*, p. 12.

¹⁷³ For a detailed discussion on the role of the UN in the promotion and protection of human rights, see generally, United Nations, *The United Nations and human rights 1945-1995*; Lewis A, ‘Treaty-based procedures for making human rights complaints within the UN system’, in Hannum H (ed.), *Guide to international human rights practice* (1999); Krause E & Rosas M (eds.), *Economic, social and cultural rights* (1985), pp. 41-62.

¹⁷⁴ See generally, Symonides J, *Human rights: International protection, monitoring and enforcement* (2003), p. 15.

They then pledged to ensure that protection of individual rights internationally would have to become their major priority if there was to be international peace and security. To make sure that their pledges became a reality, they adopted legally binding treaties that exposed the treatment of individuals by their governments to international scrutiny.¹⁷⁵ Thus, in the aegis of the UN, the Allied Powers embarked on a serious mission of universalising human rights.¹⁷⁶ This was especially through the adoption of, for example, the UDHR in 1948, as well as the International Covenant on Civil and Political Rights (ICCPR) together with its Optional Protocols; the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷⁷ and other human rights instruments.¹⁷⁸

Apart from some isolated controversies over the concept of human rights, generally¹⁷⁹, there is a certain degree of consensus that human rights are universal, inalienable, and inherent to every human being in every society.¹⁸⁰ Further, all rights are interdependent notwithstanding the fact that different measures may be required to implement them.¹⁸¹ In order to implement human rights norms and call states to account for human rights violations, the international community of states established various institutions and mechanisms. For example, through the UN Economic and Social Council's (ECOSOC) Resolution 1235 of 1967, followed by ECOSOC Resolution 1503 of 1970, foundation was laid for UN Charter-based systems for the protection of human rights.¹⁸²

¹⁷⁵ Ibid.

¹⁷⁶ See in this regard, Burgenthal T (ed.), *International human rights in a nutshell* (1995); Sohn L & Burgenthal T, *International protection of human rights* (1973), pp. 1-504.

¹⁷⁷ Adopted Dec. 16, 1996, G.A Res. 2200 (XXI), U.N GAOR, 21st Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

¹⁷⁸ Mugwanya G, *Human rights in Africa*, note 129 above, p. 17.

¹⁷⁹ On some of the controversies, see generally, Cranston M, 'Human rights, real or supposed', note 10 above, p. 43; Dowrick F, *Human rights: Problems, perspectives and texts* (1979); Campbell T, et. al. (eds.), *From rhetoric to reality* (1986).

¹⁸⁰ On this consensus see the *Vienna Declaration*, Part I, paras. 1,5.

¹⁸¹ Ibid.

¹⁸² Mugwanya G, *Human rights in Africa*, note 129 above, p. 17.

From 1976, ECOSOC adopted a series of resolutions, which culminated in the establishment of the Committee on Economic, Social and Cultural Rights, a permanent body with the mandate to promote the implementation of ICESR.¹⁸³ Treaty-based institutions and mechanisms have also been evolved to reinforce the UN Charter-based mechanisms. These treaty-based institutions and mechanisms are, for example, the U.N Human Rights Committee (now known as the Human Rights Council), which is the enforcement mechanism for the ICCPR.¹⁸⁴

The Committee on the Elimination of Racial Discrimination came into being with the entry into force of the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁸⁵ Various other treaty-based institutions such as the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child are also in place.¹⁸⁶ Further, Specialised Agencies of the UN, such as UNESCO and ILO, have over the years adopted special mechanisms to deal with human rights violations falling within their scope of competence.¹⁸⁷

Despite all attempts to give it international credence, the concept of human rights faced great resistance during the Cold War period, a time when the question of human rights protection was deeply politicised.¹⁸⁸ There was tension between the Western capitalist and the Eastern socialist nations. Western industrialised states took it upon themselves to

¹⁸³ Scheinin M, 'Economic and social rights as legal rights' in Eide K & Rosas (eds.), *Economic social and cultural rights*, note 173 above, pp. 41.

¹⁸⁴ Ibid.

¹⁸⁵ Convention on the Elimination of all forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965; entry into force 4 January 1969, in accordance with Article 19.

¹⁸⁶ See Mbondenyei M and Sifuna N, 'A Review of Procedural and Jurisdictional Challenges in Enforcing International Human Rights Law Under the African Charter Regime', (2006) *Berkeley Legal Press, Working paper No. 1869* at <http://law.bepress.com/expresso/esps/1869>, p. 3.

¹⁸⁷ See UNESCO 104 EX/Decision (1978). See also Alston P, 'UNESCO's procedure for dealing with human rights violations', (1980) 20 *Santa Clara Law Review*, p. 665.

¹⁸⁸ Nowak M, *Introduction to the international human rights regime*, note 168 above, p. 25.

criticise the socialist states and the South for their gross and systematic human rights violations based on their own (Western) standards.¹⁸⁹ Starting from the 1970s, the Conference for Security and Cooperation in Europe (CSE), along with the UN, began to serve as a platform for the human rights clash between East and West.¹⁹⁰

As of the late 1970s, the US, the European Union (EU), as well as several European donor states formulated development policies with the intention to extract human rights concessions.¹⁹¹ To counter this move, the East responded by pointing to violations of economic, social and cultural rights in capitalist states. However, their defence was a mere attempt to conceal the massive violations and the deteriorating human rights situation in the East.¹⁹² The East, which professed and was inclined to the socialist human rights philosophy, rejected to be monitored by any international mechanism. Instead, it opted to take cover under the doctrine of state sovereignty.¹⁹³ Similarly, the South also began to resist the doctrine of international human rights, especially in the 1980s and 1990s.¹⁹⁴ The main cause of the resistance was the imposition of the concept of ‘universal human rights’ without due regard to cultural and ideological differences.¹⁹⁵

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Dowrick F, *Human rights: Problems, perspectives and texts*, note 174 above, p. 135.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Nowak M, *Introduction to the international human rights regime*, note 168 above, p. 25.

¹⁹⁵ For an exposition of the doctrine of universality of human rights, see generally, Lindholt L, *Questioning the universality of human rights: The African Charter on Human and Peoples Rights in Botswana, Malawi and Mozambique* (1997); Howard R, *Human rights in Commonwealth Africa* (1986); Nickel J, *Making sense of human rights* (1987); Donnelley J, *Universal human rights in theory and practice* (1989); Cassese A, *Human rights in a changing world*, (1990); Tang J, (ed.) *Human rights and international relations in the Asia-Pacific region* (1995); Howard R, *Human rights and the search for community* (1995); Howard R, ‘Cultural absolutism and the nostalgia for community’, (1993)15 *Human Rights Quarterly*, p. 315; Oloka-Onyango J, ‘The concept of human rights in the international order’, in Kalu A & Osinbajo Y, *Perspectives on human rights*, (1992), pp. 1-9.

As stated elsewhere in this thesis, the universalism concept drew lots of suspicion from non-western states, terming it as a move by the Western states to impose its culture on other states.¹⁹⁶ During the late 1980s, the socialist regimes in Central and Eastern Europe began to collapse, and these ‘velvet revolutions’ were also considered a victory for human rights.¹⁹⁷ As the Cold War ended and President Gorbachev’s vision of a ‘common European House’ was taking root together with the ‘New World Order’ based on the principle of human rights and democracy, the time seemed ripe for the advancement of the international human rights agenda.¹⁹⁸

The 1993 Vienna World Conference on Human Rights eventually set out the parameters for this advancement agenda.¹⁹⁹ The conference reaffirmed ‘the solemn commitment of all states to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.’²⁰⁰ It cannot therefore be gainsaid that concern with the protection and promotion of human rights at the international level has been one of the most outstanding developments since the end of the Second World War.²⁰¹ This is especially because, notwithstanding national and regional differences in historical, cultural and religious backgrounds, the Vienna Declaration recognised that it is the responsibility of all states to protect human rights and fundamental freedoms.²⁰²

¹⁹⁶ See this argument in Mamdani M, ‘Social movements and constitutionalism in the African context’, in Shivji I, *State and constitutionalism: An African debate on democracy*, note 6 above, p. 237.

¹⁹⁷ Nowak M, *Introduction to the international human rights regime*, note 168 above, p. 26.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.* Had it not been for the more than 1,500 NGOs both from the North and the South, which parallel to the conference were trying to push through the idea of ‘all human rights for all’, the World Conference would perhaps have foundered because of the issue of universalism of human rights which was then being spearheaded by the Western world. On the very last day, following tough negotiations, the 171 states were able to agree on the wording of the Vienna Declaration, which states that all human rights are universal, indivisible and interrelated.

²⁰⁰ See the *Vienna Declaration and Programme of Action*, 25 June 1993, Section I, para 1.

²⁰¹ Robertson A and Merrils J, *Human rights in the World*, note 6 above, p. 1.

²⁰² The *Vienna Declaration and Programme of Action*.

The Declaration seems to have settled, at least for the time being, the heated debate on the philosophical and ideological differences in perception of the human rights concept.²⁰³ At the same time it also aimed to put an end to the tiresome dispute on state sovereignty by identifying protection of human rights not only as a legitimate concern of the international community, but a priority objective of the UN.²⁰⁴ That brought to an end the prolonged argument that under Article 2(7) of the UN Charter, human rights protection was exclusively a national matter.²⁰⁵ The end of the Cold War eventually reinforced the international human rights movement. It liberated international human rights efforts from the ideological conflicts and political sloganeering that had for decades undermined efforts to combat massive violations of human rights.²⁰⁶

It is imperative to note, however, despite the international acknowledgement of the concept, widespread violations of human rights show that the attempts to provide international protection are not as effective as they ought to be and that a great deal remains to be done to improve the existing international efforts.²⁰⁷ But in order to improve them, we need also to appreciate that their implementation and enforcement depend largely on the various conceptions held by the different peoples of the world. People from different parts of the globe recognise the need to protect human rights but adopt methods that suit their particular needs.²⁰⁸ As a result of the divergence in conceptions and perceptions, international enforcement of human rights has turned to be

²⁰³ Nowak M, *Introduction to the International Human Rights Regime*, note 168 above, p. 26.

²⁰⁴ *Ibid.*

²⁰⁵ Article 2(7) of the UN Charter stipulates: ‘Nothing contained in the Present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Member to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.’ See Gandhi P, *International Human Rights Documents* (1995), p. 15.

²⁰⁶ Mugwanya G, *Human rights in Africa*, note 129 above, p. 20.

²⁰⁷ Robertson A and Merrils J, *Human rights in the world*, note 6 above, p. 1.

²⁰⁸ *Ibid.* This position is reiterated in *The Final Act of the International Conference on Human Rights*, Tehran, 1968, as published in UN document A/Conf 32/41.

more effective through regional initiatives that have emerged in what is generally referred to as the regional protection and promotion of human rights.

Currently, international human rights are promoted and protected through regional and sub-regional mechanisms such as the European, Inter-American and African human rights systems.²⁰⁹ Before they gained momentum, it was initially believed that regional approaches to human rights might detract from the perceived universality of human rights.²¹⁰ As the European and Inter-American systems evolved, however, this view later changed.²¹¹ The UN considered creating regional human rights regimes of its own but later concluded that member states themselves bore the responsibility of forming regional human rights systems.²¹² It thus appealed to states not belonging to regional human rights regimes to ‘consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.’²¹³

The apparent inadequacies of the global system were some of the reasons that prompted regional promotion and protection of human rights. For instance, from its inception in 1945, it took nearly two decades for the UN to finalise and complete the ICCPR and ICESR.²¹⁴ Due to such long-stalled efforts, it became clear that there was need for more expedient mechanisms that would bring to materialisation the quest for a speedy

²⁰⁹ See Robertson A, & Merrills J, *Human rights in the world*, note 6 above, p. 222.

²¹⁰ Ibid.

²¹¹ Mugwanya G, *Human rights in Africa*, note 129 above, p. 32.

²¹² Ibid.

²¹³ See GA. Res. 32/127, 32 UN. GAOR (105th plen. Mtg.), UN Doc. A/32/458 (1977) *reprinted in* 31 Y.B. UN. 740 (1977). Two subsequent resolutions reiterated the plea of the General Assembly. G.A Res. 33/167, 33 UN. GAOR (90th Plen. Mtg.), UN. Doc. A/33/509 (1978), *reprinted in* 32 Y.B. U.N. 734 (1978), and G.A Res. 34/171, 34 U.N GAOR (106th plen. Mtg.), U.N. Doc A/734/829 (1979), *reprinted in* 33 Y.B. U.N. 871 (1979). See Burns H, et al., *Regional human rights regimes*, p. 591.

²¹⁴ Mugwanya G, *Human rights in Africa*, note 129 above, p. 34.

implementation of international human rights norms.²¹⁵ In this regard, regional human rights systems were perceived as the potential mechanisms.²¹⁶

It is now widely accepted that global and regional human rights systems are complementary, aimed at giving effect to the rights first comprehensively guaranteed in the UDHR as ‘a common standard of achievement for all people and all nations.’²¹⁷ Experience shows, however, that regional human rights systems can be more effective than the universal system in realising human rights.²¹⁸ The older European and Inter-American human rights systems have had an enormous impact on domestic human rights practice in their member states. An examination of the functioning of the African system demonstrates that this system also offers serious promise to aid human rights in the region.²¹⁹ Regional human rights systems have thereby been said to be capable of filling gaps in the global human rights mechanisms.²²⁰

At this juncture, this thesis shall examine the origin and evolution of the African regional human rights system. The European and Inter-American systems mentioned above, which have been discussed in detail elsewhere, fall out of the scope of this study and shall therefore not be examined herein. The examination shall be preceded by an evaluation on the existence, or otherwise, of human rights in Africa.

2.5 Human rights in Africa

A study of the current status of Africa’s human rights system cannot be complete when the structures and social forces that influenced pre-colonial African societies are

²¹⁵ See Shelton D, ‘The promise of regional human rights systems’, note 6 above, p. 355.

²¹⁶ Mugwanya G, *Human rights in Africa*, note 129 above, p. 34.

²¹⁷ See the *Universal Declaration on Human Rights*, preamble.

²¹⁸ Mugwanya G, *Human rights in Africa*, note 129 above, p. 33.

²¹⁹ Ibid.

²²⁰ Ibid.

ignored.²²¹ These rather simplistic structures and social forces later spilled over to the colonial period, emerging as intricate models of social institutions and processes, which, in turn, surfaced in post-colonial Africa as factors influencing the protection or, in the alternative, violation of human rights.²²² It is imperative, therefore that this study examines the evolution of the human rights concept in Africa by tracing its roots to the pre-colonial societies. Thus, three periods in the history of Africa shall be considered. The first period will cover human rights protection in pre-colonial Africa while the second and third periods will cover colonial and post-colonial Africa, respectively.

2.5.1 Human rights in pre-colonial Africa

Mutua believed that much of the discussion on whether African pre-colonial societies knew of and enforced human rights has taken place in the absence of considered studies of, and reference to, judicial processes and socio-political formations in those societies.²²³ As a result, scholars have engaged in an unending academic battle on this issue.²²⁴ This observation may not entirely be true because substantial research on pre-colonial African societies had already been conducted prior to Mutua's assertion.

Arguably, what was lacking in previous research conducted on these societies was an indepth search to establish whether or not the concept of human rights existed at that time. In other words, much has already been said on the judicial processes and systems and socio-political formations in pre-colonial Africa but without a clear focus on the need to investigate the status of human rights during this period. This position is also gradually changing as more scholars are taking interest in studying the status of human rights promotion and protection in pre-colonial Africa.

²²¹ Busia K, 'The status of human rights in pre-colonial Africa: Implications for contemporary practices', note 6 above, p. 226.

²²² Williams C, *The destruction of black civilisations: Great issues of a race from 4500 B.C to 2000 A.D* (1987).

²²³ Mutua M, 'The Banjul Charter and the African Cultural fingerprint: An evaluation of the language of duties', note 6 above, p. 350.

²²⁴ See, for example, the scholars listed in note 6 above.

To speak of human rights in pre-colonial Africa therefore necessitates an indepth inquiry into some critical questions, such as: What was the nature of Africa's pre-colonial societies? Were human rights a concern in those societies? What arguments have been advanced to refute claims that human rights were an entity in pre-colonial Africa? Are these arguments authentic, if not, why? An attempt is made herein to explore some of these questions.

2.5.1.1 The nature of Africa's pre-colonial societies

As a point of departure, it is important to note that Africa's pre-colonial period witnessed the prevalence of traditional communities living under various socio-political arrangements.²²⁵ Our human rights debate on this period will therefore assume a more generalised position because it would be misleading to pretend that a universal socio-political arrangement subsisted on the continent during this period. However, although Africa's pre-colonial societies differed in a number of ways, there is ample information to prove that they not only had legal systems but also some measure of respect for and protection of human rights.²²⁶

According to Mutua, for example, pre-colonial Africa consisted of two categories of societies. The first comprised societies such as the Zulu and Asante, which had centralised authority, administrative machinery and standing judicial institutions. On the other hand, the second are those societies such as the Akamba and Kikuyu of Kenya, which had more communal and less intrusive governmental paraphernalia.²²⁷ However, almost all pre-colonial African societies characteristically displayed ethnic, cultural, and

²²⁵ El-Obaid A & Appiagyeyi-Atua K, 'Human rights in Africa: A new perspective of linking the past to the present', note 6 above, p. 821.

²²⁶ Eze O, *Human rights in Africa*, note 6 above, p. 9.

²²⁷ Mutua M, 'The Banjul Charter and the African cultural fingerprint, note 6 above, p. 349. See also Gluckman *The Judicial Process Among the Barotse of Northern Rhodesia* (1967); Davidson B, *Old Africa rediscovered* (1970); Elias T, *Africa and the development of international law*, (1972); Elias T, *The nature of African customary law* (1962)).

linguistic homogeneity, a common trait that gave them fundamental cohesion.²²⁸ This observation was confirmed by Umozurike when he asserted that most pre-colonial African societies were at one time socialistic and communalistic.²²⁹ Cohen also took note of this aspect and observed:

Many African cultures value the group-one should never die alone, live alone, remain outside societal networks unless one is a pariah, insane, or the carrier of a feared contagious disease. Corporate kinship in which individuals are responsible for the behaviour of their group members is a widespread tradition. ...²³⁰

In tandem with this position, Okere observed that the ‘African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity.’²³¹ Mbiti illustriously summed up this philosophy by stating, ‘I am because we are, and because we are, therefore I am.’²³² By reason of most of pre-colonial societies being ‘socialistic’ or ‘communalistic’, rights and privileges of their members were respected and regarded as rights and privileges of the community itself.²³³ Those rights and privileges were thus not isolated or held against the community ‘but formed a great admixture with community rights so that members had an interest in the well being of other members.’²³⁴ Consequently, rights and privileges were restricted to the members of the community and were not regarded as universal.²³⁵

²²⁸ Mutua M, ‘The Banjul Charter and the African cultural fingerprint’, note 6 above, p. 349.

²²⁹ Umozurike U, ‘The significance of the African Charter on Human and Peoples’ Rights’, note 5 above, p. 44.

²³⁰ Cohen R, ‘Endless teardrops: Prolegomena to the study of human rights in Africa’, in *Human rights and governance* (1990), p. 44.

²³¹ Okere B, ‘The protection of human rights in Africa and the African Charter on Human and Peoples’ Rights: A comparative analysis with the European and American systems’, (1984) 6 *Human Rights Quarterly*, p. 141.

²³² Mbiti J, *The African religions and philosophy* (1970), p. 141.

²³³ Mutua M, ‘The Banjul Charter and the African cultural fingerprint’, note 6 above, p. 349.

²³⁴ Cohen R, ‘Endless teardrops: Prolegomena to the study of human rights in Africa’, note 230 above, p. 44.

²³⁵ *Ibid.*

The communality of most African societies notwithstanding, the individual and his or her dignity and autonomy were equally protected, as were individual rights.²³⁶ Nyerere and Wai attested to this when they argued, separately, that pre-colonial societies supported individual welfare and dignity and did not allow gross inequalities between members.²³⁷ This position is confirmed by studies conducted by a number of scholars, including Busia, Wilks and Rattray.²³⁸ These studies concentrated on democracy in pre-colonial Africa, particularly the political system of the Asante of Ghana. Busia noted that an individual could exercise his right to depose of a king, if he could show that the king had breached an oath of office or any other obligation.²³⁹ In his study of pre-colonial West Africa, Loucou also insisted that various ethnic societies; namely, the Abbey, Abidij, Abourè Adjoukrou, Ahizi, Alladian, Akyè, Avikam, Ebriè, Ega, Ehotilè, Essouma, Krobou and Mbatto, practised ‘democracy of age classes.’²⁴⁰

The Akan, Mandè and Baoulè societies were democratic monarchies with even slaves exercising senior administrative and political responsibilities, especially in the Mandè kingdom.²⁴¹ In sub-Saharan African kingdoms, unwritten laws existed that limited the power of the monarch. This was illustrated by some examples from the Anyi kingdoms in Ivory Coast and Ghana.²⁴² The king could be impeached or removed from office. A college of electors, political and military chiefs of villages, called *Asafohene*, chose

²³⁶ Ibid.

²³⁷ See generally Wai D, ‘Human rights in Sub-Saharan Africa’, in *Human Rights Perspectives*, note 6 above, p. 115; Nyerere J, *Essays on Socialism* (1968), p. 102.

²³⁸ See Busia K, *Africa in search of democracy* (1967), pp. 22-26; Busia K, *The position of the Chief in modern political system of Ashanti* (1951), chapter 3; Wilks I, *Ashanti in the nineteenth century: The structure and evolution of political order* (1975), Rattray R, *Ashanti law and Constitution* (1969).

²³⁹ Busia K, ‘The status of human rights in pre-colonial Africa: Implications for contemporary practices’, note 6 above, p. 54.

²⁴⁰ Loucou J, ‘Le multipartisme en Cote d’Ivoire’ *Afrika Zamani*, no. 2 1996, pp. 111-126.

²⁴¹ Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 6 above, p. 244.

²⁴² Ibid.

several candidates or postulants, based on their individual qualities and not their genealogical position.²⁴³

Whereas the above discussion gives a generalised perspective of the pre-colonial African societies, Eze noted that all human societies have had to go through certain stages in the process of their development.²⁴⁴ At one stage, because of the primitivism of the means of production, collective ownership, collective labour and equal distribution of the fruits of labour were necessary for subsistence.²⁴⁵ There was no room for private acquisition and accumulation of wealth. Since the society had no classes, there was neither the need for a state nor law. Such machinery would only be necessary where exploitation of man by man occurred.²⁴⁶ Whatever rules of conduct existed could at best be described as non-legal, even if they were ‘binding’ usages and rules of custom. The adage that *ubi societas ubi jus*—where there is a human society there is law—was not applicable at this stage.²⁴⁷

With the passage of time, pre-colonial African societies evolved to such a level that primitive communalism, slave owning and feudalism became the predominant socio-economic structures immediately prior to colonial incursion.²⁴⁸ The slave-owning societies and feudalism structures were characterised by the existence of laws which were promulgated to govern social relations.²⁴⁹ Nmehielle therefore attributed the origin of law in pre-colonial Africa to these two forms of socio-economic structures.²⁵⁰

²⁴³ Ibid.

²⁴⁴ Eze O, ‘African concept of human rights’, note 6 above, p. 13.

²⁴⁵ Ibid.

²⁴⁶ See ‘The origin of the family private property and the state’ in Marx K & Engels L, *Selected works* (1982), pp. 461-556; Wilmot P, *Sociology: A new introduction* (1985), Chapter 4; Eze O, ‘Theoretical Perspectives and problematics’ in Eze O, *Society and the rule of law* (1987), Chapter 1.

²⁴⁷ Eze O, ‘African concept of human rights’, note 6 above, p. 13.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Nmehielle O, *The African human rights system*, note 6 above, p. 8.

Accordingly, this explains the argument from certain quarters to the effect that societies in pre-colonial Africa had achieved a reasonable degree of political, social and economic, organisation akin to a modern state.²⁵¹ Not only so, there is sufficient historical evidence that kingdoms flourished in Africa as far back as the fourth century.²⁵² In West Africa, there were the Ghana, Songhai, Mali and Walata empires. In the south-east Africa, there was the Zulu empire, in central Africa the kingdom of Monomotapa, and in East Africa the ancient Bunyoro Empire and the Buganda kingdoms.²⁵³

Basing his argument on the confirmation of the first Europeans to reach East and West Africa by sea, Rodney concluded that the levels of development between Europe and Africa were comparable, although the former had an edge.²⁵⁴ The impressive level of legal and political development in pre-colonial Africa was further enunciated by Elias, according to whom:

African societies with strong centralised political systems tended to have a more advanced body of legal principles and judicial techniques than had those with more or less rudimentary political organisation. In the former, there were usually hierarchically graded courts ranging from the smallest chiefs to kings' courts, with well-defined machinery for the due enforcement of judicial decisions. In the latter, rules rather than rulers, functions rather than institutions, characterised the judicial organisation of these societies.²⁵⁵

²⁵¹ Ibid. According to Elias, 'in African law although theories about social contract have not been formulated in this way, yet the indigenous ideas of government are not essentially dissimilar, at least in its presuppositions, to that of Grotius as well.' See Elias T, *Africa and development of international law* (1988).

²⁵² Nmehielle O, *The African human rights system*, note 6 above, p. 8.

²⁵³ Ibid.

²⁵⁴ Rodney W, *How Europe underdeveloped Africa*, note 6 above, p. 82.

²⁵⁵ Elias T, *The nature of African customary law*, note 6 above, p. 30.

Further, Gluckman's study found the Lozi to be a society with a fairly advanced legal system.²⁵⁶ He found that in Lozi, as in western jurisprudence, the sources of law consisted of customs, judicial precedents, legislation, laws of natural morality and of nations.²⁵⁷ The bottom line of his argument is that the judicial process in Loziland on the whole corresponded to, rather than differed from, the judicial process known in Western societies.²⁵⁸

Notwithstanding the above observations, the existence, of law generally and human rights in particular, in pre-colonial Africa has been questioned. It has been contended that law did not exist in the traditional African societies.²⁵⁹ The reason for this lack of recognition of the existence of law in early African societies has been attributed to the fact that African societies in the pre-colonial era were largely governed by custom.²⁶⁰ Customs have been found to be extremely rigid and their obedience could only be ensured by the overwhelming power of group sentiment which was amply fortified by religion and magic.²⁶¹ Under these circumstances it was impossible to make any distinction between legal, moral or religious rules, all of which were 'interwoven into the single texture of customary behaviour.'²⁶²

Eze correctly queried this observation. He contended, the argument that traditional African societies did not possess legal systems was based either on inadequate information or lack of appreciation of the true nature of pre-colonial African societies on the one hand; and on the other, Western scholars' concept of law as emanating from the

²⁵⁶ Gluckman M, *The judicial process among the Bartose of Nothern Rhodesia*, note 6 above, p. 231.

²⁵⁷ Ibid.

²⁵⁸ Ibid. See also Nmehielle O, *The African human rights system*, note 6 above, p. 10.

²⁵⁹ See 'Alternative Histories and Non-Written Sources: New Perspectives from the South' 4 (Proposal for an International Seminar organised by the /South-South Exchange Programme for Research on History of Development (SEPHIS), Amsterdam, at La Paz, 12-15 May 1999).

²⁶⁰ Nmehielle O, *The African human rights system*, note 6 above, p. 7.

²⁶¹ Ibid.

²⁶² See Lloyd D, *Introduction to jurisprudence* (1972), p. 566.

state.²⁶³ Nmehielle was equally right to conclude that defining law as an offshoot of the state ignores the possibility that it could also emanate from other sources, as it did in traditional African societies and as it does from the international circles such as the United Nations.²⁶⁴ One would also agree with the reasoning that this argument has the implication that African societies operated in a total legal vacuum before foreign intervention.²⁶⁵

It cannot be disputed that indeed, there were certain barbaric practices in some pre-colonial African societies which could lead one to presume the absence of law or even human rights. Umzurike succinctly captures this phenomenon as follows:

One of the most heinous acts committed in some societies was the practice of human sacrifice. This practice was conducted for atonement or cleansing for serious crimes or to avert major catastrophes. Primitive belief in the spirit world also necessitated that on their death, dignitaries should be buried along with slaves and servants that would serve them. Similarly, the practice of killing of twins was very radical as well as controversial. Whereas twins were admired, for example, among the Yoruba of Western Nigeria, they were loathed among the Igbo, Efik and Ibibio of Eastern Nigeria. To the latter, they symbolised the wrath and displeasure of the gods and had no right to live. Twins were thus put to death and their mothers excommunicated, banished or sent back to their parental homes. In the contrary, their fathers were not condemned, something that clearly depicted gender disparity and discrimination.²⁶⁶

Another general characteristic of pre-colonial African societies was their emphasis on morality. Morality was of the greatest importance in both private and public relations.²⁶⁷ As a moral dictate, anyone who claimed a right or privilege was also required to carry out

²⁶³ Ibid.

²⁶⁴ Nmehielle O, *The African human rights system*, note 6 above, p. 7.

²⁶⁵ Eze O, *Human rights in Africa*, note 6 above, p. 10.

²⁶⁶ Umzurike O, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 16.

²⁶⁷ Marasighe L, 'Traditional conceptions of human rights in Africa', note 6 above, p. 32-45; Adegbite L, 'African attitudes to the international protection of human rights', (1968), p. 69.

the obligations that accompanied it.²⁶⁸ Societies had stabilising factors which included the sense of obligation to one's kith and kin, the fear of the deity that was omnipotent and omniscient, and accountability to him for all human actions on earth.²⁶⁹ This had a restraining effect on human activities, since the good expected to be appropriately rewarded and the wicked or their successors to be condemned.²⁷⁰

The foregoing discussion on the nature of Africa's pre-colonial societies sets the basis for our evaluation of the arguments on the existence, or otherwise, of human rights during the pre-colonial period. This solicits answers to a number of questions: Is the notion of human rights a Western invention, Western import in Africa and is the West the model thereof? Were human rights experienced in pre-colonial Africa or are they foreign to African societies? There is an ongoing debate on these issues. This study seeks to assess both sides of the argument and also add a voice to the already existing scholarly contribution on this debate.

2.5.1.2 Arguments on the existence of human rights in pre-colonial Africa

The existence of human rights in pre-colonial Africa has been a prolonged academic debate drawing dissenting views and opinions from scholars across the academic divide. Some allege that non-Western cultural and political traditions 'lacked not only the practice of human rights but also the very concept.'²⁷¹ Howard and Donnelly, for example, are some of the Western scholars in the forefront of the argument that human rights did not exist as a concept in pre-colonial Africa.²⁷²

²⁶⁸ Mutua M, 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties', note 6 above, p. 358.

²⁶⁹ Umozurike O, *The African Charter on Human and Peoples' Rights*, note 6 above, p. 17.

²⁷⁰ Ibid.

²⁷¹ Howard R & Donnelly J, 'Human dignity, human rights and political regimes', (1986) 80 *American Political Science Review*, pp. 891-919.

²⁷² See Howard R, 'Group versus individual identity in the African debate on human rights, in An-Na 'im A & Deng F, *Human rights in Africa*, note 6 above, p. 159; Howard R, 'Evaluating human rights in Africa:

Donnelly asserted that recognition of human rights simply was not the way of traditional Africa.²⁷³ He further observed that ‘even in many cases where Africans had personal rights vis-à-vis their governments, these rights were community, status or some other ascriptive characteristic.’²⁷⁴ Like Howard, he opined that the argument is now lame since the communitarian ideal had been destroyed and corrupted by the ‘teeming slums’ of non-Western states, the money economy, Western values and products; even if it could be agreed that societies based on communitarian ideals existed at a point in time in Africa.²⁷⁵ Howard stretched this view further when she contended that African proponents of the concept confuse human dignity with human rights. Accordingly:

The African concept of human rights is actually a concept of human dignity, or what defines the inner (moral) nature and worth of the human person and his or her proper (political) relations with society. Despite the twinning of human rights and human dignity in the preamble of the Universal Declaration of Human Rights and elsewhere, dignity can be protected in a society not based on rights. The notion of African communalism, which stresses the dignity of membership in, and fulfilment of one’s prescribed social role in a group (family, kinship group, tribe), still represents how accurately how many Africans appear to view their personal relationship to society.²⁷⁶

As Busia noted, it appears, at least from the foregoing, that Donnelly and Howard, like most of their Western colleagues in this argument, had a problem with the idea that African communal characteristic could accommodate the concept of human rights.²⁷⁷ However, in the search for human rights in other cultural systems, it should be recognised that even though a particular concept may be articulated or developed in a specific

Some problems of implicit comparisons’, (1984) 6 *Human Rights Quarterly*, p. 160; Donnelly J, ‘Human rights and Western liberalism’, in An-Na‘im A & Deng F, (eds) *Human rights in Africa: Cross-Cultural perspectives* (1990), p. 243.

²⁷³ Ibid.

²⁷⁴ Donnelly J, *Repression and development* (1990), p. 304.

²⁷⁵ Donnelly J, *Universal human rights in theory and practice*, note 195 above, p. 119.

²⁷⁶ Howard R, *Group versus identity in the African debate on human rights*, note 195 above, pp. 165-166.

²⁷⁷ Busia K, ‘The status of human rights in pre-colonial Africa: Implications for contemporary practices’, note 6 above, p. 226.

cultural system, it does not imply that the phenomenon does not or did not exist in other cultures.²⁷⁸

The argument on human rights being foreign to Africa is not confined to the sentiments expressed by Donnelly and Howard. In fact, some scholars who harbour similar views contend that even democracy and constitutionalism, which are fundamental in the promotion and protection of human rights, are also foreign to Africa.²⁷⁹ These concepts have been said to have no future in the continent because they are unsuitable, especially in Black Africa.²⁸⁰ Thus, the West has been perceived as the model of human rights, constitutionalism and democracy.²⁸¹

As far as African traditions in pre-colonial Africa are concerned, it is alleged that they totally ignored these concepts.²⁸² Constitutionalism and democracy, it is further said, are 'at variance with African traditions' or 'out of tune with the needs of African countries at this stage in their history.'²⁸³ This perception is not only championed by European and American scholars but also some African scholars.²⁸⁴ Simiyu, for example, insisted that democracy had no roots in Africa no matter how organised the traditional political systems were. Accordingly, he insisted that:

In black Africa, whether the political system was that of the highly centralised states or of the amorphous non-centralised communities, it did not belong to a democratic tradition. There were rudiments of democratic principles and practices, especially in the non-

²⁷⁸ Ibid.

²⁷⁹ For a detailed discussion on the existence, or otherwise, of constitutionalism and democracy in pre-colonial Africa, see generally, Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa', note 6 above, pp. 233-257.

²⁸⁰ See Wiseman J, *Democracy in black Africa*, note 6 above, p. ix, xi.

²⁸¹ Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa', note 6 above, p. 236.

²⁸² Ibid.

²⁸³ Hiden R, 'Africa and democracy', *Encounter, Pamphlet no. 8*, 1963, pp. 2-3.

²⁸⁴ See the criticism in Nzungola-Ntalaja M, *The state and democracy in Africa*, note 6 above, p. 10.

centralised communities, but it would be dangerous to equate those practices with advanced forms of democracy.²⁸⁵

This position was also echoed by Akindes who considered the ancient Dahomey as typical of the authoritarianism of pre-colonial Africa²⁸⁶, and Kedourie, who argued that ‘Africa and Asian societies are victimised by their own despotic traditions.’²⁸⁷ Conversely, a number of African scholars have risen in defence of the existence of human rights in pre-colonial Africa, thereby sharply refuting the views held by Donnelly, Howard and their cronies.²⁸⁸ For example, Nzongola-Ntalaja correctly argued that a very disturbing phenomenon is:

The tendency of Northern countries on both sides of the Atlantic to think that Africans do not deserve the same rights as peoples elsewhere, and that strong men are what is needed to keep a restless and volatile continent at peace. Thus, what is absolutely intolerable elsewhere can be justified as understandable, ‘by African standards’.²⁸⁹

Indeed, it is not proper for the West to pretend to be the inventor or the model of human rights. Human rights, constitutionalism and democracy are not un-African; nor were they unknown in pre-colonial Africa. They also belong to Africa.²⁹⁰ Ake deplored the attitude of the North and the Western conventional approach to the study of Africa. Accordingly:

²⁸⁵ Simiyu, ‘The democratic myth in African traditional societies’, quoted in Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 6 above, p. 237.

²⁸⁶ Akindes F, *Les mirages de la transition démocratique ...*, pp. 178-179 cited in Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 6 above, p. 237.

²⁸⁷ Kedourie E, quoted in Mangu A, ‘The road to constitutionalism and democracy in Africa’, note 6 above, p. 237.

²⁸⁸ See generally, Wiredu K, ‘An Akan perspective of human rights’, note 6 above, p. 243; Deng F, ‘Cultural approach to human rights among the Dinka’, note 272 above, p. 261; Mutua M, ‘The Banjul Charter and the African cultural fingerprint’, note 6 above, p. 339.

²⁸⁹ Nzongola-Ntalaja G, *From Zaire to the Democratic Republic of Congo* (1998), p. 14.

²⁹⁰ Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 6 above, p. 242.

Through decades of involvement in Africa, the North's attitude has been that democracy is not for Africa. That attitude was an important component of the ideology of colonisation, which held that Africans were unfit to govern themselves, that they needed the civilisation of colonial tutelage as their one hope of eventually achieving self-determination and development.²⁹¹

Nzongola-Ntalaja refuted the Euro-centric attitude of perceiving Africans as being incapable of determining their own affairs and by extension having no history of democracy and human rights. He correctly emphasised that:

Such an approach not only glosses over the impact of the Atlantic slave trade on political institutions and practices in West and Central Africa but also minimises the role of colonial despotism as a school of post-colonial rulers.²⁹²

Further, Mamdani ruled out the Western 'paternity' of the concept of human rights by stating that:

It is difficult to accept, even in the case of Europe, that human rights was a concept created by 17th century Enlightenment philosophy. True, one can quote Aristotle and his ideological justification of slavery as evidence that the idea of human rights was indeed foreign to the conscience of the ruling classes in ancient Greece... What was unique about Enlightenment philosophy, and about the writings of the French and American Revolutions, was not a conception of human rights, but a discussion of these in the context of a formally articulated philosophical system.²⁹³

From the foregoing, it is inevitable to observe that no country has the monopoly of human rights respect or abuses. Nor can any society claim to be a paradise for human rights. Dismissing the Western 'paternity' of democracy and constitutionalism, Mangu rightly noted that Athens and Rome that allegedly 'invented' democracy ended up in

²⁹¹ Ake C, *Democracy and development in Africa* (1996), p. 130.

²⁹² Nzongola-Ntalaja G, note 6 above, p.11-12.

²⁹³ Mamdani M, et al (eds.), *Social movements, social transformation and the struggle for democracy in Africa* (1988), pp. 236-237.

authoritarianism and dictatorship, while Greece the supposed ‘mother of Western democracy’ was still a dictatorship in the 1970s.²⁹⁴

Unfortunately, it is too easy for Western scholars to give lessons and present themselves as the ‘model’ for human rights. Busia was therefore right to discredit the Westernised analyses of the concept of human rights as ‘facile generalisations not reflecting the entire reality of human rights in pre-colonial social formations of Africa.’²⁹⁵ Hence, ‘an inquiry into the origin of human rights is not only a false search but a precarious adventure which can only resurrect the cultural relativist’s argument which is now running out of steam.’²⁹⁶

The failure of Euro-centric Western scholars to locate human rights in African cultures has been criticised by a number of African scholars who laboured to vindicate that African cultures were after all not devoid of the concept.²⁹⁷ Quashigah, for example, analysed the emergence of the concept of human rights in the Western world and concluded that, if the Western concept of human rights was so developed, then:

The irresistible inference is therefore that each and every human society, whatever its stage of development, from absolute primitivity to modern statehood, logically recognises some rights which could be rightly termed human rights. The concept of human rights is,

²⁹⁴ Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 6 above, p. 249.

²⁹⁵ Busia K, ‘The status of human rights in pre-colonial Africa: Implications for contemporary practices’, note 6 above, p. 49.

²⁹⁶ *Ibid*, p. 65.

²⁹⁷ Quashigah K, ‘The philosophic basis of human rights and its relations to Africa: A critique’, note 6 above, pp. 22-38; Mutua M, ‘The Banjul Charter and the African Cultural Fingerprint’, note 6 above, p. 355; Shivji I, *The concept of human rights in Africa*, note 6 above, p. 237; Kannyo E, *Human rights in Africa: problems and prospects*, note 6 above, p. 4; Cobbah J, ‘African values and the human rights debate: An African perspective’, note 6 above, p. 331; Wiredu K, ‘Democracy and consensus in African traditional politics: A plea for a non-party polity’, note 6 above, p. 303; Hountondji P, ‘The master’s voice: The problem of human rights in Africa’, note 6 above, p. 319; Fernyhough T, ‘Human rights and pre-colonial Africa’, in Cohen R, *et al.* (eds.), *Human rights and governance in Africa* (1993), pp. 40-41.

therefore, not alien to African societies; if anything at all, it is absent only in any articulated philosophical form.²⁹⁸

Quashigah's analysis served to acknowledge that both Western and African traditions are contradictory because they embody both respect for and abuse of human rights. As elsewhere, there was democracy and human rights in Africa, in addition to tyranny and other forms of human rights abuses.²⁹⁹ If the concept of human rights was a Western discovery as argued by the host of Euro-centric scholars, the same should be said of concepts such as genocide, slavery, absolute monarchy, inquisition, authoritarianism and so on.³⁰⁰

Wiredu and Hountondji also attempted to locate human rights in some African cultures. While Wiredu dwelt more on Africa's past cultural experiences to evolve an Akan conception of rights³⁰¹, Hountondji underscored the colonial and post-colonial periods of Africa.³⁰² On the historico-colonial front, Hountondji analysed and denounced the Western claims to being the repository of human rights.³⁰³ On his part, Shivji attempted to contrast the philosophical foundations of human rights in Africa and the West.³⁰⁴ He explained that the philosophical basis of Western human rights conceptions is contrary to the African way of thinking. According to him, in Africa, the collective is more esteemed

²⁹⁸ Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', note 6 above, p. 30.

²⁹⁹ Mamdani M, *Social movements, social transformation and the struggle for democracy in Africa*, note 6 above, p. 249.

³⁰⁰ For a similar argument with regard to democracy and constitutionalism, see Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa', note 6 above, p. 252.

³⁰¹ Wiredu K, 'Democracy and consensus in African traditional politics: A plea for a non-party polity', note 6 above, p. 303.

³⁰² Hountondji P, 'The master's voice: The problem of human rights in Africa', note 6 above, p. 303.

³⁰³ Ibid. See also Appiagyei-Atua K, 'A rights-centred critique of African philosophy in the context of development', note 6 above, pp. 354-355.

³⁰⁴ Shivji I, *The concept of human rights in Africa*, note 6 above, p. 56.

than individuals, with the result that emphasis is put in communal rights rather than individual rights.³⁰⁵ Shivji's views were consistent with those of Cobbah who asserted:

Africans do not espouse a philosophy of human dignity that is derived from natural rights and individualistic framework. African societies function within communal structure whereby a person's dignity and honour flow from his or her transcendental role as a cultural being.... We should pose the problem in this light, rather than assuming an inevitable progression on non-Westerners toward Western lifestyle.³⁰⁶

Socio-cultural differences between the Western and African societies might have contributed to the argument that pre-colonial Africa was devoid of human rights. However, as Nzungola-Ntalaja observed, the sociological reality of ancient Africa is too complex to be simplified through the lenses of Afro-centric romantics as a golden age of freedom, or those of Afro-pessimists as an epoch of despotism.³⁰⁷

Indeed, since human rights are concerned with the preservation of human dignity and the recognition of the intrinsic worth of the individual, there is no conceivable reason why they should not be a preserve for all societies.³⁰⁸ This argument, however, should not be taken to mean that there are no cultural differences which inform the various philosophical perceptions of the human rights concept. Rather, it emphasises the obvious fact that, since the values of justice and human dignity are applicable and therefore relevant to all societies, so does the human rights concept. Kannyo correctly pointed out that '... the factors which gave rise to the need for constitutional guarantees and led to the evolution of the philosophy of human rights in the West have become equally relevant in other parts of the world....'³⁰⁹

³⁰⁵ Ibid.

³⁰⁶ Cobbah J, 'African values and the human rights debate: An African perspective', note 6 above, p. 331.

³⁰⁷ Nzungola-Ntalaja G, 'The state and democracy in Africa', note 6 above, p. 10.

³⁰⁸ Diganke O, 'Protection of human rights in Africa', note 6 above, p. 375.

³⁰⁹ Kannyo E, *Human rights in Africa: problems and prospects*, note 6 above, p. 4.

This argument is sensible especially because a close nexus has been established between the modern human rights corpus and some pre-colonial African practices.³¹⁰ In this regard, Mutua contended that the right to life, for example, was so valued in pre-colonial African societies that the power over life and death was reserved for a few elders and was exercised ‘only after elaborate judicial procedure, with appeals from one court to another, and often only in cases of murder and manslaughter.’³¹¹ He then dismissed the claim that human rights could only exist in a post-feudal state, and also the assertion that the concept was alien to specific pre-capitalist traditions.³¹² This view, he observed, suggested that these traditions can make no normative contribution to the human rights corpus.³¹³

One would agree with Mutua’s observation that pre-colonial values have been undermined by change as a result of interaction between different cultures brought about by colonisation of African peoples.³¹⁴ During the colonial period, Western political and legal systems were superimposed upon the customary traditions of the African people.³¹⁵ At the same time, colonial rule curtailed much of the traditional African freedoms and practices in the name of improving and bettering the lives of Africans.³¹⁶ However, the colonial powers did not allow classical Western concepts of human rights to be assimilated into the African life-style. Instead, colonialists applied standards to the indigenous African population which differed from classical liberal traditions.³¹⁷ In fact, the period of colonialism was one in which scant respect was paid to human rights in Africa.³¹⁸

³¹⁰ Mutua M, ‘The Banjul Charter and the African cultural fingerprint’, note 6 above, p. 351.

³¹¹ Fernyhough T, ‘Human rights and pre-colonial Africa’, note 297 above, p. 56.

³¹² Mutua M, ‘The Banjul Charter and the African cultural fingerprint’, note 6 above, p. 355.

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ Swanson J, ‘The emergence of new rights in the African Charter’, note 6 above, p. 326.

³¹⁶ Busia K, *Africa in search of democracy*, note 6 above, pp. 48-49.

³¹⁷ Asante K, ‘Nation building & human rights in emergent African nations’, note 6 above, pp. 73-74.

³¹⁸ Motola Z, ‘Human rights in Africa: A cultural, ideological and legal examination’, note 6 above, p. 383.

Consequently, at independence, African countries inherited Western notions of individual rights.³¹⁹ Unfortunately, these philosophical constructs disregarded the actual development of African cultures.³²⁰ In spite of this, it was difficult for the change process arising from this interaction to totally or completely invalidate or eradicate African cultures and values systems.³²¹ This could be interpreted to mean, whatever constitutes acceptable human rights standards has much to do with the cultural and historical perspectives of a given society, generally, and those in power, particularly.³²² For instance, slavery and colonialism, which are now forms of human rights violations, were at one time not considered incompatible with human rights.³²³

In line with the approach of juxtaposing the present day notion of human rights with the cultural practices of some societies, Wai concluded that indeed human rights existed in pre-colonial Africa. According to him, rulers were bound by traditional checks and balances to limit their power and guarantee a ‘modicum of social justice and values concerned with individual and collective rights.’³²⁴ The Akamba of Kenya, it is said, believed that all members of the society were born equal and were supposed to be treated as such regardless of sex and age.³²⁵ The same was said of pre-colonial Taita society.³²⁶

On the same template, Wiredu tabulated a list of rights and responsibilities borne by the Akan in the pre-colonial era. These included rights to political participation, land and

³¹⁹ See Cobbah J, ‘African values and the human rights debate: An African perspective’, note 6 above, p. 309.

³²⁰ Motola Z, ‘Human rights in Africa: A cultural, ideological and legal examination’, note 6 above, p. 389.

³²¹ Mutua M, ‘The Banjul Charter and the African cultural fingerprint’, note 6 above, p. 355.

³²² Swanson J, ‘The emergence of new rights in the African Charter’, note 6 above, p. 326.

³²³ Marks A, ‘Emerging human rights: A new generation for the 1980s? (1981), *Rutgers law review*, p. 439.

³²⁴ See Wai D, ‘Human rights in Sub-Saharan Africa’, note 6 above, p. 352.

³²⁵ *Ibid*, p. 349.

³²⁶ See Mbondenyei M, ‘The potential of Taita customary law in the promotion and protection of human rights in Kenya’ (2003), LLB Dissertation, Moi University, p. 15.

religion, as well as the duty to defend the nation.³²⁷ Fernyhough, though not subscribing to a unique concept of human rights, also outlined many of the rights protected in pre-colonial societies.³²⁸ According to him:

From one perspective the human rights tradition was quite foreign to Africa until Western, “modernising” intrusions dislocated community and denied newly isolated individuals access to customary ways of protecting their lives and human dignity. Human rights were alien to Africa precisely because it was a pre-capitalist society, social organisation. From the opposing viewpoint there is a fundamental rejection of this as a new, if rather subtle, imperialism, and explicit denial that human rights evolved only in Western political theory and practice, especially during the American and French revolutions, and not in Africa. Behind this protest is the very plausible claim that human rights are not found in western values alone but may also have emerged from very different and distinctive African cultural milieus.³²⁹

After his analysis of the catalogue of rights in pre-colonial Africa, Fernyhough cautioned Howard and Donnelly to stick to a consistent theory of human rights in the sense that if they believed that human rights derive directly from a person’s humanity and embody human dignity, which makes them inalienable and universal, it would be contradictory for them not to apply their own definitions and philosophical conception of human rights to pre-colonial Africa.³³⁰ Indeed, human beings occupied pre-colonial Africa. By virtue of this fact, it is impossible to adopt the position that pre-colonial African societies knew not of human rights. This would definitely turn out to be a misplaced argument for the reason that human rights are inherent in all humans.

As already pointed out, this should not be taken to mean that human rights were not violated in pre-colonial Africa. It should be noted, however, violations were not peculiar

³²⁷ See Wiredu K, ‘Democracy and consensus in African traditional politics: A plea for a non-party polity’, note 6 above, p. 303.

³²⁸ Fernyhough T, ‘Human rights and pre-colonial Africa’, note 297 above, p. 40-41.

³²⁹ Ibid.

³³⁰ Ibid.

to Africa. Factually, all cultures suffer from this duality of the good and the bad.³³¹ As Eze contended, which contention this thesis agrees with, human rights were recognised and protected in pre-colonial Africa, but this fact must be looked at in the context of societies that were communal and at the same time unified by mythological beliefs.³³² Hence, emphasising community over individual rights, some scholars have relentlessly insisted that the African and Western perceptions of the concept sharply contrast.³³³

In the main, African societies were said to be humanistic and socialistic and could not have failed to pay attention to the human being and all that appertained to him, particularly his or her rights.³³⁴ This type of humanism led as a consequence, to a scrupulous mutual respect and recognition of the right and liberties for each individual and for the group.³³⁵ According to Cobbah:

The pursuit of human dignity is not concerned with vindicating the right of any individual against the world. The African notion of family seeks a vindication of the communal well-being. The starting point is not the individual but the whole group including both the living and the dead.³³⁶

The above sentiments notwithstanding, there are other African scholars who perceive the notion of human rights in Africa not solely from communalistic, but also individualistic angle. Asante, for example, argued that ‘human rights, quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic worth of the individual.’³³⁷

³³¹ Mutua M, ‘The Banjul Charter and the African cultural fingerprint’, note 6 above, p. 355.

³³² Eze O, ‘African concept of human rights’, note 6 above, p. 15.

³³³ See, for example, Mojekwu C, ‘International human rights: The African perspective’, note 6 above, p. 85; Marasinghe L, ‘Traditional conceptions of human rights in Africa’, note 6 above, p. 32; Legesse A, ‘Human rights in African political culture’, note 6 above, p. 123; Wai D, ‘Human rights in sub-saharan Africa’, note 6 above, p. 115.

³³⁴ Eze O, ‘African concept of human rights’, note 6 above, p. 15.

³³⁵ Ibid.

³³⁶ Cobbah J, ‘African values and the human rights debate: An African perspective’, note 6 above, p. 321.

³³⁷ Asante K, ‘Nation building and human rights in emergent African nations’, note 6 above, p. 102.

The point that has been emphasised all along in this discussion is that the whole debate on the existence of human rights in pre-colonial Africa is surrounded by controversies. Those Western scholars who deny the existence of human rights in pre-colonial Africa appear to be perpetuating Euro-centric views which conjure the memory of colonialism, while their opponents in Africa who defend its existence and go further to assert the concept's African uniqueness, have been dismissed as overzealous Africanists.³³⁸

This thesis maintains that the nature and character of a particular society has always determined the categories of rights to be protected, their scope and ultimately who is to enjoy them.³³⁹ This argument is premised on the observation that human rights protection evolved gradually on a stage-by-stage sequence as societies developed. The nature of the rights protected differed depending on whether the society was based on the slave mode, feudal mode or nascent capitalism that followed in the wake of colonial rule.³⁴⁰ It is therefore not correct to argue that pre-colonial African societies did not have the notion of human rights because to say so would simply mean that Africa at that time was inhabited by non-humans, which assertion is derogatory.³⁴¹ Human rights have neither 'father' nor 'founder' and no one society can therefore claim 'paternity' of the concept.

Related to the issue of 'paternity' is the question of autochthony. Should the concept of human rights as known in the West be imported as it is in African legal systems or should it be clothed with autochthonous or domestic forms? Further, is it proper to posit an 'African concept' of human rights as distinct from that of the Western world, especially Europe? Such a debate would definitely centre on two conflicting concepts—universalism and relativism. It is therefore expedient to discuss these concepts in the light of the ongoing debate on the African concept of human rights.

³³⁸ Ibid.

³³⁹ Eze O, 'African concept of human rights', note 6 above, p. 15.

³⁴⁰ Ibid.

³⁴¹ Ibid.

2.5.1.3 The African concept of human rights

The seemingly un-ending debate on the relevance and place of human rights in both pre-colonial and post-colonial African societies has been exacerbated by the arguments on the existence, or otherwise, of an ‘African’ concept of human rights. In this respect, there are African scholars who insist that human rights should be contextualised to take root on the continent.³⁴² Such scholars are inclined to the ‘cultural relativism’ theory that views human rights from a relativist perspective. Other scholars, however, opine that human rights are universal and should be construed without cultural overtones.³⁴³ Two theories are therefore fundamental in the discussion of the African human rights concept—‘cultural relativism’ and ‘universalism’.

Cultural relativism is a concept based on the theory that human rights should not be construed as absolute because there is infinite cultural variability in every society.³⁴⁴ The concept has several different possible meanings. Teson defined it as the position according to which local cultural traditions properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.³⁴⁵ According to this

³⁴² For general perceptions on African notions of human rights, see, for example, Mutua M, ‘The Banjul Charter and the African cultural fingerprint, note 6 above, pp. 351-357; Eze O, *African concept of human rights*, note 6 above, pp. 8-31; Motola Z, ‘Human rights in Africa: A cultural, ideological and legal examination’, note 6 above, pp. 373-410; Marashinge L, ‘Traditional conception of human rights in Africa’, note 6 above, p. 37.

³⁴³ For this position see the arguments in Howard R, ‘Evaluating human rights in Africa: Some problems of implicit comparison’, note 272 above, pp. 160-179; Howard R, ‘Group versus individual identity in the African debate on human rights’, in An-Na’im A & Deng F (eds.), *Human rights in Africa: Cross-cultural perspectives* (1990), pp. 159-183; Welch C Jr., & Meltzer R (eds.), *Human rights and development in Africa* (1984); Lindholt L, *Questioning the universality of human rights*, note 186 above, p. 7.

³⁴⁴ Lindholt L, *Questioning the universality of human rights: The African Charter on Human and Peoples Rights in Botswana, Malawi and Mozambique*, note 186 above, p. 33.

³⁴⁵ Teson F, ‘International human rights and cultural relativism’, in Alston P (ed.), *Human rights law* (1996), p. 11.

view, no trans-boundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.³⁴⁶

Thus, as a point of departure, substantive human rights standards vary among different cultures and necessarily reflect national idiosyncrasies. In the superficial sense, this essentially means that what may be regarded as a human rights violation in one society may probably be considered lawful in another.³⁴⁷ Additionally, this proposition holds that even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning varies substantially from culture to culture.³⁴⁸

‘Universalism’, on the other hand, is a variant of cultural relativism. The terms ‘universal’ or ‘universality’ can be defined as ‘of, belonging to, done by, all; affecting all’, and a universal rule as one with no exception.³⁴⁹ According to this definition, in order for a rule or concept of human rights law to be defined as universal, it would have to have been established by a consensus of all states and must apply to all individuals within each of these states.³⁵⁰ Panikkar correctly commented that:

...In order for a concept to become universally valid it should fulfil at least two conditions. It should, on the one hand, eliminate all the other contradictory concepts.... On the other hand, it should be the universal point of reference for any problematic regarding human dignity. In other words, it should displace all other homeomorphic equivalents and be the pivotal centre of a just social order. To put it another way, the

³⁴⁶ Ibid.

³⁴⁷ Lindholt L, *Questioning the universality of human rights: The African Charter on Human and Peoples Rights in Botswana, Malawi and Mozambique*, note 186 above, p. 33.

³⁴⁸ See Pollis A, ‘Liberal, socialist and Third World perspectives on human rights’, in Pollis & Schwab (eds.), *Towards a human rights framework* (1982), p. 23.

³⁴⁹ Oxford advanced learners dictionary of current English, (1989).

³⁵⁰ Lindholt L, *Questioning the universality of human rights: The African Charter on Human and Peoples Rights in Botswana, Malawi and Mozambique*, note 186 above, p. 33.

culture which has given birth to the concept of human rights should also be called upon to become a universal culture.³⁵¹

Supporters of universalism base their arguments on the significance of the 1948 Universal Declaration on Human Rights (UDHR). Some argue that its inception marked the transition of human rights from a contextual (national) to a universal (international) concept.³⁵² The UDHR is not only the first global instrument to clearly define a general catalogue of human rights and freedoms, but is also recognised as the ‘human rights pioneer’ in the preambles of most of the subsequent global and regional instruments, besides the constitutions of most independent states of the world.³⁵³ Its relevance in the promotion of the culture of human rights on the globe was reiterated in the First World Conference on Human Rights, held in Teheran, where it was termed as ‘an obligation for the members of the international community.’³⁵⁴

Similarly, the Second World Conference on Human Rights, held in Vienna in 1993, reaffirmed in several paragraphs the universality of human rights.³⁵⁵ In its Declaration and Programme of Action, the Second World Conference on Human Rights emphasised that the ‘universal nature of these rights and freedoms is beyond question.’³⁵⁶ At paragraph 3, the Vienna Declaration and Programme of Action stated that:

All human rights are universal, indivisible and inter-dependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

³⁵¹ Panikkar R, ‘Is the notion of human rights a Western concept?’ in Alston P (ed.), *Human rights law*, note 1 above, p. 170.

³⁵² Shestack J, ‘The philosophic foundations of human rights’, note 7 above, p. 228.

³⁵³ Ibid.

³⁵⁴ Umozurike O, *The African Charter on Human and Peoples’ Rights*, note 5 above, p. 6.

³⁵⁵ See Vienna Declaration and programme of Action, paragraph 1.

³⁵⁶ Ibid.

This is a strong and definitive ideological statement, which would somehow urge one to ascribe to the universalism theory. However, it has been difficult for the theory to gain acceptance in Africa, especially due to the insistence on the need to evolve an ‘African concept’ on human rights. Moreover, it is believed that at the time the UDHR and the two International Covenants were drafted, most of the member states of the UN were states ‘with white populations and largely Christian traditions.’³⁵⁷ Consequently, ‘the individualistic conception of human rights that is reflected in the UDHR indicates the domination of the Western world.’³⁵⁸ From their point of view, ‘the rights contained in the UN documents are not necessarily valid for all peoples at any time.’³⁵⁹ This perception did not only lead to the search for a ‘uniquely African document’³⁶⁰ more responsive to African needs³⁶¹, but also to the ongoing academic debate on the African human rights concept.³⁶²

The African concept of human rights, according to Mojekwa, ‘was fundamentally based on ascribed status...’³⁶³ Unlike the Western concept of human rights which emphasises individual rights, the African concept shares significant similarities with the Islamic concept in that both emphasise rights based on community. The concept is not static but dynamic and has been subject to various forces both internal and external, which have influenced and continue to a certain degree, to shape its essence and content.³⁶⁴ Eze is of the view that in order to fully appreciate the African concept of human rights it is necessary to, among other things,

³⁵⁷ Gittleman R, ‘The African Charter on Human and Peoples’ Rights’, note 6 above, p. 671.

³⁵⁸ Motola Z, ‘Human rights in Africa...’, note 6 above, p. 377.

³⁵⁹ Swanson J, ‘The emergence of new rights in the African Charter’, note 6 above, p. 326.

³⁶⁰ This document ended up to be the ‘African Charter on Human and Peoples’ Rights’. For a more detailed discussion on the salient features of the African Charter, see the next chapter of this thesis.

³⁶¹ International Commission of Jurists, ‘A report on the proceedings of the conference’ (1961) (African Conference on the rule of law, Lagos, Nigeria, Jan 3-7, 1961).

³⁶² Swanson J, ‘The emergence of new rights in the African Charter’, note 6 above, p. 326.

³⁶³ Mojekwa C, ‘The African perspective’, note 6 above, p. 91.

³⁶⁴ Ibid.

locate it in the context of Africa's history spanning from pre-colonial pre-capitalist-formations to the present day; examine the dynamics of its internal evolution before and, after contact with external forces, bearing in mind the pervasive influence of African and imported religions with their tendency towards fostering mythical and naturalist conceptions of human right; take due account of the process of universalisation of the principles of human rights...; determine whether in view of the overwhelming impact of external variables on Africa's socio-economic and political formations and the resultant acculturation, it can seriously be maintained that there is much left of the 'traditional' African conception of human rights, and; ascertain, given the heterogeneity of African societies whether there existed and still exists a sufficient degree of homogeneity, to justify the assertion of the existence of an African notion of human rights....³⁶⁵

Africa presents a paradoxical picture in the study of contemporary international human rights. The realities of post-colonial Africa differ greatly from those envisaged in the pre-colonial and colonial periods. As argued above, recognition and protection of human rights certainly existed in pre-colonial Africa only that African definitions of human rights differed in key respects from those propounded by the West.³⁶⁶

The conception of human rights in traditional African society was not sanctioned by a normative system deriving its validity from a constitutional base or *Grundnorm*. Instead, it was premised on social values fortified by African beliefs and transmitted to posterity through oral history and manifested through positive traditional practices.³⁶⁷ Thus, African traditional systems of human rights were underpinned by social forces peculiar to each society and were not the creation of modern constitutions.³⁶⁸ The abrogation of a constitution, therefore, did not have any effect on the traditional concepts of human rights.³⁶⁹ There is another point of departure between African traditional conceptions of

³⁶⁵ Eze O, *African concept of human rights*, note 6 above, p. 8.

³⁶⁶ Motola Z, 'Human rights in Africa: A cultural, ideological and legal examination', note 6 above, p. 377.

³⁶⁷ Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa', note 38 above, p. 18.

³⁶⁸ Hansungule M, *The African theory of human rights*, note 6 above, p. 1.

³⁶⁹ *Ibid.*

human rights and the conceptions of human rights fostered in modern (or Western) societies.

In the latter, rights are considered universal and individualistic in nature and apply on the same footing to every human being irrespective of geographical location.³⁷⁰ In the former, human rights existed within the context of a particular group or community.³⁷¹ Generally, 'African law' was a law of the group, not only because it applied to micro-societies (lineage, tribe, ethnic group, clan or family), but also because the role of the individual was largely insignificant.³⁷² It was within the group that the individual found security to enjoy his or her rights. The individual was subjugated to the archetype of the totem; of the common ancestor or protecting spirit.³⁷³

The African concept of human rights thus revolves around the African 'communitarian ideal'. This is underscored by the fact that decisions in traditional African societies were made by consensus rather than by competition, and economic surpluses were generated and disposed on a distributive rather than a profit-oriented basis.³⁷⁴ Thus, as Shivji put it, 'African traditional society is based on collectivity (community) rather than on an individual and therefore, the notion of individual is foreign to African ethnophilosophy.'³⁷⁵ Some scholars, however, dispute the 'communitarian ideal.'³⁷⁶ James

³⁷⁰ Welch C, 'Human rights as a problem in contemporary Africa', note 6 above, p. 11.

³⁷¹ Marashinge L, 'Traditional conception of human rights in Africa', note 6 above, p. 33.

³⁷² Ibid.

³⁷³ Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa', note 38 above, p. 19.

³⁷⁴ Howard R, 'Is there an African concept of human rights?' in Vincent R (ed.) *Foreign Policies and Human Rights: Issues and Responses* (1986), p. 13.

³⁷⁵ Cited in Eno W, 'The African Commission on Human and Peoples Rights'..., note 38 above, p. 18.

³⁷⁶ See, for example, Silk J, 'Traditional culture and the prospect for human rights in Africa', note 6 above, pp. 293-294; Asante K, 'Nation building & human rights in emergent African nations', note 6 above, p. 102.

Silk, for example, contended that the emphasis on groups is arbitrary since groups by their very nature do not exist without the individual in them.³⁷⁷

Mutua observed, in one culture the individual may be venerated as the primary bearer of rights; while, in another, individual rights may be more harmonised with the corporate body.³⁷⁸ It has also been argued, and rightly so, that the apparent absence of the individual conception in the traditional society should not be taken to mean the absence of individual rights.³⁷⁹ Individual rights and interests were defined in groups or communities through which the individual found expression. It would also be wrong to assume that the authoritarianism or absence of Western styled democracy in most post-colonial African states reflects the nature of human rights of the traditional African political systems.³⁸⁰ This seems to be the central thesis of those who deny the existence of the concept, and even the practice, of human rights and democracy in non-Western systems.³⁸¹

Further, while the modern concept of human rights protection relies on the courts and other agencies for their enforcement, traditional African societies mainly relied on communal solidarity and the moral upbringing of its people.³⁸² It was believed that if individuals were properly brought up to respect one another, their elders, and live in solidarity with one another, there would be no room for human rights violations, and consequently no cause for the establishment of courts for their protection.³⁸³ Keba M'Baye noted that:

According to African conception of the law, disputes are settled not by contentious procedures, but through reconciliation. Reconciliation generally takes place through

³⁷⁷ Silk J, 'Traditional culture and the prospect for human rights in Africa', note 6 above, pp. 293-294.

³⁷⁸ Mutua M, 'The Banjul Charter and the African cultural fingerprint', note 6 above, p. 342.

³⁷⁹ Eze O, *African concept of human rights*, note 6 above, p. 8.

³⁸⁰ Mutua M, 'The Banjul Charter and the African cultural fingerprint, note 6 above, p. 342.

³⁸¹ Ibid.

³⁸² See generally Welch C, et al. (eds.), *Human rights and development in Africa*, note 6 above, pp. 31-45.

³⁸³ Mutua M, 'The Banjul Charter and the African cultural fingerprint, note 6 above, p. 342.

discussions which end in a consensus leaving neither winners nor losers. Trials are always carefully avoided. They create animosity. People go to court to dispute rather than to resolve a legal difficulty.³⁸⁴

This argument tends to purport that there existed a discernible tradition in pre-colonial Africa favouring reconciliation rather than litigation. However, a cursory glance at the political traditions of societies in pre-colonial Africa reveals the inaccuracy of the proposition. The Amhara of Ethiopia, for example, historically thrived on litigation and the vigorous examination and cross-examination of witnesses.³⁸⁵ The Taita of Kenya also had a judicial mechanism, comprising the council of elders, similar in many respects to the present court systems.³⁸⁶

Although the descriptions of the above traditions are not exhaustive, such arrangements are certainly representative of the general scheme that existed in most pre-colonial societies with standing judicial institutions.³⁸⁷ Hence, to suggest that courts tend to create animosity rather than promote the resolution of disputes is to flagrantly misrepresent the function and purpose of judicial institutions.³⁸⁸ This argument notwithstanding, studies conducted on the African concept of human rights, as recognised by traditional societies, illustrate enormous satisfaction as to the basically democratic way in which the societies protected their own human values: the choosing of leaders, the settlement of conflicts, the provision of social amenities, the rendering of assistance and support, among others.³⁸⁹

³⁸⁴ International Commission of Jurists, 'Human and peoples rights in Africa and the African Charter: Report of a conference' (1985), p. 27

³⁸⁵ Anthony E, 'Beyond the paper Tiger: The challenges of a human rights court in Africa', (1997) 32 *Tex. International Law Journal*, p. 520.

³⁸⁶ Mbondenyi M, 'The potential of Taita customary law in the promotion and protection of human rights in Kenya', note 326 above, p. 24.

³⁸⁷ Anthony E, 'Beyond the paper Tiger: The challenges of a human rights court in Africa', note 385 above, p. 520.

³⁸⁸ *Ibid.*

³⁸⁹ See, for example, the analysis in Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa', note 6 above, pp. 235-264.

Some of the rights guaranteed in modern constitutions were fully guaranteed and enjoyed in traditional societies, although not embodied in texts negotiated by a certain portion of the population.³⁹⁰ Basic human rights such as the right to life, the right to shelter, the right to food, the freedom of association, assembly, and expression, among others, were recognised and guaranteed, and even the head of a particular community could not, without the consent of the subjects, and by due customary process, deprive an individual of any of these rights.³⁹¹ However, it must not be forgotten that with the advent of colonialism things suddenly changed.

At the social spheres, for example, the imposition of colonial rule brought new complexities and changes in existing indigenous practices.³⁹² When collective and individual expression came into conflict, the values of the colonising power were presumed to be superior to those of the indigenous African societies. The European rulers thus had both the will and the power to impose new procedures and values. The frameworks brought by colonialism reflected Western liberal assumptions; traditional expectations, such as those about the responsibilities of chiefs or the nature of judicial settlement were jeopardised.³⁹³ The overall effect was one of weakening the effectiveness of indigenous standards and traditional institutions without firmly implanting new ideas that were consistent with the African value system and beliefs.³⁹⁴

In summary therefore, the African concept of human rights can be said to envisage three important elements; these are, the pre-eminence of the group over the individual; the preference of consensus over competition and; the redistribution of economic surplus rather than profit making.³⁹⁵ In addition, the concept hinges upon the premise of human dignity. The inherence of human rights in every person in the community, according to

³⁹⁰ Mutua M, 'The Banjul Charter and the African cultural fingerprint, note 6 above, p. 342.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Nmehielle O, *The African human rights system* (2001), p. 25.

³⁹⁴ Ibid.

³⁹⁵ Howard R, *Human rights in Commonwealth Africa*, note 195 above, p 50.

this concept, stems from the fact that every human being has inherent dignity which must be respected by all.³⁹⁶ By extension, every bearer of rights had the duty to protect the rights of others in society. Thus, the African concept of human rights advocates for rights which are intertwined with duties. This aspect of the concept is reflected in the African Charter.³⁹⁷

In spite of its being romanticised by certain African scholars, the African concept of human rights has sharply been criticised by others for various reasons. First, there has been much debate among scholars as to whether Africa has a tradition of human rights.³⁹⁸ The arguments in this regard have been discussed in detail elsewhere above. However, it is worth reiterating that those who affirm its existence insist that Africa in fact had the tradition of human rights and that the concept is not unique to the West.³⁹⁹ Others attacked this proposition as one which fails to understand the correct material and philosophical basis of pre-colonial African societies.⁴⁰⁰

With this debate still going on, and notwithstanding the various aspects discussed above, what is needed is the enquiry whether it is proper to talk of a uniform, or even unique, 'African concept' of human rights. If we sum up the various positions societies find themselves at the various stages of development, it is clear that it is not possible to have a uniform or unique African concept of human rights.⁴⁰¹ However, while maintaining that Africa is not one society and that diversity exists, it is possible to make certain

³⁹⁶ Ibid.

³⁹⁷ See generally Arts. 27-29 of the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), adopted June 27, 1981, *entered into force* Oct. 21, 1986.

³⁹⁸ See, for example, Howard R, 'Group versus individual identity in the African debate on human rights', note 343 above, pp. 159-183.

³⁹⁹ See M'Baye K & Ndiaye B, 'The OAU', in Alston P, (ed), *The international dimensions of human rights* (1982), p. 583; Wai D, 'Human rights in sub-Saharan Africa', in Pollis A & Schwab P, (eds.), *Human rights: Cultural and ideological perspective* (1979), pp. 115-144.

⁴⁰⁰ Shivji I, *The concept of human rights in Africa*, note 6 above, p. 44.

⁴⁰¹ Lindholt L, *Questioning the universality of human rights*, note 195 above, p. 17.

generalisations in relation to the supposed ‘African concept’ of human rights.⁴⁰² In line with Lindholt’s suggestion, to arrive at such generalisations, the important distinction between form and essence must first be drawn.⁴⁰³ Hence, looking for an African human rights concept in the same form as it is known from a European perspective may not be fruitful.⁴⁰⁴ There is obviously nothing sacrosanct about the forms evolved in the West because they differ from one Western country to another.

Thus, every nation should be allowed to express itself according to its own wishes and traditions.⁴⁰⁵ The enforcement of human rights must be premised on local conditions because the simplistic adoption of models designed elsewhere is likely to be unsuccessful.⁴⁰⁶ Although African countries slavishly imitated former colonial masters’ institutions, these institutions have to a large extent failed to yield tangible results as they cannot function in the same way in a culturally, historically and socially different context.⁴⁰⁷ However, while it is proper to predicate human rights enforcement on local conditions, insisting on autochthony or a ‘unique African concept’ of human rights would be contradictory to the view that human rights also belong to Africa and that pre-colonial Africans were familiar with them. This is because the debate on autochthony insists that human rights are ‘Western’ inventions or notions foreign to Africa that should be domesticated in order to develop or consolidate.⁴⁰⁸

Further, the issue of a ‘unique African concept’ of human rights is highly problematic and controversial since it is hard to define what constitutes ‘African’ and what is, or may be, actually an ‘African version’ of the concept that is uniformly applicable, or known

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ See generally the argument in Okere J, ‘Human rights and the African Charter’, note 6 above, pp. 153-156.

⁴⁰⁵ Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 6 above, p. 261.

⁴⁰⁶ Wiseman J, *Democracy in black Africa*, note 6 above, p. 10.

⁴⁰⁷ Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa’, note 6 above, p. 262.

⁴⁰⁸ Ibid.

throughout the continent.⁴⁰⁹ Simply put, African cultures are diverse and its societies differ in many respects, making it difficult for one to talk of an ‘African’ version of human rights. On the other hand, this should not be taken to mean that one cannot speak of an African contribution to human rights. Indeed the continent has contributed invaluablely, in more than one ways, to the concept and its development.⁴¹⁰

In fact, all societies, be they modern or traditional, have contributed to the development of the human rights concept by upholding certain essential values.⁴¹¹ However, the ways these values are conceptualised differ.⁴¹² Put differently, although the conceptualisation of human rights differs from one society to another, all societies manifest the notion. This point was emphasised in the first meeting of the group of experts preparing a Draft African Charter in Dakar in November 1979 as follows: ‘You have to be careful that your Charter may not be a Charter of the ‘African man’. Humankind is one and indivisible and the basic needs are similar everywhere.’⁴¹³ This means that Africa can have a model where human rights are universal in their essence, but allow for cultural diversity in their form, interpretation and practical application.⁴¹⁴ Adherence to universalism does not imply that African peoples have no contribution to make to the development of the concept.

Principally, universalism, it is argued herein, does not in itself preclude the expression of regional or national preferences and peculiarities.⁴¹⁵ Thus, what may be deemed to be ‘universally valid’ are the standards or values that define and perpetuate the inherent dignity of all human beings. These standards or values are what define the core of human

⁴⁰⁹ Ibid.

⁴¹⁰ See generally, Viljoen F, ‘Africa’s contribution to the development of international human rights and humanitarian law’, (2001) 1 *African Human Rights Law Journal*, pp. 18-39.

⁴¹¹ Berger H, ‘Are human rights universal?’, (1977) *Commentary*, p. 62.

⁴¹² Motola Z, ‘Human rights in Africa: A cultural, ideological and legal examination’, note 6 above, p. 279.

⁴¹³ Benedek W & Ginther K, ‘New perspectives and conceptions of international law: An Afro-European dialogue’, *Australian Journal of Public and International Law* (1983), p. 148.

⁴¹⁴ Lindholt L, *Questioning the universality of human rights*, note 195 above, p. 17.

⁴¹⁵ Ibid.

rights, *viz* inalienability, indivisibility, interdependence, interrelation and inherence.⁴¹⁶ It is upon these standards or values that all human rights hinge, thus giving them a universal appeal.

By extension, this means that universalism of human rights is only applicable to the extent that it is appreciated that all persons are vested with inalienable, interdependent, interrelated and indivisible rights by virtue of being custodians of inherent human dignity. Anything short of this recognition waters down its relevance. These standards may be uniformly (universally) enforced and realised notwithstanding the divergent interpretations (or margins of appreciation) given to human rights across socio-economic or political divides or geographical locations. It is argued that the fact that rights are interpreted contextually does not mean that human rights are not universal.

It is therefore submitted that no single document, or even society, can represent a blueprint of the full content of 'human rights'.⁴¹⁷ This is because, as stated earlier, the substance of human rights depends on the cultural setting of a particular society. As Quashigah observed, 'since societal development has never been universally in *pari materia*, human rights contents which are specific ideas rooted in certain social circumstances of particular societies cannot be expected to be universal.'⁴¹⁸ He, however, acknowledged that certain human rights are 'indisputably universally ascribable to persons of every historical, geographical and cultural background.'⁴¹⁹ This view seems to bridge the gap between the hypothetical absolute universalism and the purely relativistic view. It emphasises an approach which on the one hand recognises that universalism exists to some extent but that some space must also be given to relativism.

Undoubtedly, most African governments have accepted the UN Charter and UDHR.⁴²⁰ However, to conclude that their acceptance of the UN documents has led to the evolution

⁴¹⁶ See paragraph 3 of the Vienna Declaration.

⁴¹⁷ Motola Z, 'Human rights in Africa: A cultural, ideological and legal examination', note 6 above, p. 373.

⁴¹⁸ Quashigah K, 'The Philosophical basis of human rights and its relation to Africa', note 6 above, p. 22.

⁴¹⁹ *Ibid.*

⁴²⁰ Motola Z, 'Human rights in Africa: A cultural, ideological and legal examination', note 6 above, p. 378.

of universal human rights standards would be merely legalistic and ignorant of the political, economic, cultural and social factors that underpinned the promulgation of these documents.⁴²¹ Some governments adopt international instruments as a mere formality or as a public relations exercise. Again, in many regards, the UDHR is universal in essence but not in form. This is because, although it contains certain provisions which are respected in all societies and cultures, for example, the right to life and the right against torture, the conceptualisation of these rights tends to differ from one society to the other.

The lack of uniformity in conceptualisation exposes the concept of human rights to many exceptions as a result of which universalism loses meaning. For example, while the right to marry in most parts of the world involves members of the opposite sex, in some states, mainly in the West, it is increasingly being extended to homosexuals, despite strong objections from certain quarters.⁴²² Similarly, in states where the death sentence has been abolished, the right to life is absolute, while in other states where this sentence may be imposed it is qualified or limited. Again, whereas freedom of worship includes the right to change one's religion, Muslim states, by virtue of Islamic tenets, may regard such a change as apostasy.

It follows that 'universalism' varies to a great extent and is subject to remarkable specificities and peculiarities, a phenomenon that puts its relevance into question. Hence, it might take some time for universalism to be acknowledged in practice and be legally recognised by all states.⁴²³ This is especially if Europe and the US will continue to expect high human rights standards from the countries of the south yet fail to do the same on their part.⁴²⁴ On a more positive note, it is inevitable to note that the African human rights system, which was previously more inclined to cultural relativism, is gradually shifting to

⁴²¹ See Pollis A & Schwab P (eds.), *Human rights cultural and ideological perspectives*, note 6 above, p. 7.

⁴²² The only country in Africa that has recently decided to extend this right to homosexuals, at the time of compiling this thesis, is South Africa. Other African countries do not recognise it for various reasons which could either be religious or cultural.

⁴²³ Mutua M, 'The Banjul Charter and the African cultural fingerprint, note 6 above, p. 348.

⁴²⁴ *Ibid.*

a less radical approach. This approach, at least to some degree, recognises the universality of human rights.

It is now accepted that the African Charter is based on a compromise between a wide-ranging diversity of national legal and cultural backgrounds.⁴²⁵ At the same time, the African human rights system looks upon the UN and other regional human rights systems when developing its normative and jurisprudential frameworks. Thus, African states cannot validly argue that human rights represent ‘Western imperialism’, because the African human rights system, a system Africans specifically crafted, is inspired by, and reinforces universal human rights norms.

The African human rights concept, on the other hand, can only be valid if it does not trample on the universal standard that acknowledges the inherent dignity of every person. The question that could be asked is, should African scholars continue their search for a ‘suitable African human rights concept’, or should the present discussion be taken to mean the end of the debate on this issue? The answer is, the quest for a ‘suitable African human rights concept’ is not about to end, however much one may want to discourage it.

The ongoing debate on the African concept of human rights should be encouraged in order to develop the African human rights system. Adoption of African notions or concepts of human rights will not make African leaders any less responsible for their human rights commitments at the international level, as the universalists fear.⁴²⁶ However, the goal of adopting such notions should not be to allow oppressive leaders or intellectuals to formulate ‘African concepts’ of human rights that would perpetuate oppression of the African masses and neo-colonialism.⁴²⁷ Rather, the goal should be to develop the African human rights system, taking heed of the pre-colonial, colonial and post-colonial experiences of the African people. Caution should also be taken when

⁴²⁵ Ibid.

⁴²⁶ Appiagyeyi-Atua K, ‘A rights-centred critique of African philosophy in the context of development’, note 6 above, p. 357.

⁴²⁷ Ibid.

crafting a ‘suitable African human rights concept’ to avert the possibility of giving the impression that human rights are foreign to Africa and Africans.

2.5.2 The status of human rights in Africa during the slave trade period

The nature, scope and dynamics of human rights violations on the continent took a dramatic turn for the worst since her contact, over the past many centuries, with the Islamic jihadists, Arab merchants and later Euro-American slavers and imperialists.⁴²⁸ Since the seventh century, Africa witnessed successive waves of military assault, massive destructions and killings.⁴²⁹ During the first half of the 8th century, Islam began to work its way across the trans-Saharan trade route from North to West Africa. Not long after the Arab conquerors had overrun North Africa, the Umayyad rulers there began organising military expeditions and slave raids into the southern regions of Morocco and as far south as the boundaries of the ancient Ghana empire. On several occasions, Arab settlers, particularly those in Mauritania, unleashed persecution, summary execution, deprivation of citizenships, illegal expulsion and arbitrary arrests on African-Mauritanians.⁴³⁰

The widest suppression and desecration of human rights during Africa’s colonial period has been attributed to the slave trade.⁴³¹ The trade in slaves was accompanied by wars, ironically waged just to capture slaves. Victims of slave trade were mainly men, women or children who were thought to have brought dishonour to the family, the village or the clan. They were often sold into slavery to prevent further disrepute.⁴³² Slaves went through agonising and torturous experiences from the time they were captured, marched to the slave market and finally sold to the intermediary slave trader.⁴³³

⁴²⁸ Alemika E, ‘Protection and realisation of human rights in Africa’, in Kalu A & Osinbajo Y, *Perspectives on Human Rights* (1992), p. 153.

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ See Eze O, ‘African concept of human rights’, note 6 above, p. 16.

⁴³² Ibid.

⁴³³ Ibid.

They were tied to each other, with chains around their necks and their hands tied behind their backs. Some had their lips perforated and locked with a view to preventing them from eating when desired. Such act can be described not only as barbaric but also a gross violation of human rights.⁴³⁴ The slave ship itself was the ultimate in human degradation, for the slaves were packed like sardines and left in chains.⁴³⁵ In the process many slaves died due to the poor conditions of transportation. Worse still, stubborn or sick ones were thrown overboard. William Wilberforce is quoted to have said: ‘Never can so much misery be found condensed into so small a space as in a slave ship.’⁴³⁶

According to statistics, it was not unusual to have an 80% casualty-rate in a boat. It was also estimated that for every 300 slaves that survived in the Americas, 700 had died—500 during the raids and the march to the coast, 125 in slave ships and 75 after landing in the New World.⁴³⁷ As a result of the slave trade, large areas of Africa were depopulated. It is estimated that about twenty million people were transported out of the continent during this period.⁴³⁸

Besides having negative implications on human rights, the trade was totally extractive of human resources, negated political, economic, social and cultural development and stultified the growth of civilisation.⁴³⁹ It destroyed kingdoms and prevented the development of legitimate trade. Personal insecurity was highest during the slave-trade era with consequent degradation of the quality of life.⁴⁴⁰ Slaves who survived the long tortuous journey across the Atlantic sea finally reached their destinations where they were subjected to hours of daily toil, further torture, the denial of adequate food and

⁴³⁴ Eze O, ‘African concept of human rights’, note 6 above, p. 16.

⁴³⁵ *Ibid.*, 17.

⁴³⁶ Wallbank T, *Contemporary Africa, Continent in Transition*, (1964).

⁴³⁷ Eze O, ‘African concept of human rights’, note 6 above, p. 17.

⁴³⁸ *Ibid.*

⁴³⁹ Eno W, ‘The African Commission on Human and Peoples’ Rights’, note 38 above, p. 33.

⁴⁴⁰ *Ibid.*

satisfaction of innate human desires. Most were transported to the New World for the exploitation of its resources.⁴⁴¹

Shocking as it now appears, the institution of slavery was generally legal under the national laws of many European countries and America by the end of the eighteenth century.⁴⁴² It was legal in the United States until 1863, in Brazil until 1880, and in some countries into the twentieth century. In England it was illegal according to the Somerset's case of 1772, and at the turn of the century, a humanitarian movement, largely inspired by William Wilberforce, sought to prohibit it internationally.⁴⁴³ Due to its inhuman and degrading nature, and following the campaigns of anti-slavery activists, steps were taken to secure the abolition of slave trade so as to prevent the increase in the number of slaves.⁴⁴⁴

In 1807, slave trade was prohibited in British colonies.⁴⁴⁵ It was also abolished in France, and by the treaty of Paris of 1814 the British and French governments agreed to cooperate in the suppression of the traffic in slaves. This undertaking was generalised and accompanied by a solemn condemnation of the practice by the major European states at the Congress of Vienna in 1815.⁴⁴⁶ More than fifty bilateral treaties on the subject were concluded between 1815 and 1880, and at the Berlin Conference of 1885 the practice was forbidden in conformity with the principles of international law.⁴⁴⁷ All the efforts and successes to end the trade in slaves notwithstanding, a permanent imprint had been left on the face of the continent on how brutal human beings can be against one another.⁴⁴⁸

⁴⁴¹ Umozurike O, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 17.

⁴⁴² Robertson H & Merrills J, *Human rights in the world* (1993), p. 15.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ The congress of Vienna 1815 considered that the slave trade was 'repugnant to the principles of humanity and of universal morality.'

⁴⁴⁷ Robertson H & Merrills J, *Human rights in the world*, note 442 above, p. 15.

⁴⁴⁸ Umozurike O, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 17.

Thus, the subsequent attempts, centuries later, by Western states to reprove African states for their poor human rights records went largely unheeded and were largely dismissed as pretentious.⁴⁴⁹ Unluckily, the slave trade was just the beginning of the nightmarish ordeal Africans would experience for a couple of centuries thereafter.⁴⁵⁰ With the demise of the trade in slaves came the urgent need among the European powers already in Africa to translate their presence into other commercial activities.⁴⁵¹

Throughout the second half of the nineteenth century the British, French, Dutch, Portuguese, and other Europeans brutishly jostled one another for influence and control over trade of certain valued commodities.⁴⁵² So intense was the competition for commercial hegemony that in 1884 Chancellor Bismarck of Germany convened a conference of European nations to diffuse the tension that had built among them. The purpose of the conference was to establish rules ‘for recognising spheres of commercial suzerainty.’⁴⁵³ Its end result was the partitioning of Africa amongst European powers. This was climaxed by a frenetic scramble to establish spheres of dominance where none existed before.⁴⁵⁴ Eventually, Africa found itself under the control of ‘white’ foreigners. The major colonial powers at that time were France, Britain and Belgium. Portugal and Spain exacted some measure of colonial authority as well, though they had no great impact as the other three.⁴⁵⁵

As already stated above, each of these powers had its unique system of administration. Differences in the systems were based on the philosophical and historical experiences of the colonisers.⁴⁵⁶ These systems could loosely be dubbed: indirect, direct/paternalism and

⁴⁴⁹ Umozurike O, *The African Charter on Human and Peoples’ Rights*, note 5 above, p. 17.

⁴⁵⁰ Nmehielle O, *The African human rights system*, note 393 above, p. 17.

⁴⁵¹ Ibid.

⁴⁵² Ayittey G, *Africa betrayed* (1992), p. 81.

⁴⁵³ Nmehielle O, *The African human rights system*, note 393 above, p. 17.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

the assimilation systems. It is therefore imperative to consider them separately in order to determine the status of human rights under each.

2.5.3 Human rights in colonial Africa

Before the coming of foreigners to Africa, local societies, as already indicated, were mostly governed by customary law and traditions.⁴⁵⁷ Foreign intrusion later led to the decline and subsequent demise of the then subsisting African kingdoms, chiefdoms and empires. In spite of this, there remained a substantial part of the culture, political systems and customs inherited from the past.⁴⁵⁸ African customary law amazingly survived the onslaught from foreign invasion, even after vehement attempts to subjugate it. Foreign invasion did, however, have a direct and decisive impact on it.

In the first place, with the coming of Arab slave traders and later the colonialists, African customary law ceased to be endogenously developed by Africans. It no longer evolved according to African needs. African societies became subject to political, economic and social domination. Local cultures were either ignored or supplanted with foreign ones.⁴⁵⁹ Besides tampering with the socio-economic and political formation of the then existing societies, foreign intervention in Africa was characterised by gross violation of human rights.⁴⁶⁰

In many instances, Africans were regarded as beasts rather than human. It is against this background that this part of the study examines the status of human rights in Africa in the wake of colonialism. The term ‘colonial period’ is deliberately used to depict that period when Africa was subjugated by the cruel hand of its European foreign ‘masters’, who initially posed as its trading partners only to reveal their true intentions later on. In this

⁴⁵⁷ Ibid.

⁴⁵⁸ Eze O, *Human rights in Africa*, note 6 above, p. 14.

⁴⁵⁹ Ibid.

⁴⁶⁰ Nmehielle O, *The African human rights system*, note 393 above, p. 18.

study therefore, ‘colonial period’ essentially envisages the entire epoch from the coming of the European imperialists to when they relinquished their dominion over the continent.

It should be noted that foreigners employed different techniques to bring the African inhabitants to submission as well as plunder their resources. As a result, the techniques and systems of administration preferred, for example, by the British, French, and Belgian colonialists to govern their subjects varied a lot. However, the end result of each was the gross violation of human rights and suppression of the local African population. To put this phenomenon into perspective, this part of the study illuminates the status of human rights in colonial Africa by examining the following key systems that marked this period: indirect administration system (British rule), direct administration/paternalism (Belgian/Portuguese rule) and the assimilation system (French rule).

2.5.3.1 The status of human rights in colonial Africa under the Indirect Rule system

The indirect rule system of colonial administration was coined and perpetuated by the British in their colonies. The system was ‘indirect’ because it encouraged the use of existing institutions and the traditional political leaders.⁴⁶¹ Where the system flourished, the African traditional chief became a tool in the hands of the British colonisers for the main purpose of maximising exploitation.⁴⁶² It was also invented and imposed on societies that were generally not hierarchically structured.⁴⁶³ Under this system, each colony was divided into regions governed by regional administrators or chiefs, each region into provinces under provincial commissioners, and each province into districts under district commissioners.⁴⁶⁴ Each district consisted of one or more of the traditional communities, and the day-to-day affairs and local ordinances were left in the hands of

⁴⁶¹ Eze O, *Human rights in Africa*, note 6 above, p. 19.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Ayittey G, *Africa betrayed*, note 452 above, p. 86.

traditional rulers and the council of elders.⁴⁶⁵ The system recognised and provided for the application of African customary law. Although the system utilised the services of local chiefs and rulers, indirect rule had two major limitations in that regard.

First, it tended to conserve and reinforce the authoritarian aspect of the powers of the chiefs who frequently abused them. Their authority went beyond the limits that would have been tolerated in traditional African societies.⁴⁶⁶ Secondly, the imposition of this system derailed the dynamic evolution of African institutions that would have increasingly developed and become more democratic as a result of inevitable intercourses between various groups; notably, the emergence of the elite who would be opposed to absolute traditionalism.⁴⁶⁷

Generally, the indirect rule of colonial administration was essentially authoritarian and even the introduction of English law as the basis for the local legal systems did not result in the colonial subjects enjoying the full rights of liberty, due process, free speech and other rights, which the common law was said to guarantee to the English themselves at that time.⁴⁶⁸ The system encouraged buttressing of the powers of the traditional rulers, the creation of special native courts to apply unwritten customary laws and administrative orders, the exercise of powers of political detention or deportation and use of laws of sedition and censorship framed more widely than those of England.⁴⁶⁹

In addition, the system established and maintained, by means of law, a governmental and societal system characterised by authoritarianism and racial discrimination in such fields as the administration of justice, the development of representative institutions and agrarian administration.⁴⁷⁰ Like the French and Belgian systems, indirect rule did not

⁴⁶⁵ Ibid.

⁴⁶⁶ Nmechielle O, *The African human rights system*, note 393 above, p. 25.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ See Ghai Y & McAuslan J, *Public law and political change in Kenya* (1970), pp. 407-408.

create adequate appeal machinery, nor did it place fundamental and justiceable limitations of power on either the legislature or executive. The legislature had a wide measure of freedom in the areas in which it could legislate and the emergency powers granted to it could only have exacerbated the denial of fundamental rights and freedoms.⁴⁷¹

The point remains that this system, like colonialism at large, was disrespectful of African traditions and values. It relegated Africans to subservience in all fields. It arrested and destroyed the internal dynamics of the evolution of African societies.⁴⁷² Undoubtedly, by abolishing certain objectionable traditional practices that were prevalent in pre-colonial Africa, such as human sacrifice, slavery, killing of twins, among others, the colonialists somehow contributed to the development of human rights.⁴⁷³ However, the negative effects of colonialism generally, and the indirect rule system in particular, on colonial and independent Africa cannot be taken lightly.

2.5.3.2 The status of human rights in colonial Africa under the Direct Rule/ Paternalism system

Direct rule or paternalism system was employed by Belgium to govern its colonies in Africa. These colonies were located in the Congo basin and embraced also the Rwanda-Burundi regions. Under this system of colonial administration, Africans were considered to be incapable of guiding their own destinies.⁴⁷⁴ Thus, the colonialist controlled every aspect of African life and welfare. Thus, Belgian Congo was administered directly from Brussels to the effect that all edicts and directives came from there. The Congolese were not consulted in the administration of their own affairs. Belgian overlords felt free to interfere in the selection of African leaders in their protected states.⁴⁷⁵ Prior to the introduction of this system, the personal influence of King Leopold II of Belgium

⁴⁷¹ Nmehielle O, *The African human rights system*, note 393 above, p. 27.

⁴⁷² Ibid.

⁴⁷³ Umozurike O, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 17.

⁴⁷⁴ Nmehielle O, *The African human rights system*, note 393 above, p. 22.

⁴⁷⁵ Ibid.

prevailed in this region. Later, Congo graduated from the personal rule of the king to the status of a Belgian colony.⁴⁷⁶

Colonial rule in the Congo was a tripartite arrangement: rule by corporation, which consisted of the crown, the Catholic Church and large companies in which the crown held substantial stock. The colonial administration of the Congo under the tripartite arrangement was brutal, portraying a picture of almost total human degradation. This was aggravated by the preoccupation of King Leopold who not only reaped benefits from the region but also regarded the territory as his private property.⁴⁷⁷ The brutality and exploitation of the Congo by King Leopold II attracted widespread protests in the region. This forced the Belgian parliament to annex the Congo Independent State, as it was then called, under Leopold's sole 'ownership', and brought it under Belgian state rule, after the adoption of the Colonial Charter of 1908, as the Belgian Congo.⁴⁷⁸ The takeover by the Belgian parliament achieved little by way of reform after that date. From the period of takeover, Belgian colonial policy was one of direct rule, also known as paternalism or tutelage.

Through the direct rule system, stringent conditions were imposed on the subjects. For example, the African could not travel in the Congo without a permit, possess arms or drink anything stronger than beer.⁴⁷⁹ He could be a bishop, journalist, an accountant, a medical assistant, a teacher, a civil servant or a pharmacist, but not an architect or an attorney. By the 1930s there were several lawyers in British and French West Africa, but not a single one in the Congo.⁴⁸⁰ The reason for restricting Africans in the Congo from the study of law was because of colonial politics. Lawyers meant politics, and they would instigate demands for political rights outlawed for the Africans.⁴⁸¹

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ See Ayittey G, *Africa betrayed*, note 452 above, p. 86.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

Despite the total control that Belgium had over their African colonial subjects, the subjects were never considered citizens nor given the opportunity to become one, as was done by the French.⁴⁸² Unlike the British and the French, the Belgians did their utmost to keep their African subjects out of Europe, particularly out of Belgium itself. Africans in other European colonies could attend universities in Europe, but not the Congolese.⁴⁸³ The Belgian administration, like that of the French and British, was equally brutal. To suppress rebellions, the ‘scotched-earth’ policy was applied where villages were burned down to ashes. Its policies were not for the betterment of Africans. They were racist and degraded Africans in many respects, to say the least. Human rights were therefore more of a myth than a reality under this system of colonial administration.

2.5.3.3 The status of human rights in colonial Africa under the Assimilation system

The assimilation system was the handmaiden of the French colonial administration. Under this system, the colonised people were expected to assimilate the French culture. The rationale for assimilation was based on the belief that French culture was superior.⁴⁸⁴ The system made it impossible to have a uniform application of policies. Policies in many cases had to be modified to accommodate the various categories of persons present in society.⁴⁸⁵ Most often, this meant that at the political level, the traditional rights of African societies to participate in their own government had to be suspended. This system posed the gravest danger to indigenous African institutions, especially the great paramount chieftaincies, which were deliberately destroyed.⁴⁸⁶

Apart from an unacceptable arrogance, in some areas, as to the superiority of the French law and jurisprudence, the French made a distinction between various categories of

⁴⁸² See generally, Young C, ‘Colonial rule through direct rule: The Belgian model’, in Cartey W & Kilson M, (eds.), *The African reader: Colonial Africa*, pp. 87-88.

⁴⁸³ Ibid.

⁴⁸⁴ Nmehielle O, *The African human rights system*, note 393 above, p. 20.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ayittey G, *Africa betrayed*, note 452 above, p. 86.

Africans on the one hand and the French on the other.⁴⁸⁷ For example, customary law was applicable to persons who were considered as having customary status (*statut coutumier*), while persons to whom the French law applied acquired the French civil status (*statut civil Francais*). Assimilation was limited to a few Africans and the French were compelled to resort to indirect rule when they failed to do otherwise.⁴⁸⁸

Notwithstanding the applicable system, chiefs who were at the apex of traditional African societies were reduced to being agents of French colonial administrators. At the societal level, freedom of movement was restricted so as to ensure the provision of cheap labour both for the administration and the colonial corporations and for this adequate pay was not given.⁴⁸⁹ Forced labour was also practised. The *indigenat*, which consisted of regulations that allowed colonial administrators to inflict punishment on African subjects without obtaining a court judgement or approval from the metropolis, was largely applied under the French system.⁴⁹⁰ It allowed the colonial officers to jail any African for up to two years without trial, to impose heavy taxes and punitive fines, or to burn the villages of those who refused to pay.⁴⁹¹

In summary therefore, there is no doubt that no one system of colonial administration was better than the other. A closer look at these systems will reveal that they had the same objectives and produced more or less similar consequences for the colonised peoples.⁴⁹² By whatever name called, or philosophies under which they were formulated, all the systems were fashioned to exploit the colonies in the maximum way possible. Colonial policies and legislation were generally racist, and degraded Africans in many respects. Even when native law and custom could generally be enforced, they could not be

⁴⁸⁷ Eze O, *Human rights in Africa*, note 6 above, p. 15.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Nmehielle O, *The African human rights system*, note 393 above, p. 20.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

observed or enforced if they were repugnant to natural justice, equity and good conscience, or incompatible with any ordinance in force in the territories.⁴⁹³

Ironically, the standards of natural justice, equity and good conscience by which they were to be judged were of colonial origin.⁴⁹⁴ Additionally, all colonisers practised forced labour; were disrespectful of African traditions and values and by relegating Africans to subservience, particularly in the field of administration, arrested and destroyed the internal dynamics of the evolution of African societies.⁴⁹⁵ Colonialism denied the people of the right to determine their political, economic, and social future.

No wonder in many cases, the history and legacy of violations of the rights of African peoples that began during colonialism became the basis on which post-colonial despots undermined international efforts against human rights abuses on the continent. Thus, former President of Zaire (now ‘the Democratic Republic of Congo’), the late Mobutu Sese Seko, a leading despot in Africa (during his time) and an ally of Western governments (particularly the US), was able to claim without remorse, shamelessly though:

we are often accused of violating human rights. Today it is Amnesty International and tomorrow it is a human rights league and so forth. During the entire colonial period, the universal conscience never thought it necessary to have a human rights organisation when indignities, humiliations and inhuman treatment inflicted in those days against the people of the colonies should have been condemned. It is rather odd. Everybody waited until we became independent suddenly to wake up and start moralising all day long our young states.⁴⁹⁶

⁴⁹³ Eze O, ‘African concept of human rights’, note 6 above, p. 17.

⁴⁹⁴ Ibid.

⁴⁹⁵ Nmehielle O, *The African human rights system*, note 393 above, p. 29.

⁴⁹⁶ Quoted in Reyntjens F, ‘Authoritarianism in Francophone Africa from colonial to the post-colonial state’ *Third World Legal Studies* (1988), p. 73.

While Mobutu's sentiments cannot be upheld as a justification for the continued violation of human rights in post-colonial Africa, it must be conceded that indeed the exploitation and subjugation witnessed during the colonial era were done with impunity in utter violation of international standards. One example is the noble International Labour Organisation's (ILO) minimum standards for dealing with labour under the ILO Conventions. According to M'Baye, the application of these standards in the colonial territories appeared to be practically outside the purview of the conventions, or the colonialists chose on their own not to apply them without any consequences.⁴⁹⁷

Ironically, the abuse and marginalisation of Africa from the international human rights affairs could not be stopped by the League of Nations. Member states of the league misused international law against Africa while it remained passive.⁴⁹⁸ This was epitomised by Italy's invasion and colonisation of Ethiopia in 1935, an independent member of the league.⁴⁹⁹ Umozurike argued that certain states failed to regard Ethiopia as a sovereign state, 'because it was African.'⁵⁰⁰ Thus, the failure of the UN Security Council to respond adequately to violation of human rights in Africa compared to other regions may be a legacy of the marginalisation and oppression of Africa.

Furthermore, the colonised states were excluded from deriving benefit from the whole international human rights movement that had been galvanised by the League of Nations and further developed under the UN.⁵⁰¹ The UDHR, for example, while theoretically intended as profiting the colonised peoples and nations, was not in fact applied to check discrimination and other injustices resulting from colonialism. It was not until the promulgation of the *Declaration on the Granting of Independence to Colonial Countries*

⁴⁹⁷ See M'Baye K, 'Human rights in Africa' in Vasak K & Alston P, (eds.), *The international dimensions of human rights* (1982), p. 583.

⁴⁹⁸ Umozurike U, *International law and colonialism in Africa* (1979), p. 66.

⁴⁹⁹ See Zumach A, 'Parallels between the League of Nations and the UN: The Specter of Abyssinia', in Amnesty International, *Global Rights: UN 50 years after take off* (1995), p. 27.

⁵⁰⁰ Umozurike U, *International law and colonialism in Africa*, note 498 above, p. 66.

⁵⁰¹ *Ibid.*

and Territories by the UN in 1960 that serious consideration was given to the conditions of peoples and nations under alien domination.⁵⁰²

2.5.4 Human rights in post-colonial Africa

The status of human rights protection and promotion in Africa took a slightly different turn from the late 1950s when the then colonised states began to emerge from colonial bondage.⁵⁰³ By then, colonialism had greatly damaged the socio-economic and political structures of the traditional African societies. New systems, which were totally in contrast with the values and norms of the local populace, were in place.⁵⁰⁴ Thus, the emerging states had to face the challenge of embracing new values, systems and institutions, on the one hand, and the universal agitation for human rights promotion and protection, on the other.⁵⁰⁵

Amid these challenges states that were independent resolved to consolidate their efforts and forge a common front to blot out colonialism in its entirety from the face of the continent. This move saw the emergence of the Organisation of African Unity (OAU), whose historical antecedents shall be examined in detail below. Further, albeit reluctantly, independent African states also saw the need for regional mechanisms for the protection of human rights on the continent. This came along with the unending concern for an African concept of human rights, whose parameters were demystified elsewhere above.

This part of the study shall therefore examine the status of human rights promotion and protection in post-colonial Africa. The key aspects of this examination shall be: the emergence of independent Africa states; the emergence and role of the OAU in human

⁵⁰² See Sohn L & Buergethal T, *Basic documents on international protection of human rights* (1973) p. 116.

⁵⁰³ Eze O, *Human rights in Africa*, note 6 above, p. 23.

⁵⁰⁴ Nmehielle O, *The African human rights system*, note 393 above, p. 27.

⁵⁰⁵ *Ibid.*

rights protection in Africa and the emergence and evolution of Africa's regional human rights system to its present status.

2.5.4.1 The emergence of independent African states

With the emergence of independent African states, there were high hopes for the protection and promotion of human rights and the restoration of human dignity on the continent.⁵⁰⁶ This was especially because, political governance had passed from the hands of colonialists to indigenous leaders who were expected to understand and appreciate the problems of their people. It was equally expected that the lost glory and traditional institutions that were undermined by colonialists would be restored, of course with some reforms that would accommodate the incumbent socio-economic and political diversity.⁵⁰⁷ This, however, turned out not to be the case. Many of the emerging independent states adopted constitutions and legal systems similar to those of the colonial powers, regardless of the fact that they were in conflict with the socio-economic and political set-up of the traditional societies.⁵⁰⁸ With these legal and constitutional systems came a package of guarantees— multiparty systems, independence of the judiciary, rule of law, and the promotion and protection of human rights, among others.

Sadly, the end of the 1960s was characterised by the negation of the pledged democracy as well as gross violation of human rights with impunity across the continent. Multiparty democracy became a by-word as opposition parties were regarded as 'clogs in the wheels of progress.'⁵⁰⁹ Thus, ruling parties which had become more intolerant of the opposition politics denied government resources and facilities to their opponents and some even veered to the single party system.⁵¹⁰

⁵⁰⁶ Umozurike U, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 22.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid, p. 23.

⁵¹⁰ For example, in 1982 Kenya became a *de Jure* one party state following the Amendment of S 2A its Constitution.

The line between public, party and private property became blurred, as evidenced in the massive wealth of most long-reigning political leaders— even as their countries wallowed in penury.⁵¹¹ As corruption became rife, the misused resources were insufficient to support the expected rate of development. A wave of coups therefore swept across the continent, where the military took over or attempted to overthrow virtually all African governments, purportedly to clean the socio-economic and political messes.⁵¹²

Military regimes were usually enthusiastically received as saviours by the populace at the initial stages but with time fell into the same errors as the civilians.⁵¹³ Eventually, the rule of law changed to the rule of force and in some states some ethnic groups were marked out for systematic decimation and marginalisation.⁵¹⁴ There were mutinies in Burundi and Rwanda in the 1970s and 1990s and in Nigeria, as early as 1966. In the same period, Ghana witnessed ten-minute trials and executions of former heads of government, following a successful military coup.

Generally, respect for human rights reached its lowest ebb on the continent in the 1970s.⁵¹⁵ During this period, for example, a number of African states deported foreign Africans from their territories and in most cases deprived them of their property.⁵¹⁶ Nigerians were deported from Cameroon soon after independence, Ghanaians from Ivory Coast, Rwandans from Burundi and vice versa. Ghana deported foreigners in 1969 and 1970 in order to check unemployment.⁵¹⁷ Liberians were deported from Ivory Coast and

⁵¹¹ Examples of such leaders include Moi of Kenya, Mobutu of Zaire, Kaunda of Zambia, among others.

⁵¹² Umozurike U, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 22.

⁵¹³ Ibid.

⁵¹⁴ Ibid.

⁵¹⁵ Yardley D, 'The effectiveness of the Westminster model of constitution', (1977) *YBWA*; Emerson R, 'Faith of human rights in the Third World', *World Politics*, (1975) Vol. XXVII No. 2, Jan.

⁵¹⁶ Umozurike U, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 23.

⁵¹⁷ Ibid.

Nigerians from Zaire. Kenyans, Tanzanians and Asian Ugandans were expelled from Uganda.⁵¹⁸

In summary, although African leaders were expected to promote and protect human rights at independence, they violated the same with impunity. Unfortunately, as Babu sarcastically stated, liberation was duly climaxed by the following tendencies commonly embraced by leaders all over Africa:

Arbitrary arrest of citizens; disrespect for the right of habeas corpus; imprisonment without trial; denial of freedom of movement; ... organised and systematic police brutality; domination of government by secret police; mass arrests and detentions; concentration camps; physical and mental torture of prisoners; public executions; and the whole apparatus of violent repression.⁵¹⁹

This has been an ongoing situation in Africa. Human rights violations have taken new forms and status, including genocide, war crimes and crimes against humanity. As recently as 1994, for example, the continent experienced one of the gravest genocides in its history where approximately 800,000 people were brutally massacred in Rwanda.⁵²⁰ Violence has, since the colonial era, been an instrument of governance in the hands of Africa's ruling class.⁵²¹ Likewise, torture is still widely popular among the rulers. The paradox of the situation is that human rights violations in independent African states has, and continues to produce consequences which when carefully considered are antithetical to the interests of protection and promotion of human rights, particularly in the regional set up.⁵²² This in a way justifies the previous and current intergovernmental efforts towards the promotion and protection of human rights at the regional level. These efforts shall therefore be highlighted below.

⁵¹⁸ Ibid.

⁵¹⁹ Babu A, *African socialism or socialist Africa?* (1981), p. 171.

⁵²⁰ For more information on the Rwandan genocide and the ongoing trials of its perpetrators, visit www.ictj.org.

⁵²¹ Alemika E, 'Protection and realisation of human rights in Africa', note 428 above, p. 152.

⁵²² Ibid.

2.5.4.2 The emergence and role of the OAU in human rights protection in Africa

The background to the creation of the OAU can be traced back to a series of developments in various regions across the continent,⁵²³ with the various groupings among French-speaking countries⁵²⁴, East and Central Africa⁵²⁵ and others pulling in slightly different directions.⁵²⁶ In August 1959 a conference of nine independent African states⁵²⁷ was held in Monrovia to look specifically at the Algerian question— to stop the war there and assist the nationalists, many of these states having recognised the Algerian provisional government. The successes of this conference provoked a number of All-African Peoples’ conferences, which were held in the late 1950s and early 1960s with the aim of encouraging those who were not yet liberated to liberate themselves and to organise non-violent revolution in Africa.⁵²⁸ At this stage the potential role of African states in the concerted effort to promote and protect human rights within the continent emerged in the forms of condemnation of racism in South Africa, the call for the need for universal vote and concerns about religious separatism, among others.⁵²⁹

With the passing of time, these states acknowledged the need for a regional organisation of independent states that would help them speak as one voice. States did not, however, agree on the nature of the regional organisation, with some falling into the ‘Monrovia’

⁵²³ Murray R, *Human rights in Africa: From the OAU to the Africa Union* (2004), p. 2.

⁵²⁴ Cameroon, Central Africa Republic, Chad, Congo, Dahomey, Gabon, Ivory Coast, Malagasy, Mauritania, Niger, Senegal, Upper Volta first met in 1960.

⁵²⁵ In the aegis of the Pan-African Movement of East and Central Africa (PAFMECA).

⁵²⁶ In July 1959 the Sanniquellie Conference was held bringing together the governments of Liberia, Guinea and Ghana who pledged to work to set up a community of independent African states and decided to hold a conference in 1960.

⁵²⁷ Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, Sudan, Tunisia and United Arab Republic.

⁵²⁸ Murray R, *Human rights in Africa: From the OAU to the Africa Union*, note 523 above, p. 2.

⁵²⁹ Resolutions of the first All African Peoples’ Conference held in Accra, 8-13 December 1958. See *International Organisation* 16(2) (1962), p. 430.

bloc⁵³⁰, favouring a ‘more classical, ‘confederal’ approach where, ‘far from aiming at the integration of African states, sovereignty would be preserved in the framework of a much looser arrangement.’⁵³¹ In contrast, other states under the leadership of Ghana’s President Nkrumah, in what became known as the ‘Casablanca’ bloc⁵³², had signed the more federalist Casablanca Charter for economic cooperation, stressing elements of self-defence and the need to eliminate colonialism.⁵³³

In May 1961 a pan-African conference was held in Monrovia in which twenty-two of the twenty-seven states in Africa that were independent at that time participated, although the Casablanca bloc was not represented. Some liberation movements were also admitted as observers.⁵³⁴ One of the recommendations of the conference was that a charter should be drawn up for an Organisation of African and Malagasy states.⁵³⁵ Therefore, in January 1962 a second conference of the newly formed Assembly of Heads of States and Government was held in Lagos, Nigeria to look at drafting a Charter.⁵³⁶ Among other things, it proposed the establishment of a Council of Ministers.

Eventually the conference approved in principle a detailed charter for an Organisation of Inter-African and Malagasy states with three organs: an Assembly of Heads of State, a Council of Ministers and a Secretariat, with a Secretary General. It proposed setting up committees on certain issues.⁵³⁷ The text of the charter was finally adopted and at a

⁵³⁰ Cameroon, CAR, Chad, Congo, Dahomey, Ethiopia, Gabon, Liberia, Libya, Malagasy, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Togo, Tunisia and Upper Volta.

⁵³¹ Sands P and Klein P, *Bowett’s law of international institutions*, (2001), p. 244.

⁵³² United Arab Republic, Ghana, Guinea, Mali and Morocco.

⁵³³ Sands P, and Klein P, *Bowett’s Law of International Institutions*, note 531 above, p. 244. See also *International Organisation* 16(2) (1962), pp. 437-9.

⁵³⁴ Murray R, *Human rights in Africa: From the OAU to the Africa Union*, note 523 above, 3.

⁵³⁵ See Elias T, ‘The Charter of the Organisation of African Unity’, *AJIL* (1965) 59, pp. 243-244.

⁵³⁶ *Ibid.*

⁵³⁷ See *International Organisation* 16(2) (1962), pp. 439-43.

further meeting in December 1962, seventeen states signed the charter of the Organisation of African and Malagasy states, or Lagos Charter.⁵³⁸

Emerson observed, the history of colonisation to which nearly all of Africa had been subject, the resulting groupings among newly independent African states and the idea of a sense of African unity were behind the creation of the OAU.⁵³⁹ It was within the remit of the OAU that the independence of the African states should be safeguarded and all forms of colonialism and racism, especially as manifested in southern Africa, be ended.⁵⁴⁰ What therefore reinforced the OAU was what Kannyo called ‘the strong and unanimous desire to complete the process of decolonisation and dismantle the system of apartheid in South Africa.’⁵⁴¹ However, the OAU Charter did not intimate the protection and promotion of human rights as one of its principal goals. Instead, its objectives simply mentioned the eradication of ‘all forms of colonialism’ from Africa, while its preamble glossed over the desire of its members to observe human rights, in the following words:

Conscious of our responsibility to harness the natural and human resources of our continent... [p]ersuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among states...

Dlamini observed that besides the issues of apartheid and decolonisation, the only sense in which the OAU could be considered as an organisation for the promotion of human rights was in relation to its general goal of ‘total advancement of our peoples in spheres of human endeavours.’⁵⁴² Kannyo attributed the absence of human rights provisions in the charter of the OAU to the purpose for which the organisation was established, that is,

⁵³⁸ The Casablanca bloc was still not present at any of these meetings.

⁵³⁹ Emerson R, ‘Pan-Africanism’ (1962) 16/2 *International Organisation*, p. 282.

⁵⁴⁰ Art 21(1) of the Charter of the OAU.

⁵⁴¹ Kannyo E, *Human rights in Africa: Problems and prospects* (1980), p. 15; Venter D, ‘Black Africa and the Apartheid issue: A South African response?’ (1981) *Journal of Contemporary African studies*, p. 84.

⁵⁴² Preamble of the Charter; Dlamini C, ‘The OAU and the protection of human rights in Africa’ (1991) *Obiter*, p. 69.

the termination of foreign dominion.⁵⁴³ Perhaps one of OAU's major failures was its lack of emphasis on human rights protection and promotion; which could have been the reason why some of its member states lacked comprehensive Bills of Rights in their independence constitutions. Member states were expected to ascribe to the human rights fundamentals entrenched in the Universal Declaration of Human Rights.⁵⁴⁴

Despite its obvious failure to entrench human rights through the provisions of its charter, the OAU's role in agitating for the right to self-determination in the continent cannot be overemphasised. The organisation relentlessly played a crucial role in strengthening and invigorating the UN's efforts against colonialism and apartheid by setting up a Liberation Committee through which it channelled support to the liberation movements fighting in Mozambique, Angola, Namibia, Guinea (Bissau) and South Africa.⁵⁴⁵ The organisation gave its official approval to the Lusaka Manifesto of 1969 adopted by the Heads of State of East and Central Africa and secured its adoption by the UN General Assembly.⁵⁴⁶ The manifesto renewed faith in 'the belief that all men are equal and have equal rights to human dignity and respect, regardless of colour, religion or sex. We believe that all men have the right and duty to participate as equal members of the society, in their government.'⁵⁴⁷ The manifesto was a carefully crafted instrument that embodied the ideas of democracy and was therefore an unassailable condemnation of apartheid.

Additionally, the OAU exerted itself to ameliorate the plight of refugees that was created by colonial repression and liberation wars.⁵⁴⁸ It adopted the 1969 Convention on the Specific Aspects of Refugee Problems in Africa⁵⁴⁹, which not only incorporates aspects

⁵⁴³ Kannyo E, *Human rights in Africa: Problems and prospects*, note 541 above, p. 17.

⁵⁴⁴ See Othman H, 'Africa and the protection of rights', (1995) 6/1 *African Law Review*, pp. 51-55.

⁵⁴⁵ Nmehielle O, *The African human rights system*, note 393 above, p. 70.

⁵⁴⁶ Reproduced in Hamalengwa, Flinterman & Dankwa (eds.), *The international law of human rights in Africa* (1988), pp. 104-110.

⁵⁴⁷ *Ibid*, p. 104.

⁵⁴⁸ Murray R & Lloyd A, 'Institutions with responsibility for human rights protection under the African Union' (2004) 48/2 *Journal of African Law*, p. 167.

⁵⁴⁹ Office of the UNHCR, *Collection of international documents concerning Refugees*, (1988) pp. 193-200.

of the 1951 UN Convention Relating to the Status of Refugees, on persons fleeing because of a well-founded fear of persecution, but also extends the status to others escaping from the consequences of aggression, occupation, foreign domination or events seriously disturbing public order.⁵⁵⁰ The OAU in this regard co-operated with international agencies and helped the host states financially to support refugees who had fled their countries in Africa.⁵⁵¹

The OAU's role in human rights protection and promotion in the continent was also emphasised by the myriad conferences⁵⁵² and summits held to discuss the issue of conflicts and human rights affecting the continent, from which an array of treaties, protocols, declarations and communiqués emanated.⁵⁵³ Other commissions established under the organisation's charter also had the mandate to consider human rights matters. These included the Labour and Social Affairs Commission, the Population Commission and the Women's Committee on Peace and Development.⁵⁵⁴ All these initiatives evidenced a willingness by African states to perceive human rights as a matter within the OAU's remit.⁵⁵⁵

In spite of its roles in human rights protection and promotion on the continent, the OAU suffered a serious legitimacy crisis in as far as it remained passive while its members grossly violated human rights with impunity. The organisation was strongly accused for

⁵⁵⁰ Nmechielle O, *The African human rights system*, note 393 above, p. 71.

⁵⁵¹ Ibid.

⁵⁵² See, for example, the *Resolution on the Ministerial Conference on Human Rights in Africa*, CM/Res.1673 (LXIV); *Grand Bay Mauritius Declaration and Plan of Action, adopted by the Ministerial Conference on Human Rights* in April 1999, CONF/HRA/DECL (I).

⁵⁵³ For a discussion on all the legal instruments adopted by the OAU since its establishment, see generally, Maluwa T, 'International law making in the Organisation of African Unity: An overview', (2000) 12 *African Journal of International and Comparative Law*, p. 201.

⁵⁵⁴ This body was a joint initiative of the OAU and UN Economic Commission for Africa, to increase the participation of women in decision making on conflict at the international level. It is composed of government representatives, NGOs and individual experts and has a task of advising on conflict and gender-related issues.

⁵⁵⁵ Murray R, *Human rights in Africa: From the OAU to the Africa Union*, note 523 above, p. 6.

unduly emphasising the principle of non-interference in the internal affairs of its member states.⁵⁵⁶ Similarly, during its tenure, many armed conflicts on the continent escaped its rather blind eye. Among its many failures, the OAU was generally criticised for its inability to halt the genocide in Rwanda, stop the civil war in Liberia, mitigate the crisis in Burundi and put an end to the conflict in the Democratic Republic of the Congo (DRC).⁵⁵⁷

The end of the millennium therefore presented an opportunity for re-positioning the OAU in order to set the African continent as a whole on a firm path to development, peace and the respect for human rights.⁵⁵⁸ This therefore provoked the transformation of the OAU to the African Union (AU) whose Constitutive Act entrenches more human rights provisions than the OAU Charter. The evolution and normative parameters of the AU are discussed in detail elsewhere below.

Meanwhile, it is important to note that it is during the subsistence of the OAU that the continent witnessed the evolution of its regional human rights promotion and protection system. As different scholars have argued, the creation of this system was not of the OAU's liking.⁵⁵⁹ In fact the OAU was utterly opposed to its formation for various reasons. It is therefore imperative to illuminate the evolution of this important phenomenon in the history of the continent's efforts to ensure effective human rights promotion and protection.

⁵⁵⁶ Umozurike U, 'The significance of the African Charter on Human and Peoples' Rights', in Kalu A & Osinbajo Y, (eds.), *Perspectives on Human Rights (1992)*, p.45.

⁵⁵⁷ See Abass A & Baderin M, 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) 49 *Netherlands International Law Review*, p. 12.

⁵⁵⁸ See Kithure K, '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*, p. 99.

⁵⁵⁹ Reisman W, 'Through or despite governments: Differentiated responsibilities in human rights programs', (1987) 72 *Iowa Law Review*, p. 392; Dlamini C, 'The OAU and the protection of human rights in Africa', note 542 above, p. 68.

2.5.4.3 The emergence of Africa's regional human rights system

The African human rights system is a product of prolonged negotiations from both within and outside the continent.⁵⁶⁰ Its emergence centres on a series of events that also instigated the rise and fall of the OAU. As already stated, the OAU was established to encourage a unified African front.⁵⁶¹ The OAU leadership, for political expediency, resisted agitation by non-state actors for a proactive regional human rights system. The incumbent OAU leaders were reluctant to embrace a human rights system that would strictly define benchmarks for their compliance.⁵⁶² Given the alarming levels of violations and the attendant impunity, there was so much agitation that resistance by the OAU could no longer hold back reforms.

Notably the agitation for change had by then got the eye of the international community which precipitated international response by powerful nations such as the US calling for a proactive human rights dispensation in the continent.⁵⁶³ As Umozurike succinctly put it:

Chief among these was the emphasis that President Carter placed on human rights in the international relations of the United States. The Helsinki Final Act of 1975, signed by the United States, Canada, and 33 European countries, emphasised respect for human rights. Watch committees were subsequently set up to monitor observance and this kept the issue alive in international politics.... Though unsuccessful, an attempt was made to include human rights in the renewed EEC-ACP pact, the Lome II Convention. The stage was thus set both internally and externally for the debut of the African Charter on Human and Peoples' Rights.⁵⁶⁴

⁵⁶⁰ Mbondenyi M & Sifuna N, 'A review of procedural and jurisdictional challenges in enforcing international human rights law under the African Charter regime', note 186 above, p. 28.

⁵⁶¹ Dlamini C, 'The OAU and the protection of human rights in Africa', note 542 above, p. 68.

⁵⁶² Reisman W, 'Through or despite governments: Differentiated responsibilities in human rights programs', note 559 above, p. 392.

⁵⁶³ Ibid.

⁵⁶⁴ Umozurike U, 'The African Charter on Human and Peoples' Rights', (1983) 77 *American Journal of International Law*, p. 904; See also Young-Anawaty, 'Human rights and the ACP-EEC Lome. II Convention', (1980) 13 *New York University Journal of International Law & Policy*, p. 63.

President Carter of the US promoted human rights in his African policy to the point of cutting off aid to Uganda and placing an embargo on the importation of coffee as a sanction against Idi Amin's violations of human rights.⁵⁶⁵ Similarly, there were futile attempts to incorporate human rights into the EEC-ACP, Lome II Convention. This, however, emphasised European concern for human rights in independent Africa.⁵⁶⁶ In addition, the activities of the UN on human rights and the pressure of non-governmental organisations, especially Amnesty International, popularised and strengthened the demand for the respect and promotion of human rights in the continent.⁵⁶⁷

Political dictatorship had at that time reached its core on the continent, with some leaders proving to be more dictatorial than the European imperialists had been, and set out to demonstrate their superiority in brutal action against the people they ruled.⁵⁶⁸ The massive human rights violations in post-colonial African states became embarrassing to some of the African elite and leaders, such as President Leopold Senghor of Senegal, who had great respect for genuine African socialism and moral values.⁵⁶⁹

Such a cadre of leaders was ashamed of the uncivilised and primitive behaviour of some of their colleagues who denied the continent not only the dignity it deserved in the eyes of the world but also the necessary adjustment to the changing times and circumstances of the universal moral order of the post-Second World War era.⁵⁷⁰ Consequently, they felt they had to do something to ensure respect for the rule of law and the protection of Africa's image in the post-colonial period. They regretted the breakdown of the African code of the extended family and African values. This provoked an earnest search for a

⁵⁶⁵ Ojo O & Sesay A, 'The OAU and human rights: Prospects for the 1980s and beyond', (1986) 1/9 *Human Rights Quarterly*, p. 92.

⁵⁶⁶ Young-Anawaty, 'Human rights and the ACP-EEC Lome. II Convention', note 564 above, p. 63.

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid.

⁵⁶⁹ Umozurike U, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 12.

⁵⁷⁰ Ibid.

human rights system that would incorporate African values without necessarily compromising universal standards.⁵⁷¹

The search for a new human rights dispensation in Africa goes back to as early as 1961 when African jurists met in Lagos, Nigeria, under the auspices of the International Commission of Jurists (ICJ) and proposed the promulgation of a Human Rights Charter for Africa.⁵⁷² The African Conference on the Rule of Law, as it was called, took steps to carry out the intentions of the ICJ to ensure the global adherence to the principle of Rule of Law.⁵⁷³ Here, the Conference proclaimed the ‘Law of Lagos’, which stated, among other things:

That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African governments to study the possibility of adopting an African Convention of Human Rights.⁵⁷⁴

Interestingly, the conference also proposed the establishment of an African court of human rights, which was temporarily abandoned at the conception of the African Charter in favour of a more promotionally-oriented commission.⁵⁷⁵ During the 1960s and 1970s the process towards the creation of a legal framework for human rights protection and promotion in Africa, began in Lagos, intensified, expressed through a series of

⁵⁷¹ Ibid.

⁵⁷² The OAU had its own Commission of jurists, which emanated from the meetings of African jurists held in August 1963 and January 1964 in Lagos Nigeria. However, when the OAU in 1969 opted to re-organise and reduce the number of specialised commissions, the commission of jurists was one of those that were wound-up. Until that time the OAU specialised Commissions included: the Economic and Social Commission; the Education and cultural Commission; the Health, Sanitation and Nutrition Commission; the Defence Commission, and the Scientific, Technical and Research Commission. See also Kannyo E, *Human Rights in Africa: Problems and prospects*, note 541 above, pp. 17-18.

⁵⁷³ Ibid.

⁵⁷⁴ Quoted in Lindholt L, *Questioning the universality of human rights: The African Charter on Human and Peoples Rights in Botswana, Malawi and Mozambique*, note 195 above, p. 73.

⁵⁷⁵ Ibid.

conferences and seminars.⁵⁷⁶ Some of the most important milestones of this process were the UN Human Rights Commission seminar in Cairo in 1967 pressing for the establishment of an African human rights commission⁵⁷⁷, which in 1971 was followed up by a seminar in Addis Ababa in conjunction with the UN Economic Commission for Africa adopting this proposal.⁵⁷⁸

Though their importance could hardly be overemphasised at that moment, it was common cause that regional human rights commissions would be meaningful if set up by the members of the regions themselves and not imposed from outside.⁵⁷⁹ The UN Human Rights Commission then advised the UN Secretary-General to organise seminars in those regions where no human rights commissions existed with a view to discussing the need for them.⁵⁸⁰ In 1969, another UN seminar was held in Cairo, Egypt, at the close of which the participants, including 19 African states, requested the UN Secretary-General to, *inter alia*, communicate the report and its recommendations to the OAU Secretary-General and members. One of the recommendations was the setting up of a regional commission in Africa that would be fully supported by the OAU member states.⁵⁸¹

The Cairo seminar opened the floodgate for other seminars, meetings and conferences in various parts of Africa. These were held in Lusaka, Zambia in 1970⁵⁸²; Addis Ababa, Ethiopia in 1971⁵⁸³; Yaounde, Cameroon in 1971⁵⁸⁴; Libreville, Gabon in 1971⁵⁸⁵; and

⁵⁷⁶ Nmehielle O, *The African human rights system*, note 393 above, p. 70. See also Onguergouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable development in Africa* (2003), p. 20.

⁵⁷⁷ Later in 1967, jurists from Francophone African states meeting in Dakar, Senegal, reiterated this call. See Seriti W, 'The African Charter on Human Rights', (1995) 6/1 *African Law Review*, p. 13.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid.*

⁵⁸⁰ Umozurike, 'The African Charter on Human and Peoples' Rights', note 564 above, p. 904.

⁵⁸¹ *Ibid.*

⁵⁸² Seminar on the Realisation of Economic and Social Rights with particular reference to the Developing countries' Lusaka, Zambia 23 June- 4 July 1970.

⁵⁸³ Conference of African jurists on (the) African legal process and the individual' Addis Ababa, Ethiopia 19-23 April 1971.

Dar-es-Salaam, Tanzania in 1973.⁵⁸⁶ Most of these meetings echoed the urgent need for an African human rights commission or some other human rights protection mechanism.⁵⁸⁷

Another significant event worth mentioning here was the International Commission of Jurists' seminar on 'Human Rights in a One-Party State' co-hosted with the government of Tanzania in 1976, which drew up the important conclusions that human rights included both 'individual and collective rights', and stated that the establishment of civil and political rights must go hand in hand with the promotion of economic, social and cultural rights.⁵⁸⁸ These statements were to represent some of the most characteristic aspects of the African Charter. Later, seminars took place in 1978 in Butare, Rwanda and in Dakar, Senegal, both under the heading 'Human Rights and Economic Development in Francophone Africa'.⁵⁸⁹

Also in 1978 the third general meeting of the African Bar Association in Freetown, Sierra Leone, affirmed that individual human rights were fundamental in Africa, at the same time as the UN Human Rights Commission decided to review the human rights situation in several African countries. The Commission also adopted a resolution moved by Nigeria, which requested the assistance of the UN in establishing regional human rights institutions.⁵⁹⁰ The seminar in Dakar was particularly important since it succeeded in drafting concrete proposals for a human rights document. Here, President Sengor of Senegal agreed to sponsor a draft resolution which would provide for an African human

⁵⁸⁴ Seminar on measures to be taken on National Level for the implementation of the United Nations Instrument Aimed at Combating and Eliminating Racial Discrimination and for the Promotion of Harmonious Race Relations' Yaounde, Cameroon 16-29 June 1971.

⁵⁸⁵ Seminar on the Participation of Women in Economic Life, Libreville, Gabon 27-29 August 1971.

⁵⁸⁶ Seminar on the study of New Ways and Means for Promoting Human Rights with special Attention to the Problems and Needs of Africa, Dar-es-salaam, Tanzania 23 October- 5 November 1973.

⁵⁸⁷ Dlamini C, 'Towards a regional protection of human rights in Africa: The African Charter on Human and Peoples' Rights', (1991) XXIV *CILSA*, p. 189.

⁵⁸⁸ Bello E, 'Human rights: African developments', *Encyclopaedia of Public International Law* (1985), p. 287 See also Onguergouz F, 'The African Charter on Human and Peoples' Rights, note 576 above, p. 22.

⁵⁸⁹ Ibid.

⁵⁹⁰ Naldi G, *The Organisation of African Unity* (1989), p. 110.

rights commission at the next OAU Assembly meeting. Furthermore, he delegated Keba M'baye, President of the Supreme Court of Senegal and a judge of the International Court of Justice, to draft a text on human rights, which was later to form the basis of the present African Charter.⁵⁹¹

In more than one respect the road had then been paved for the initiation of the process that would result in the elaboration and adoption of the African Charter. The founding principles had already been laid down and even more significant was perhaps the OAU's constructive change of policy towards more direct interference against the massive human rights violations in some African states.⁵⁹² Significant in this respect was the establishment of the Bokassa inquiry in May 1979, where an independent OAU commission of five judges from the Ivory Coast, Liberia, Rwanda, Senegal and Togo publicised its findings of substantive violations of human rights.⁵⁹³ Unable to bear the intense pressure and agitation for a regional human rights mechanism, the OAU caved in to the demands.

At a summit conference held in Monrovia in July 1979, the OAU resolved to facilitate the process of establishing a commission on human rights.⁵⁹⁴ Later in the same year the UN convened another seminar to discuss the possibility of establishing an African human rights commission. The outcome of these meetings was the establishment of a working group to draft concrete proposals for the creation of an African Commission on Human Rights.⁵⁹⁵ The actual drafting process of the charter began with the first meeting of

⁵⁹¹ Ibid.

⁵⁹² Bello E, 'Human rights, African development', note 588 above, p, 290.

⁵⁹³ Ibid.

⁵⁹⁴ This conference was preceded by a symposium organised by the OAU Secretariat in Monrovia, Liberia, from 12-16 February 1979, to discuss the theme, 'What kind of Africa by the year 2000?' Experts in various fields attended the symposium.

⁵⁹⁵ UN seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Monrovia, 10-21 September 1979, UN Doc. ST/HR/SER.A/4 (1979); See also Kannyo E, *Human rights in Africa: Problems and prospects*, note 541 above, p. 28.

experts in Dakar, in November and December 1979, which produced a draft 'specifically suited to cater for the special problems relating to human rights in Africa.'⁵⁹⁶

The forceful accentuation of the need to take into consideration special African culture can to some degree be seen in view of the fact that the expert group, to their surprise, discovered that the Secretariat of the OAU had already prepared a preliminary draft based primarily on the European and American Conventions on Human Rights.⁵⁹⁷ The meeting rejected this draft accordingly, and outlined their own draft charter, which had the same basic characteristics as the final charter, even though it underwent several amendments.⁵⁹⁸ The next step was for the ministers of justice of the OAU member states to review the project, and the first meeting in this regard held in March 1980 in Addis Ababa failed to materialise, mainly due to political reasons.

Subsequently, however, the Council of Ministers managed to meet two times in Banjul, Gambia, although the first of these sessions in June 1980 was unsuccessful, resulting in the drafting of only 11 articles at the end of the session.⁵⁹⁹ The basis for these difficulties was mainly the lack of consensus and a general atmosphere of suspicion among some delegates, and a prevailing tendency to maintain a cautious attitude on certain subjects.⁶⁰⁰ Fortunately enough, the tension diffused remarkably at the second meeting of ministers in January 1981, also in Banjul, and in only two weeks the delegates succeeded in fully revisiting and adopting the text of the charter.⁶⁰¹ In January 1981, the preliminary draft of the African Charter on Human and Peoples' Rights was finally adopted by the OAU Council of Ministers with some modifications. The 18th Assembly of Heads of State and Government (AHSO) later adopted the charter in its session held in Nairobi, Kenya.⁶⁰²

⁵⁹⁶ Bello E, 'Human rights, African development', note 588 above, p. 30.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Lindholt L, *Questioning the universality of human rights*, note 195 above, p. 80.

⁶⁰⁰ Ibid.

⁶⁰¹ Bello E, 'Human rights: African development', note 588 above, p. 30.

⁶⁰² This was on the 26 of June 1981.

In accordance with its Article 63(3), the Charter came into force 3 months after a simple majority of the member states of the OAU had ratified or acceded to it. The number of member states of the OAU was, at that time, 50, and a simple majority therefore meant that 26 states would have to ratify the charter in accordance with the provisions of art 63(1) & (2) in order for it to come into force.⁶⁰³ This caused great concern and doubt among those who wanted to see the charter come into effect, because they feared that lack of sufficient commitment among the African states would render the charter to be of no effect.⁶⁰⁴ Indeed the process was slow, with only one state ratifying it in 1981, five in 1982 and in 1983, and four in 1984.⁶⁰⁵

In 1985 the process seemed to have come to a halt, when no state at all ratified the charter, giving way to grave speculations and widespread scepticism about its future. In 1986, however, as many as 13 states ratified it, and suddenly the charter was a reality with a status similar to the European and the American Conventions on Human Rights.⁶⁰⁶ It happened on 21 October 1986, when on 21 July 1986 Niger, as the 26th country, deposited its instrument of ratification, and as such tipped the crucial balance of the charter coming into force.⁶⁰⁷

⁶⁰³ Lindholt L, *Questioning the universality of human rights*, note 195 above, p. 80.

⁶⁰⁴ Ibid.

⁶⁰⁵ Egypt ratified the African Charter on 20 March 1984 and reserved as follows: 'Article 8 (freedom of conscience, religion and the professions) and Article 18(3) (elimination of discrimination against women and the protection of women and children) are subject to Islamic laws, while Article 9 (right to receive and impart information) is subject to Egyptian law.' Zambia ratified on 10 January 1984 subject to the following reservations: Article 13(3) should read: 'Every individual shall have the right of access to any place, services or public property intended for use by the general public.' Zambia also wanted an article additional to Article 62 so that states that have neither ratified nor acceded should render periodic reports on their human rights situations and the difficulties that prevent ratification or adherence. See Umozurike U, *The African Charter on Human and Peoples' Rights*, note 5 above, p. 27. Lindholt L, *Questioning the universality of human rights*, note 195 above, p. 80.

⁶⁰⁶ Ibid, p. 80.

⁶⁰⁷ Ibid.

The charter eventually entered into force on 21 October 1986.⁶⁰⁸ Once this was a reality, several other states took steps to ratify it. Lindholt argued that the period of five years from the adoption of the charter to its coming into force was not unduly long, considering the fact that the UN Covenants took eleven years to accomplish the same.⁶⁰⁹ Compared to the other regional instruments, where the European Convention took only three years and the American Convention nine years, the African Charter stands out proudly, given the political, social and economic circumstance in which it was born.⁶¹⁰

The adoption of the charter heralded the establishment of the African Commission on Human and Peoples' Rights. This commission was formally initiated in November 2, 1987 and its Banjul Headquarters were established in mid-1989. The time span between the initiation of the commission and the establishment of its headquarters in Banjul speaks volumes about the 'cold reception' it got from its political principal, the OAU. Bello tried to explain this phenomenon by observing that:

apart from concern held by governments, who were clearly unwilling to give up too fast their chosen policy of violating human and peoples' rights for fear of losing comfortable privileges and positions, a substantial number of African leaders since the days of independence in the mid-sixties regarded almost all jurisdictional bodies, particularly of an international nature, with suspicion, and therefore were hesitant, at best, to accept supra-national provisions regarding human and peoples' rights.⁶¹¹

The fact that the charter has today been ratified by virtually all the states of Africa, however, indicates the growing commitment and willingness of African states to improve the state of human and peoples' rights on the continent. Although it has been said to be a 'faulty document', the African Charter is on record as the first major attempt by African leaders to establish regional mechanisms for the implementation of the rights of

⁶⁰⁸ For a detailed exposition of the Charter see, for example, D'Sa R, 'Human and Peoples' Rights: Distinctive features of the African Charter', (1985) *Journal of African Law*, p. 73.

⁶⁰⁹ Lindholt L, *Questioning the universality of human rights*, note 195 above, p. 80.

⁶¹⁰ Ibid.

⁶¹¹ Bello E, 'Human rights: African developments' note 588 above, p. 135.

Africans.⁶¹² The Charter reaffirms the support of African leaders for protection of human rights and freedom, as declared in the Universal Declaration of Human Rights.⁶¹³

Having thus given consent to the internationalisation of human rights, African leaders could no longer plead that human rights were matters reserved exclusively for the domestic jurisdiction. Therefore, the concept of ‘national sovereignty’ would no longer provide a cover up for grave breaches of human rights.⁶¹⁴ Just like its predecessors, the European Convention on Human Rights and Fundamental Freedoms and the Inter-American Convention on Human Rights, the African Charter entrenches a catalogue of rights. The context and scope of these rights shall be discussed in detail in the next chapter.

Meanwhile, it is important to note that despite the international acclaim that heralded the adoption of the charter, and its subsequent entry into force, the demand for its reform began barely within five years of its existence.⁶¹⁵ One reason for this demand is its failure to provide for adequate or effective enforcement institutions. While the African Commission has an elaborate promotional mandate under the African Charter, it does not possess sufficient protective powers.⁶¹⁶ In fact, neither the Charter nor the Commission’s Rules of Procedures provide for enforceable remedies, or a mechanism for encouraging

⁶¹² Ibid.

⁶¹³ See the African Charter on Human and Peoples Rights, preamble.

⁶¹⁴ See this argument in Mugwanya G, *Human rights in Africa*, note 129 above, pp. 31-32.

⁶¹⁵ For a comprehensive discussion on the inadequacies of the African Charter and its possible reforms, see generally, Heyns C, ‘The African regional human rights system: In need of reform?’ (2001) 2 *African Human Rights Law Journal*, p. 157; Mbondenyi M, ‘Improving the substance and content of civil and political rights under the African human rights system’ (2008) 17/2 *Lesotho Law Journal*, pp. 1-35; Nmehielle O, *The African human rights system*, note 393 above, 8-74; Heyns C, ‘Civil and political rights in the African Charter’ in Murray R & M Evans (eds.) *The African Charter on Human and Peoples’ Rights: The system in practice* (2002), pp. 137-177; Ankumah E, *The African Commission on Human and Peoples’ Rights* (1996), pp. 111-176.

⁶¹⁶ See this argument in, among others, Nmehielle O, *The African human rights system*, note 393 above, p. 236; Ankumah E, *The African Commission on Human and Peoples’ Rights*, note 615 above, pp. 74-75.

and tracking state compliance with decisions that the Commission makes.⁶¹⁷ Despite some positive developments in the Commission's individual complaint mechanism⁶¹⁸, the decisions it renders are non-binding, and attract little, if any, attention from governments of member states.⁶¹⁹

There was therefore the need to supplement the Commission's mandate by creating other mechanisms, such as a regional human rights court. The agitation for a regional human rights court was coupled with increased activism and a continental call for the respect for human rights. This further necessitated the transformation of moribund institutions, such as the OAU and the creation of new mechanisms and initiatives such as the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM). Consequently, the beginning of an important chapter in the history of regional promotion and protection of human rights in the continent was marked. What follows therefore is a discussion on the evolution of the African human rights system from its initial status, under the OAU and the African Commission's regimes, to the current status, under the African Union (AU) and the African Court on Human and Peoples' Rights.

2.5.4.4 The evolution of the African human rights system to its present status

From the 1990s, there has been a rapid transformation in the international human rights discourse which by extension has affected regional promotion and protection of human rights in Africa. This period witnessed what has been described as a 'New World Order', whose dictates have led both to positive and negative consequences in the protection and

⁶¹⁷ Mugwanya G, *Human Rights in Africa: Enhancing human rights through the African regional human rights system*, note 129 above, p. 36.

⁶¹⁸ See, for example, Communication 74/92, *Commission Nationale de Droits de l' Homme et des Libertes v Chad*.

⁶¹⁹ Mutua M, 'The African human rights court: A two-legged stool?' (1999) 21 *Human Rights Quarterly*, p. 348.

promotion of human rights. The New World Order actually began with the collapse of the Berlin wall in 1989, which in turn marked the beginning of the end of the ideological division between the East and the West.⁶²⁰

As this process advanced, African states struggled to integrate themselves continentally through increased sub-regional and regional coalitions and associations. By losing the benefits of East-West ideological divisions, they not only lost the political and ideological protection they had enjoyed since independence and throughout the Cold War era, but also became vulnerable as their Western allies turned their backs on those regimes whose outrageous human rights records had previously been ‘overlooked’ in the interests of retaining ‘African friends’ for strategic, economic, political, military and other reasons.⁶²¹

With the end of the Cold War, the West applied new conditions and pressures on African states and used human rights as a weapon against certain African governments perceived as perpetuating human rights abuses.⁶²² Pressure appeared in different forms, including political isolation, economic embargos and incitement of political forces to strongly oppose some government’s poor human rights records.⁶²³ As if to reciprocate international efforts and concerns, African states embarked on a series of initiatives, meetings and conferences targeted at purging its human rights record. These initiatives were a marked departure from the passiveness previously displayed by a majority of African states in so far as human rights issues were concerned. Their contribution to the advancement of human rights promotion and protection in the continent cannot be overlooked.

The Second World Conference on Human Rights held in Vienna, Austria, in 1993, perhaps inspired the positive attitude of African governments to human rights. The

⁶²⁰ Mugwanya G, *Human rights in Africa*, note 129 above, p. 20.

⁶²¹ Eno W, ‘The African Commission on Human and Peoples’ rights’, note 38 above, p. 38.

⁶²² Ibid.

⁶²³ Ibid.

greatest demonstration of Africa's determination to improve its human rights situation occurred when the African Ministers of Justice and Attorney's-General met in Tunis in November 1992 to prepare an African Position Paper that was presented in that conference.⁶²⁴ At the end of this meeting, they had adopted an 'African Declaration of the Regional Meeting for Africa of the World Conference on Human Rights'. In this declaration, stress was laid on 'the need to promote and protect human rights everywhere in Africa by all concerned institutions, groups and individuals, as well as by governments, national institutions, nongovernmental organisations and other bodies.'⁶²⁵

The main objective of the 1993 conference was to set out the parameters of international human rights law. In its Declaration and Programme of Action, it was categorically stated:

The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community.⁶²⁶

The Declaration and Programme of Action also settled the long drawn debate on the universality of human rights by stating:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms.⁶²⁷

⁶²⁴ Nowak M, *Introduction to the international human rights regime*, note 168 above, p. 26.

⁶²⁵ Ibid.

⁶²⁶ See *Vienna Declaration and Programme of Action*, Art 4.

⁶²⁷ Ibid, Art 5.

In spite of the outcome of the conference, violations of human rights increased during the 1990s due to the prevailing political situations in various parts of Africa, most notably Algeria, Burundi, the DRC (formerly Zaire), Liberia, Nigeria, Sierra Leone, Rwanda South Africa and the Sudan. At the same time, demands and pressure on African governments to enhance the promotion of human rights both locally and internationally were also intensified.⁶²⁸ This forced African governments to individually and collectively embark on efforts to resolve internal and regional conflicts in order to protect human rights.

A number of meetings and conferences were therefore convened in Africa to look for ways to for arbitrating the human rights principles evolved at the Second World Conference on human rights. These conferences include the Grand Bay (Mauritius), Kigali (Rwanda), Cairo (Egypt) and Algiers (Algeria) conferences. Consequently, some of the conferences and summits led to the establishment of the African Union (AU), NEPAD, APRM and the African Court on Human and Peoples Rights. The emergence and evolution of these institutions is discussed in detail below.

2.5.4.4.1 The transformation of the OAU to African Union (AU)

On 8 and 9 September 1999, forty-four African leaders met in Sirte, Libya at an Extraordinary Summit of the OAU called by Muammar Gaddafi, to discuss the formation of a ‘United States of Africa.’⁶²⁹ The theme of this summit was ‘Strengthening OAU’s capacity to enable it to meet the challenges of the new millennium.’ At this meeting, the Sirte Declaration⁶³⁰ was adopted, calling for the establishment of an African Union, the shortening of the implementation periods of the Abuja Treaty and the speedy establishment of all institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and the Pan-

⁶²⁸ Nowak M, *Introduction to the international human rights regime*, note 168 above, p. 26.

⁶²⁹ (1999) 36 *Africa Research Bulletin* 13677.

⁶³⁰ OAU Doc EAHG/Dec1 (IV) Rev 1, reprinted in (1999) 7 *African Yearbook of International Law*, 411.

African Parliament.⁶³¹ The legal parameters of the Union were to be defined by the legal experts who were instructed to model it on the European Union, taking into account the Charter of the OAU and the Treaty Establishing the African Economic Community.⁶³²

The OAU legal unit then drafted the Constitutive Act of the African Union (herein CAAU or the Act). The draft Act was debated in a meeting of legal experts and parliamentarians and later at a Ministerial Conference held in Tripoli from 31 May to 2 June 2000.⁶³³ The involvement of the African parliamentarians was intended to ensure that the Union becomes more closely connected with the people. The Act was adopted by the OAU Assembly of Heads of State and Government in Lomé in July 2000.⁶³⁴ All members of the OAU had signed the Act by March 2001,⁶³⁵ and therefore the OAU Assembly, at its 5th extraordinary summit held in Sirte, Libya from 1 to 2 March 2001 declared the establishment of the AU.⁶³⁶ However, for the Union to be operationalised, the Constitutive Act had to be ratified by two-thirds of the member states of the OAU.⁶³⁷ This was achieved on 26 April 2001 when Nigeria became the thirty-sixth OAU member state to deposit its instrument of ratification of the Constitutive Act of the AU with the OAU Secretary-General.⁶³⁸ The AU became a legal and political reality a month thereafter, on 26 May 2001, when the Constitutive Act entered into force.

⁶³¹ Para 8(ii) Sirte Declaration.

⁶³² (1999) 36 *Africa Research Bulletin* 13678.

⁶³³ Para 247, OAU Secretary-General report <<http://www.oau-oua.org/LOMÉ2000/ENGLISH%20INTRO%Note%20SG.htm>> (accessed 31 July 2007).

⁶³⁴ 36th ordinary session of the Assembly held in Lomé, Togo 10-11 July 2000.

⁶³⁵ OAU 'Decision on the Africa Union' 5th OAU extraordinary session of the Assembly of the Heads of State and Government 1-2 March 2001 Sirte, Libya EAHG/Dec 1-4 (V).

⁶³⁶ Ibid.

⁶³⁷ The Constitutive Act of the Africa Union entered into force 30 days after the deposit of the instruments of ratification by two-thirds of the members of the OAU. See Article 28, AU Constitutive Act.

⁶³⁸ OAU 'The Constitutive Act of the African Union attains the legal requirement for entering into force. Press release No 52/2001 at <http://www.oau-oua.org/oa_info/pressrelease/PRESS%20RELEASE%20NO%2052-%202001.htm>(accessed 31 July 2007).

The Constitutive Act of the African Union incorporates a number of human rights provisions, a marked departure from its predecessor, the OAU Charter, which, as discussed earlier, had a passing mention of human rights. The progressive attitude of the AU towards human rights promotion and protection is clear in the Preamble of the CAAU and in its objectives and guiding principles. One of the objectives of the AU is to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.⁶³⁹

This provision, which concretises the relationship between the regional human rights system and its political affiliate, the AU, is an indication of the latter's resolve to take human rights issues seriously. This is also alluded to by the objective to promote democratic principles and institutions, popular participation and good governance.⁶⁴⁰ Poor governance and unconstitutional change of government have had the major stake in human rights violations in Africa.⁶⁴¹ It is therefore a welcome idea that African governments have taken cognisance of this fact.

As alluded to earlier, some of the guiding principles of the AU also embody human rights provisions. For instance, respect for democratic principles, human rights, the rule of law and good governance are some of the principles of the Union.⁶⁴² Other principles that have human rights implications include promotion of gender equality⁶⁴³; the promotion of social justice to ensure balanced economic development⁶⁴⁴; respect for the sanctity of

⁶³⁹ Constitutive Act of the African Union, Article 3(h). For a detailed discussion on the role of the AU in human rights protection in Africa see Viljoen F, *International human rights law in Africa*, note 1 above, pp. 178-234.

⁶⁴⁰ Ibid, Art. 3(g). See also Baimu E, 'The African Union: Hope for a better protection of human rights in Africa?' (2001) 2 *African Human Rights Law Journal*, p. 311.

⁶⁴¹ See generally, Mbondeniyi M, 'The right to participate in the government of one's country: An analysis of Article 13(1) of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 elections crisis', *African Human Rights Law Journal*, (forthcoming in 2009).

⁶⁴² CAAU, Art. 4 (m).

⁶⁴³ Ibid, Art. 4 (l).

⁶⁴⁴ Art. 4 (n).

human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities⁶⁴⁵; and condemnation and rejection of unconstitutional change of government.⁶⁴⁶ In fact, the CAAU categorically states that a government that shall seize power through unconstitutional means shall not be allowed to participate in the activities of the Union.⁶⁴⁷

One remarkable innovation in the CAAU is the provision for the imposition of sanctions on members that fail to comply with the decisions and policies of the AU.⁶⁴⁸ There was no such provision in the OAU Charter. Although it may be debatable how far this provision will be put in practice, the decision to suspend the Central African Republic from participating in the AU policy organs as a result of the coup d'état in March 2003 offered some hope for its implementation.⁶⁴⁹

It is also encouraging to note that the provision was initially implemented against Madagascar, which was barred from the AU inauguration summit in 2002, because of doubts over the legitimacy of its president.⁶⁵⁰ The state was, however, re-admitted in 2003, during the second AU Summit in the Mozambican capital, Maputo.⁶⁵¹ Unfortunately, the AU has failed to implement this provision in a number of cases that show utter disregard for its attempts to promote and protect human rights in the region. One notable example is its failure to punish the notorious government of Robert Mugabe

⁶⁴⁵ Art 4 (o).

⁶⁴⁶ Art 4 (p).

⁶⁴⁷ CAAU, Art 30.

⁶⁴⁸ Art 23 provides as follows: '2. ...any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly'.

⁶⁴⁹ Ninetieth Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level, 17 March, 2003, Communiqué, Central Organ/MEC/AMB/Comm.(XC).

⁶⁵⁰ Cornwell R, 'Madagascar: First Test for the African Union', (2003) 12 *African Security Review*, p. 1.

⁶⁵¹ 'Decision On The Situation In Madagascar', available at http://www.au2003.gov.mz/key_documentation/audecis1.htm, last accessed on 13 August 2007.

in Zimbabwe, among other recalcitrant states. The AU's reluctance in dealing with Zimbabwe has caused accusing fingers to be pointed at it by the civil society.⁶⁵²

In addition to its objectives and principles that embody human rights, the CAAU also provides for the creation of organs within the AU framework, some of which could be used to enhance the promotion and protection of human rights in the continent.⁶⁵³ These organs include the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representative Committee (PRC), the Specialised Technical Committees (STCs), the Economic, Social and Cultural Council, and the Financial Institutions.⁶⁵⁴

While the CAAU is a marked departure from the OAU Charter, it clearly has its own flaws and limitations. For example, in spite of its reference to human rights and the African Charter, it is silent on the Charter's enforcement institutions— the African Commission and Court on Human and Peoples' Rights. This limits the intended relationship between the human rights institutions and their political affiliate. It further raises the question as to what extent the AU envisioned human rights to be of paramount importance on its agenda.⁶⁵⁵ Fortunately, this omission was addressed when the AU Assembly resolved to incorporate in its framework the African Commission and the African Committee of Experts on the Rights and Welfare of the Child.⁶⁵⁶

Another issue of concern in the provisions of the CAAU is the retention of the principle of non-interference in the internal affairs of member states.⁶⁵⁷ This principle, in the main,

⁶⁵² 'Zimbabwe casts shadow over AU launch', available at www.irinnews.org, last accessed on 3 October 2007.

⁶⁵³ CAAU, Art. 5 (1) & (2).

⁶⁵⁴ See the Constitutive Act of the African Union, Article 5 (a) – (i).

⁶⁵⁵ See Udombana J, 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review*, p. 1177.

⁶⁵⁶ See 'Decision on the Interim Period', 1st Ordinary Session of the AU Assembly of Heads of State and Government, 9-10 July 2002, Durban, South Africa, AU Doc ASS/AU /Dec 1(1) para 2(xi) & 9.

⁶⁵⁷ CAAU, Art 4 (g).

accounted for the failure of the OAU to address human rights violations on the continent.⁶⁵⁸ However, unlike the OAU Charter which blatantly prohibited interference with the internal affairs of its member states, the attempt to diminish the impact of this principle in the Constitutive Act must be commended. The CAAU permits the AU to intervene in a member state in respect of grave circumstances; namely, war crimes, genocide and crimes against humanity.⁶⁵⁹ It also provides for the right of member states to request intervention from the AU in order to restore peace and security.⁶⁶⁰

The scope of the right to intervene provided for in the CAAU is, however, not satisfactory because most of the human rights violations in Africa do not reach the levels of war crimes, genocide or crimes against humanity.⁶⁶¹ This suggests that other forms of violations of human rights are not of importance to the AU, as long as they have not reached the magnitude or status contemplated under article 4(h). Article 4(h) of the CAAU, therefore, keeps other forms of human rights violations outside the purview of the AU's intervention.⁶⁶²

From the foregoing, it is inevitable to note that the transformation from the OAU to AU ushered in a new dimension in regional enforcement of human rights in Africa. While the full impact of the AU is yet to be seen or felt, its inception is a bold step intended to further the realisation of human rights in the region. Its Constitutive Act is also an instrument that strengthens the African human rights system. It is noteworthy that the creation of the AU culminated to a series of other activities of relevance to the human rights discourse in the region. For example, the Union held its 'First AU Ministerial

⁶⁵⁸ Nmehielle O, *The African human rights system*, note 393 above, p. 80. Nmehielle observed that the notable principle that has always stood in the ways of the human rights agenda in Africa is the principle of non-intervention in internal affairs of states enshrined in Article III (2).

⁶⁵⁹ CAAU, Art 4 (h).

⁶⁶⁰ *Ibid*, Art 4 (j). See 'African Union: A new opportunity for the promotion and protection of human rights in Africa' (*AI Index*: IOR 63/0002/2002).

⁶⁶¹ See Baimu E, 'The African Union: Hope for a better protection of human rights in Africa?' note 640 above, p. 314.

⁶⁶² *Ibid*.

Conference on Human Rights in Africa' in May 2003, which culminated to the adoption of the Kigali Declaration.⁶⁶³

This declaration forms the basis of the revised agenda of the AU on human rights in Africa.⁶⁶⁴ It reaffirmed the AU member state's commitment to the objectives and principles contained in the Constitutive Act of the African Union⁶⁶⁵, the African Charter on Human and Peoples' Rights⁶⁶⁶, the solemn Declaration of the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA)⁶⁶⁷, the New Partnership for Africa's Development (NEPAD)⁶⁶⁸, the Declaration on the Code of Conduct on relations between States adopted in Tunis⁶⁶⁹, all relevant AU Declarations and Decisions as well as the UN Charter and the Universal Declaration of Human Rights and the Vienna Declaration of 1993.

The Kigali Declaration should therefore be seen as an added impetus to the human rights revolution that has been sweeping across the continent particularly at the dawn of the new millennium. It is expected that many more developments will be made in this regard. In fact, many other conferences, of relevance to human rights promotion and protection in the region, took place before and after the Kigali Conference.⁶⁷⁰ It is, however, unfortunate that most of these conferences ended with declarations which are anything but binding on the member states.

⁶⁶³ Kigali Declaration, MIN/CONF/HRA/Decl. 1 (I), adopted at the First AU Ministerial Conference on Human Rights in Africa, 8 May 2003.

⁶⁶⁴ See Murray R and Lloyd A, 'Institutions with responsibility for human rights protection under the African Union, note 548 above, p. 172.

⁶⁶⁵ Lome, Togo 2000.

⁶⁶⁶ Nairobi, Kenya 1981.

⁶⁶⁷ Lome, Togo 2000.

⁶⁶⁸ Lusaka, Zambia 2001.

⁶⁶⁹ Tunisia in June 1994.

⁶⁷⁰ For example, the Grand Bay Conference, Algiers Conference, Cairo Conference and Sirte Summit.

2.5.4.4.2 The New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM)

Another phenomenon that depicts the evolution of regional enforcement of human rights in Africa is the emergence of the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM). NEPAD is an initiative that started off as the Millennium Africa Recovery Plan (MAP) conceived by Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria in the year 2000.⁶⁷¹ MAP merged with the OMEGA plan developed by President Wade of Senegal to form the New African Initiative (NAI) in July 2001.

The title NAI was later changed to NEPAD in October 2001.⁶⁷² The MAP document had its immediate origins in the Organisation of African Unity (OAU) Summit held in Togo in July 2000. This summit mandated Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria to engage the countries in the North with a view to developing a partnership for the renaissance of the continent.⁶⁷³ About the same time, the newly elected president of Senegal, Wade, conceived a plan titled OMEGA.⁶⁷⁴ The MAP and OMEGA plans were presented, respectively, by Presidents Obasanjo and Wade during the fifth Extraordinary Summit of the OAU held in Sirte, Libya from 1 to 2 March 2001.⁶⁷⁵

Recognising the synergies and complementarities between the two plans on continent-wide development, the Sirte Summit recommended the integration of the two

⁶⁷¹ See Ohiorhenuan J, 'NEPAD and dialectics of African underdevelopment' (2002) 7 *New Agenda*, p. 10.

⁶⁷² Para 5(b) of the Communiqué issued at the end of the first meeting of the HSIC, Abuja, Nigeria, 23 October 2001.

⁶⁷³ Para 321 of the OAU Secretary-General Report (2001). Pursuant to this mandate, the three leaders relentlessly engaged the industrialised countries in the north and multi-lateral organisations on the partnership at various fora. For example, the three leaders made a presentation on the MAP at the World Economic Forum in Davos in January 2001.

⁶⁷⁴ Para 323 of the OAU Secretary-General Report (2001).

⁶⁷⁵ *Ibid*, Para 318.

initiatives.⁶⁷⁶ The decision to have a single, coordinated African plan was grounded on the need to avoid confusing Africa's partners, diffusing the focus, eroding capacity, splitting resources and undermining the credibility of the plans.⁶⁷⁷ The result of this merger, which was finalised on 3 July 2001, was the New African Initiative (NAI). The NAI was approved by the 37th OAU Assembly of Heads of State and Government held in Lusaka in July 2001.⁶⁷⁸ The NAI had to be reorganised and edited to clear repetition and inconsistencies emanating from the hasty merger of the MAP and OMEGA plans. The finalisation of the NAI document was achieved on 23 October 2001, when its name was also changed to NEPAD.⁶⁷⁹

NEPAD is a vision and strategic framework for Africa's renewal.⁶⁸⁰ It is an African innovation practically designed to support the vision and goals of the AU and although it is an economic development programme, in many ways it continues the African insistence that human rights, peace and development are interdependent matters.⁶⁸¹ As a development programme, it has a strong human rights component and provides for the development of an African Peer Review Mechanism (APRM), which deals with the human rights practices of member states.⁶⁸²

⁶⁷⁶ Baimu E, 'Human rights in NEPAD and its implications for the African human rights system' (2002) 2 *African Human Rights Law Journal*, p. 303.

⁶⁷⁷ *Ibid.*

⁶⁷⁸ See OAU Declaration on the New African Initiative [MAP and OMEGA] 37th ordinary session of the Assembly of the Heads of State and Government of the OAU, July 2001 Lusaka, Zambia, OAU Doc AHG/Decl 1 (XXXVII) para 9.

⁶⁷⁹ See Baimu E, 'Human rights in NEPAD and its implications for the African human rights system', note 676 above, p. 303.

⁶⁸⁰ See 'NEPAD in brief', available at <http://www.nepad.org/2005/files/inbrief.php>, last accessed 1 March 2007).

⁶⁸¹ See Nagan W, 'Implementing the African Renaissance: Making human rights comprehensive for the new millennium', available at http://www.cha.uga.edu/CHA-CITS/Nagan_paper.pdf, last accessed 1 March 2007.

⁶⁸² Heyns C, 'The African regional human rights system: The African Charter' (2004) 108/3 *Penn State Law Review*, p. 684.

NEPAD consists of three initiatives: a Peace and Security Initiative⁶⁸³, an Economic and Corporate Governance Initiative and the Democracy and Political Governance Initiative. It is the latter which is important from the perspective of human rights. It notes that ‘Africa undertakes to respect the global standards of democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers unions, and fair, open and democratic elections periodically organised to enable people to choose their leaders freely.’⁶⁸⁴ In July 2002, the AHSG of the AU agreed to the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance. In the particular context of human rights, paragraph 15 of the Declaration states as follows⁶⁸⁵:

To promote and protect human rights, we have agreed to:

- facilitate the development of vibrant civil society organisations, including strengthening human rights institutions at the national, sub-regional and regional levels;
- support the Charter, African Commission and Court on Human and Peoples’ Rights as important instruments for ensuring the promotion, protection and observance of human rights;
- strengthen co-operation with the UN High Commission for Human Rights; and
- ensure responsible free expression, inclusive of the freedom of the press.

Through NEPAD, African leaders have set an agenda for the renewal of the continent. This agenda is based on national and regional priorities and development plans that must be prepared through a participatory process involving the people of Africa.⁶⁸⁶ It is a

⁶⁸³ Comprising development and security, early warning and prevention, management and resolution of conflicts.

⁶⁸⁴ NEPAD Document, para 79.

⁶⁸⁵ *Declaration on Democracy, Political, Economic and Corporate Governance*, AHG/235(XXXVIII), Annex 1, adopted by the HSIC at its Third Meeting in June 2002; Communiqué Issued at the end of the Third Meeting of the Heads of State and Government Implementation Committee of the New Partnership for Africa’s Development (HSIC), Rome, Italy on 11 June, 2002.

⁶⁸⁶ NEPAD Document, para 47.

framework intended, among others, to define the nature of the interaction between Africa and the rest of the world, including the industrialised countries and multilateral organisations.⁶⁸⁷ This is born out of the realisation that the continued marginalisation of Africa from the globalisation process and the social exclusion of the vast majority of its people constitute a serious threat.⁶⁸⁸ To achieve NEPAD's objectives, African leaders take responsibility for:

strengthening the mechanisms for conflict prevention, management and resolution; promoting and protecting democracy and human rights; restoring and maintaining micro-stability through fiscal and monetary policies; regulating financial markets and private companies; promoting the role of women in social and economic development by reinforcing their capacity in the domains of education and training, revitalising health training and education with high priority to HIV/AIDS; maintaining law and order; and promoting the development of infrastructure.⁶⁸⁹

Implementation of the NEPAD is envisaged through a number of mechanisms. Firstly, a Heads of State and Government Implementation Committee (HSIC) composed of 20 states⁶⁹⁰, meets every four months. Secondly, a Secretariat is at present based in South Africa and deals with the administrative workload. Thirdly, implementation of NEPAD is voluntary but for those states which choose to be bound, enforcement is through the African Peer Review Mechanism (APRM).⁶⁹¹ Thus, paragraph 28 of the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance acknowledges the establishment of the APRM on the basis of voluntary accession. Its aim is to 'ensure the policies and practices of participating states conform to the agreed

⁶⁸⁷ Ibid, para 48.

⁶⁸⁸ Ibid, para 2.

⁶⁸⁹ NEPAD Document para, 49.

⁶⁹⁰ This was expanded from 15. They are: Nigeria, Senegal, Algeria, Egypt and South Africa as the five founding states; as well as the central African states of Cameroon, Gabon, Sao Tome and Principe; East African states of Ethiopia, Kenya, Mauritius and Rwanda; North African states including Libya and Tunisia; Southern African States of Angola, Botswana and Mozambique, and West African states of Ghana and Mali.

⁶⁹¹ African Peer Review Mechanism, AHG/235(XXXVIII), Annex II.

political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.⁶⁹²

The APRM entails a series of periodic reviews including a base review carried out within 18 months of joining, and periodic reviews every two to four years. States can also request additional reviews and these can be prompted by an ‘impending political or economic crisis’ in the country.⁶⁹³ The reviews entail visits to the country by a Panel of Eminent Experts comprising of Africans who have distinguished themselves in careers that are considered relevant to the work of the APRM and who are ‘persons of high moral stature and demonstrated commitment to the ideals of Pan Africanism.’⁶⁹⁴

The reports finalised by the Team have also to be tabled in a variety of organs such as the Pan-African Parliament, the African Commission, the Peace and Security Council and the Economic, Social and Cultural Council of the AU.⁶⁹⁵ According to NEPAD’s Secretariat, reviews of the first four countries— Ghana, Kenya, Mauritius and Rwanda— were completed in 2006.⁶⁹⁶ A state’s review by its peers focuses on areas of high priority in NEPAD such as strengthening institutions of democracy and human rights. The intention of such reviews is to increase the adoption of best practices and standards among the participating states. Where matters relate to human rights, democracy and political governance, the arrangements expressly provide for the assessments to be conducted by existing OAU/AU institutions with a human rights remit. Among those mentioned are the African Commission on Human and Peoples’ Rights, the African Committee on the Rights and Welfare of the Child, the Central Organ, Pan-African Parliament and CSSDCA Unit.⁶⁹⁷

⁶⁹² Ibid, para. 1.

⁶⁹³ Ibid, Annex II, para 13.

⁶⁹⁴ Ibid, paras 5 and 6.

⁶⁹⁵ African Peer Review Mechanism, Annex II, para. 24

⁶⁹⁶ For more information, visit www.nepad.org. See also ‘Zambia: ready for NEPAD governance review’, available at <http://www.afrol.com/articles/14260>, last accessed 1 March 2007.

⁶⁹⁷ Ibid.

Further, NEPAD has also resolved to address the recurrence of conflicts in the continent. Thus it has directed its efforts towards the prevention, management and resolution of conflict, peacemaking and peace enforcement, post-conflict reconciliation, rehabilitation and reconstruction, and combating the illicit proliferation of small arms, light weapons and landmines.⁶⁹⁸ To further these objectives, a subcommittee on peace and security has been established within NEPAD.⁶⁹⁹ If these commitments are fulfilled, then it will promote peace and security and reduce the occurrence of conflicts. Income previously spent on wars and conflicts may be diverted to the realisation of human rights.

Generally, the NEPAD and APRM initiatives can innovatively be used to come up with uniform human rights standards across the continent. They can also be useful tools to persuade states to ratify human rights treaties that they have not, in order to ensure uniformity among the participating states.⁷⁰⁰ Arguably, the initiatives provide a holistic, comprehensive integrated strategic framework for the socio-economic development of Africa, within the constitutional framework of the AU. Specifically, NEPAD serves as the socio-economic development blueprint for the AU to implement its objectives.⁷⁰¹ It is believed that, unlike prior endeavours, NEPAD is realistic in the sense that it recognises the dynamics of the current global economy and its inevitability, and suggests a partnership with the outside world, based on mutual commitments and obligations.⁷⁰² The initiatives, however, have some overt shortcomings.

One of the most evident shortcomings of the NEPAD is its superficial approach to human rights promotion and protection. Economic, social and cultural rights are vaguely referred

⁶⁹⁸ NEPAD Document, para 74.

⁶⁹⁹ See Communiqué issued at the end of the first meeting of the HSIC, Abuja, 23 October 2001.

⁷⁰⁰ Mbazira C, 'A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal*, p. 44.

⁷⁰¹ Murray R & Lloyd A, 'Institutions with responsibility for human rights protection under the African Union', note 548 above, 179.

⁷⁰² Mbazira C, 'A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development', note 700 above, p. 44; Ohihenuan J, 'NEPAD and dialectics of African underdevelopment', note 671 above, p. 10.

to in terms of greater access to services instead of as concrete, inherent rights.⁷⁰³ There is nothing concrete in the NEPAD document about integrating human rights in the development process.⁷⁰⁴ This is contrary to the understanding that, if human rights are to be realised, they have to be streamlined in all activities, including development. According to the former UN Secretary-General, Kofi Annan, human rights are integral to the promotion of peace and security, economic prosperity and social equity.⁷⁰⁵ This is particularly relevant to the enforcement of socio-economic rights, because of their recognition as non-justiciable rights in so many constitutions of African countries.⁷⁰⁶

Further, NEPAD is an initiative of the Assembly of Heads of State and Government. As a result of this, it has encountered some problems in gaining legitimacy.⁷⁰⁷ This is a serious shortcoming, because by its nature, the realisation of rights requires the participation of beneficiaries. It is for this reason that NEPAD has in many circles been viewed as dubious economic globalisation.⁷⁰⁸ It is also important to note that, despite its commitment to human rights, NEPAD does not in any manner establish a direct nexus with the African human rights system. There is need for it to make reference to the African Commission on matters relating to human rights, this is because the later is in a better position to conduct a human rights audit based on impartial evidence.⁷⁰⁹

⁷⁰³ Rights & Democracy, 'Human rights and democratic development in Africa: Policy considerations for Africa's development in the new millennium', available at <http://www.ichrdf.ca>, last accessed 27 August 2007.

⁷⁰⁴ Baimu E, 'Human rights in NEPAD and its implications for the African human rights system', note 676 above, p. 303.

⁷⁰⁵ Secretary-General Report to the General Assembly, *Renewing the United Nations: A Programme of Reform A/51/950*, 14 July 1997, para 78.

⁷⁰⁶ See, for example, the Constitutions of Ghana and Nigeria which include them as Directive Principles of State Policy.

⁷⁰⁷ See Baimu E, 'Human rights in NEPAD and its implications for the African human rights system', note 676 above, p. 303.

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Ibid.*

The APRM should also be faulted. In the main, because its membership is voluntary, states can withdraw without any severe consequences.⁷¹⁰ The project also lacks definite elements of compulsion. The reviewing body has no clearly defined ways of compelling deviant states to reform. This rather loose setup with seemingly no serious strings and no internal coercive mechanisms has failed to attract African countries to the project.⁷¹¹ A further source of concern is the tendency for African leaders to shy away from condemning their peers even in cases where the APRM produces damning reports.⁷¹²

The continental silence on human rights violations including the range of human rights abuses in the Sudan, Rwanda, Cameroon, Liberia, Somalia, Kenya, Burundi and the absence of a clear stance on the unfolding crisis in Zimbabwe, have amply demonstrated African leaders' lack of moral courage to chastise each other. This lack of 'tough stance' by African leaders on human rights violations, even in countries across their borders, is a cautionary signal that it is extremely dangerous to place undue expectation on the APRM in its bid to police or prevent human rights violations in Africa.⁷¹³

Despite such shortcomings, NEPAD and the APRM cannot be dismissed as having no positive influence on the realisation of socio-economic rights. There is no doubt that under the umbrella of the AU, through the inspiration of the NEPAD and APRM, African leaders have developed their own strategies for meeting the continent's pressing challenges, including extreme poverty, illiteracy, HIV/AIDS, war, environmental degradation and, most importantly, human rights abuses.⁷¹⁴

⁷¹⁰ Ibid.

⁷¹¹ Akokpari J, 'Policing and preventing human rights abuses in Africa: the OAU, the AU & the NEPAD Peer Review', (2004) 32/2 *International Journal of Legal Information*, p. 468.

⁷¹² Ibid.

⁷¹³ Ibid.

⁷¹⁴ Ibid.

2.5.4.4.3 The establishment of the African Court on Human and Peoples' Rights

Following the creation of the African Commission and the consequent dissatisfaction with its output, efforts were directed at the establishment of a regional human rights court in Africa. The idea of a regional court, however, generated another debate of almost a similar magnitude to the one that preceded the creation of the regional human rights system and the African Commission. At the Third Afro-Americo-European Conference on 'Regional Systems of Human Rights Protection in Africa, America and Europe' in Strasbourg in June 1992, the issue of regional human rights courts was discussed.⁷¹⁵ Here, some of the participants were of the view that the creation of an African court should be postponed to a later stage.

Their opinion was based on the argument that given the desperate shortage of funds for the work of the commission, it would have been unwise to establish another institution at that time.⁷¹⁶ There was also the issue to determine which rights in the Charter were justiciable and could be taken to a court. Without underestimating the importance of a court, in view of the existing constraints, it was deemed wise to strengthen the commission and revert back to the issue of a court at the appropriate future time.⁷¹⁷

After prolonged discussions, it was resolved that a Protocol creating a regional human rights court for Africa should be drafted. The process of drafting the Protocol was initiated at a Summit of Heads of State and Government of the OAU in Tunis in June 1994.⁷¹⁸ A resolution adopted at this summit requested the Secretary General of the OAU to convene a meeting of government experts to examine ways of enhancing efficiency of

⁷¹⁵ Benedek W & Heinz (eds.), *Regional systems of human rights protection in Africa, America and Europe: Third Afro-Americo-European Conference, Strasbourg, June 1992* (1992).

⁷¹⁶ Ibid.

⁷¹⁷ Ibid.

⁷¹⁸ Nmehielle O, *The African human rights system*, note 393 above, p. 255; Onguergouz F, *The African Charter on Human and Peoples' Rights*, note 576 above, pp. 688-690.

the African Commission and to consider in particular the question of the establishment of an African Court on Human and Peoples' Rights.⁷¹⁹ A Draft Protocol, prepared by the OAU Secretariat, was submitted to a meeting of government experts in Cape Town, South Africa, in September 1995.

The Cape Town meeting was followed by a number of intermediary meetings, until the meeting of Ministers of Justice in December 1997 at which the draft Protocol was adopted, before being ratified by the Summit of Heads of State and Government in Ouagadougou, Burkina Faso on 9 June 1998.⁷²⁰ The Protocol was largely inspired by existing regional instruments which established the European and Inter-American Human Rights Courts, the Statute of the International Court of Justice as well as the Report of the International Law Commission on the International Criminal Court.⁷²¹ It came into force on the 25th of January 2004, after the fifteenth instruments of ratification was deposited by Comoros.⁷²²

In July 2004, the AHSG resolved to integrate the African court of justice and the African human rights court into a single institution.⁷²³ The motivation for such a merger was that it would be financially expedient to do so.⁷²⁴ The issue of the merger of the courts is underscored in the next chapter of this thesis, where the relationship between the African human rights court and the AU and its organs, is examined at length. Due to the prolongation of the negotiations on the intended merger of the two courts, it was deemed expedient to go ahead with the operationalisation of the African human rights court.

⁷¹⁹ Resolution no. AHG 230 (XXX), doc. OAU/LEG/EXP/AFC/HPR, September 95.

⁷²⁰ Nmehielle O, *The African human rights system*, note 393 above, p. 255.

⁷²¹ Ibid.

⁷²² See 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.

⁷²³ See paras 4 and 5 of Assembly/AU/Dec 45(III). See also Viljoen F & Baimu E, 'Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of justice', (2004) 22/2 *Netherlands Quarterly of Human Rights*, p. 241-267.

⁷²⁴ Ibid.

Hence, on 2 July 2006, the first eleven Judges of the African human rights court were sworn in.⁷²⁵

The establishment of the court has been applauded as a means of strengthening the regional mechanism for human rights in Africa.⁷²⁶ Given the continent's history of serious human rights violations, the court is a potentially significant development in the protection of human rights at the regional level. The adoption of the Protocol thus demonstrated a resolve by African governments to realise the spirit of the African Charter and ensure the protection of human rights in Africa.⁷²⁷ Similarly, through it, victims of human rights violations or their representatives would have recourse to judicial redress. The court possesses the authority to issue a binding and enforceable decision in such circumstances.⁷²⁸

In addition, an African Court would provide the platform for the articulation of international legal principles at the regional level. At the same time, it is supposed that domestic courts in Africa will look to it for direction and precedents in their application of human rights instruments at the domestic level.⁷²⁹ Ultimately, the court could be an important institution in sustaining constitutional democracies and facilitating the fulfilment of human and peoples' rights, which are now universally recognised. A detailed discussion on the court in the light of its normative framework is entailed in the next chapter.

⁷²⁵ See Viljoen F (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*, (2006), p. iii.

⁷²⁶ See Amnesty International, *Credibility in question: Proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples' Rights*, AI Index: IOR 63/02/1998.

⁷²⁷ Ibid.

⁷²⁸ See generally the provisions of the Protocol establishing the court.

⁷²⁹ See Amnesty International, *Credibility in question: Proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples' Rights*, note 726 above.

2.6 Conclusion

In this chapter, the historical and philosophical foundations of human rights, as well as the emergence and evolution of the African human rights system were examined. A review of the definitions, classification and scope of human rights was conducted with a view to contribute to the existing scholarly discourse on the concept. Particularly, the definition of the concept was found to be a subject that has generated great controversy among scholars. The study confirmed that despite numerous attempts to find a composite definition of human rights, the province of this concept cannot easily be determined; meaning that human rights are continually evolving.

The study also evaluated the various theories advanced by different scholars to demystify the philosophical foundations of human rights. In the main, it analysed the naturalist, positivist and Marxist theories. It also acknowledged the existence of various sociological theories evolved to explain the philosophy of this concept. At the same time, it was pointed out that although these theories, which are 'Western' in origin, have been used in the present study to explain the philosophical foundations of the concept, no society has the monopoly of human rights respect or abuses; nor can any society claim to be a paradise for human rights. On this premise, one of the main arguments in this chapter has been that the concept of human rights is not foreign to Africa; Africa has a tradition of human rights.

The major difference between the African and Western conceptions of human rights is their philosophical formulations. No society can therefore rightfully claim to be the custodian or 'father' of rights. The chapter reiterated, even though a particular concept may be articulated or developed in a specific cultural set-up, it does not imply that the phenomenon does not, or did not, exist in other cultures. It also established that the concept of international human rights law is of recent origin and its historical antecedents were traced to the events during and after the Second World War. This is not to say that the concept was unknown before this period. Indeed, the study confirmed, efforts to protect individuals under international law begun after the First World War, during which

period treaties were concluded to protect the rights of linguistic and ethnic minorities. This was largely because the rights that constituted international humanitarian law were in an extremely primitive state.

International human rights law, as it is known today, evolved as a branch of international law specifically concerned with the protection of individual's rights from an international platform. This was largely because states were known to be the chief violators of the rights of their nationals. It was noted, as a result of the divergence in conceptions and perceptions, international enforcement of human rights has turned to be more effective and readily acceptable through the regional human rights systems. Regional human rights systems could therefore be said to complement, while at the same time fill gaps in the global human rights mechanisms.

In particular, the study underscored the emergence and evolution of the African human rights system. Generally speaking, to attain its present status, the system evolved under difficult circumstances. Its inception was resisted by the then OAU leadership because of the fear that elevating human rights protection to the regional status would most likely compromise state sovereignty, which to them was more important at that time. The study discussed the many reasons for resisting the evolution of human rights in Africa. At some point, the concept of human rights was dismissed as a baseless foreign ideology with no relevance in Africa and to Africans. This position was mainly maintained by the proponents of the African concept on human rights, particularly those who fronted the 'autochthony' idea. Moreover, the gross violations of human rights during the slave-trade and colonial periods made many to view the concept with suspicion.

As alluded to earlier, some African leaders questioned the double standards invoked in condemning human rights violations. They could not understand why violations of human rights committed during the colonial period did not receive as much attention as those committed in the post-colonial era. Indeed the application of double standards in condemning human rights violations has been a major impediment to their effective

enforcement in the continent and globally. It is needless to emphasise that human rights were violated in all the three periods that defined the history of Africa.

Africa has been 'demonised' on the basis of its pathetic human rights record. Without intending to be 'the devil's advocate', it is important to note, whereas the present study concurs with the view that human rights are not highly esteemed in Africa; the same could be said of other continents. European and Asian countries, as well as America- the self-styled 'mother of democracy and human rights'- have also had their share of human rights violations. We cannot close our eyes to the fact that some of these continents have also experienced massive violations of human rights, even to the magnitude of genocide, war crimes and crimes against humanity. Diverse forms of discrimination, particularly on racial grounds, have also taken place in some Western countries. Like the 'Mosaic Law', the respect for human rights is fundamentally premised on the assumption that 'if you break one, you break all.' When the Western world points the accusing finger on the violations committed in Africa, it should do likewise to those committed within its states. A violation is a violation, by whatever name called, notwithstanding its magnitude or the colour of its perpetrator.

Where does the above argument leave us? Should we, like the proverbial Ostrich, bury our heads in the sand or fold our hands abreast, as the continent continues to wallow in the miasma of confusion and unabated violations? Should we ignore the historic struggles the continent has been entangled in, in its quest for a viable and sustainable human rights dispensation? Should we refuse to acknowledge that even though they could not define the concept, our pre-colonial ancestors knew of, and in fact respected human rights? The answers to all these questions is 'no'. The efforts of Africa's peoples to achieve human rights need to be appreciated.

The historical background to the evolution of this concept in Africa, whose labyrinths were laid bare in this chapter, speaks volumes. Unfortunately, most governments in Africa and their agents have acted in utter disregard to the subsisting regional human rights norms. This situation calls for a constant re-examination and invigoration of the

regional human rights institutional and normative mechanisms to make human rights meaningful in the lives of the people in Africa.

CHAPTER THREE

A REVIEW OF THE NORMATIVE AND INSTITUTIONAL MECHANISMS OF THE AFRICAN HUMAN RIGHTS SYSTEM

3.1 Introduction

For purposes of conceptual clarity, the expression ‘African human rights system’, in the context of this chapter, refers to the regional system of norms and institutions for enforcement of human and peoples’ rights in Africa. There has been an academic controversy over the scope and definition of the African human rights system. Gutto, for example, argued that a distinction should be made between the broader ‘African human rights system’ and the narrower ‘African Charter system’.¹ Accordingly, whereas the African Charter system centres around two enforcement institutions; namely, the African Commission and the African Court on Human and Peoples’ Rights, the African human rights system goes beyond to include the political institutions and other organs created under the AU.²

Gutto’s observations could be faulted because the African Charter, which is at the core of his so-called ‘African Charter system’, is a very important instrument of the ‘African human rights system’. Hence, the African human rights system cannot be construed as separate from the ‘African Charter system.’ Secondly, it is not proper to view the ‘African Charter system’ distinctly from the pan-continental political institutions principally because the latter play an indispensable role in the operation of the former. This is confirmed by the fact that the African Charter, whose provisions are analysed in

¹ Gutto S, ‘The reform and renewal of the African regional human and peoples’ rights system’, (2001) 2 *African Human Rights Law Journal*, p. 176.

² *Ibid*, p. 184.

detail below, effectively puts the African Commission under the control of the Assembly of the Head of State and Government (AHSG).³

Further, just before the inception of the African Union, the former OAU Council of Ministers, which met in Lusaka in July 5-8, 2001, called for the incorporation of ‘organs, institutions/bodies which have not been specifically mentioned in the Constitutive Act.’⁴ The AU Assembly, at its first ordinary session, decided that, ‘the African Commission on Human and Peoples’ Rights and the African Committee of Experts on Rights and Welfare of the Child shall henceforth operate within the framework of the African Union.’⁵ These are a few illustrations of the links and synergies between the ‘political institutions’ and the ‘African Charter system’ which make it difficult for one to conclude that their existence is distinct.

As a variant of Gutto’s proposition, this thesis perceives the African human rights system as a system that embodies two inter-related components; namely, the political (AU-based) and the legal (African Charter-based) components.⁶ While the former is more concerned with regional politics than with human rights, the latter is wholly involved in human rights affairs. The meeting point of the two components, however, is their involvement in regional promotion and protection of human rights. On the face of it, the distinction between these two components is hard to tell.

Odinkalu argued for a much broader definition of the expression ‘African human rights system.’⁷ According to him, the system encapsulates not only the subsisting regional

³ See Article 58 of the African Charter.

⁴ Udombana N, ‘The institutional structure of the African Union’, (2002) 33 *California Western International Law Journal*, p. 84.

⁵ Ibid.

⁶ With regard to this arrangement, see the observations in Baimu E, ‘Human rights mechanisms and structures under NEPAD and the African Union: Emerging trends towards proliferation and duplication’ *Occasional No 15*, Centre for Human Rights (2002).

⁷ Odinkalu C, ‘The role of case and complaints procedures in the reform of African regional human rights system’, (2001) 2 *African Human Rights Law Journal*, p. 227.

human rights mechanisms but also supra-national, pan-continental systems and mechanisms and the domestic legal systems in Africa.⁸ This depiction, however, is overbroad and therefore misleading. It ignores the all important fact that, whereas supra-national and domestic systems in Africa may enforce regional human rights norms, the regional mechanisms are not mandated to enforce, or even interpret, supra-national or domestic laws. They may only interpret and enforce those norms created under, or that are relevant to, the system.⁹

Under the African human rights system, the rule of exhaustion of domestic remedies serves as the link between domestic and regional human rights mechanisms.¹⁰ However, contrary to Odinkalu's understanding, this rule does not make the domestic mechanisms part of the regional human rights system.¹¹ Rather, the rule was evolved to uphold sovereignty of states by granting them the first opportunity in domestic dispute resolution.¹² The African Commission confirmed this position when it stated that the exhaustion of domestic remedies rule prevents it from acting as a court of first instance as long as domestic remedies are available, effective and sufficient.¹³

Through this assertion, the commission wanted to distinguish the roles between domestic and regional human rights systems.¹⁴ In this regard, Odinkalu's perception should,

⁸ Ibid.

⁹ See for example Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights Establishing the Africa Court on Human and Peoples' Rights. The Article provides that: 'the jurisdiction of the court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and *any other relevant human rights instrument ratified by the States concerned.*' (emphasis mine)

¹⁰ See Art 56(6), African Charter.

¹¹ Odinkalu C, 'The role of case and complaints procedures in the reform of African human rights system', note 7 above, p. 227.

¹² See Viljoen F, 'Admissibility under the African Charter', in Murray R & Evans M, *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002), p. 62.

¹³ Communications 147/95, 149/95, *Sir Dawda K Jawara v The Gambia*, Thirteenth Annual Activity Report.

¹⁴ Viljoen F, 'Admissibility under the African Charter', note 12 above, p. 62.

therefore, not be upheld, because one could be misled into understanding that the African human rights system includes the human rights norms and institutions created under the aegis of the UN, in as far as African states are parties to the UN treaties. As stated above, this chapter adopts the position that the African human rights system refers to the regional system of norms and institutions for enforcement of human and peoples' rights in Africa. This system includes the regional political institutions involved in human rights, such as the AU and its organs.

Based on this definition, it may be argued that the system, created under the auspices of the (OAU, now the AU), comprises a number of normative instruments. These instruments include: the Constitutive Act of the African Union (CAAU)¹⁵; the African Charter on Human and Peoples' Rights¹⁶; the Convention Governing the Specific Aspects of Refugee Problems in Africa¹⁷; the Convention on the Elimination of Mercenaries in Africa¹⁸; the African Charter on the Rights and Welfare of the Child¹⁹; the Cultural Charter for Africa²⁰; the Convention on the Prevention and Combating of Terrorism²¹; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women

¹⁵ See the Constitutive Act of the African Union adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo. The African Union replaced the Organisation of African Unity. Art 3(h) of the Constitutive Act of the Union stipulates that the Union aims, among other things, at 'promoting and protecting human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.'

¹⁶ African Charter on Human and Peoples' Rights, OAU DOC CAB/LEG/67/3, rev 5, 27 June 1981.

¹⁷ Adopted on 10 September 1969, entered into force on 20 June 1974, OAU Doc CAB/LEG 24.3.

¹⁸ Adopted June 1977, entered into force 1985, OAU Doc CM/433/Rev L Annex I (1972). For a discussion on the political, human rights, legal and security aspects of the problems of mercenaries in Africa, see Fayemi J & Musah A (eds.), *Mercenaries: An African security dilemma* (2000).

¹⁹ Adopted in July 1990, entered into force on 29 November 1999, OAU Doc CAB/LEG 153/REV 2. The Children's Charter is reprinted in Heyns C (ed.), *Human rights law in Africa* 1997 (1999), p. 38.

²⁰ Cultural Charter for Africa of 1976 (1990), reprinted in Heyns C (ed.), *Human rights Law in Africa*, *ibid*, p. 55.

²¹ Adopted by the 35th ordinary session of the Assembly of Heads of State and Government, Algiers, Algeria, 14 July 1999.

in Africa²²; and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.²³

There are also two African treaties dealing with the environment, although not from a human rights perspective, which have been included by some scholars in the list of norms informing the African human rights system.²⁴ These are the African Convention on the Conservation of Nature and Natural Resources and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.²⁵ By virtue of the AU being part of the African human rights system, the Protocol to the Constitutive Act of the African Union on the Establishment of the African Court of Justice could also be cited as one of its normative instruments.²⁶

In addition to the normative mechanisms, a number of institutions are involved, either directly or indirectly, in the enforcement of the norms of the system. These are: the African Union (AU)²⁷; the African Commission on Human and Peoples' Rights (the Commission), established under the African Charter on Human and Peoples' Rights; the African Court on Human and Peoples' Rights created by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; and the African Committee of Experts on the Rights and

²² Adopted by the Second Ordinary Session of the Assembly of the Union in Maputo, July 11, 2003.

²³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), available at <http://www.achpr.org>, last accessed 28 November 2007.

²⁴ See Gutto S, 'The reform and renewal of the African regional human and peoples' rights system', note 1 above, p. 176.

²⁵ Adopted at Bamako, Mali, 29 June 1991, reprinted in reprinted in (1993) 1 *African Yearbook of International Law*, p. 269.

²⁶ Adopted by the Assembly of the Union in Maputo on 11 July 2003.

²⁷ The Constitutive Act of the AU makes reference to the African Charter in its objectives (Art 3(h) Constitutive Act). Additionally, various institutions and organs have since been established within the AU framework, most of which will be directly or indirectly responsible for human rights protection and promotion.

Welfare of the Child, established under the African Charter on the Rights and Welfare of the Child.²⁸

It is important to note that the CAAU provides for the establishment of institutions and organs that may fundamentally support and facilitate the work of the regional human rights system.²⁹ These organs include the Assembly of the Union, the Executive Council, the Pan African Parliament, the Court of Justice, the Commission, the Permanent Representative Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council, and Financial Institutions.³⁰ Arguably, these institutions, to the extent of their involvement in human rights, could also be enumerated among the existing institutional mechanisms of the African human rights system.

Despite the proliferation of norms and institutions, the African Charter remains the main human rights instrument of the African system.³¹ Similarly, the African Commission has, since the inception of the Charter, been the sole institution that ensures state compliance with the Charter's norms. This has been through, *inter alia*, the communications³² and

²⁸ The Committee was inaugurated in 2002. See Heyns C, 'The African regional human rights system: In need of reform?', (2001) 2 *African Human Rights Law Journal*, p. 155-156.

²⁹ For a description of the organs of the AU and their functions in the promotion and protection of human rights, see Garling M & Odinkalu C, *Building bridges for rights: Inter-African initiatives in the field of human rights* (2001), p. 45-51; Heyns C, 'The African regional human rights system: The African Charter', (2004) 108/3 *Penn State Law Review*, p. 684; Amanda L & Murray R, 'Institutions with responsibility for human rights protection under the African Union', (2004) 48/2 *Journal of African Law*, pp. 165-186.

³⁰ See Article 5 of the Constitutive Act of the African Union. The AU has also established other programmes and initiatives such as the Peer Review Mechanism of the New Partnership for Africa's Development (NEPAD) and the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA).

³¹ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', in Viljoen F, (ed.), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006), p. 16.

³² Articles 45 & 55, African Charter.

state reporting mechanisms.³³ The African Court on Human and Peoples' Rights was recently established to complement the role of the commission.

Another terminology that ought to be clarified in the context of this chapter is 'enforcement'. The expression 'human rights enforcement' should be taken to mean 'all measures intended and proper to induce respect for human rights.'³⁴ Hence, human rights enforcement in this study relates to the act of securing compliance (by states) to the human rights norms of the African human rights system. It is noteworthy that the only use of the term 'enforcement' in the UN Charter occurs in relation to the enforcement of the decisions of the Security Council provided for under Chapter VII.³⁵ By virtue of this provision, some international lawyers have equated human rights enforcement with the use of, or threat of use of economic or other sanctions or armed force.³⁶

This, however, is a very narrow construction of the terminology. The use of force and imposition of economic sanctions are just some of the ways human rights could be enforced. Enforcement could also be done through other means, such as the judgement of a court or tribunal that demands for compliance with existing human rights norms.³⁷ Such a judgement may, for example, require the repeal or amendment of legislation that contradicts human rights principles. Awarding of remedies to a victim of violation is also another way of enforcing human rights because it somehow compels the violating party to respect human rights.³⁸

Unlike the UN Charter, the OAU Charter made no provision for the enforcement of its principles and objectives. It merely emphasised cooperation among member states and

³³ Article 62, African Charter.

³⁴ Bernhardt R, 'General Report', in Bernhardt & Jolowicz (eds.), *International enforcement of human rights* (1985), p. 5.

³⁵ Art 45, Charter of the United Nations, 1945.

³⁶ Steiner & Alston P, *International human rights in context: Law, politics & morals*, p. 347.

³⁷ Bernhardt R, 'General Report', note 34 above, p. 5.

³⁸ *Ibid.*

the peaceful settlement of disputes.³⁹ This contributed to the subsequent reluctance of member states to criticise one another for human rights violations. This position, however, was discarded by the CAAU, which gives the Union the right of intervention in respect of grave circumstances of human rights violations.⁴⁰

Against this background, this chapter reviews the institutional and normative mechanisms for the enforcement of human rights on the continental level in Africa. The main focus is on the main human rights treaty in the region, the African Charter on Human and Peoples' Rights and its enforcement institutions, the African Commission and Court on Human and Peoples' Rights. As argued above, these form the most important 'component' of the African human rights system. It should be noted that it is not the intention of this chapter to review all the normative and institutional mechanisms of the Africa human rights system because this will be an enormous task that is beyond the scope of the study.

3.2 Normative mechanisms of the African human rights system

As stated above, the normative framework of the African human rights system is substantially broad, depending on how one defines the system. This part shall, however, be restricted to the review of the African Charter on Human and Peoples' Rights (hereinafter 'ACHPR', 'the Charter' or 'African Charter'), being the key normative instrument of the system.

3.2.1 The African Charter on Human and Peoples' Rights

The African Charter is the principal substantive instrument of the African human rights system, providing a catalogue of rights, duties and their enforcement mechanisms. This part of the study therefore systematically reviews the Charter. It commences with a discussion on the structure and salient features of the Charter then proceeds to examine

³⁹ See the Charter of the Organisation of African Unity (OAU), Articles II (1) (b) & III (4).

⁴⁰ See Article 4 (j) of the Constitutive Act of the African Union.

its substantive provisions. For purposes of this study, the rights under the Charter shall be examined under two broad categories; namely, individual and collective rights. Individual rights shall be classified further, viz, (i) civil and political rights; and (ii) economic, social and cultural rights.

3.2.1.1 Structure and salient features of the African Charter

Structurally, the African Charter consists of 68 Articles and is divided into four chapters: Human and Peoples' Rights; Duties; Procedure of the Commission; and Applicable Principles.⁴¹ It includes all the three generations of rights: civil and political rights⁴²; economic, social, and cultural rights⁴³; and group (peoples') rights.⁴⁴ The Charter is an innovative human rights instrument because some of its provisions distinctively depart from those in other regional human rights systems that preceded it.⁴⁵ As Umozurike correctly argued, although the Charter is different in some way from those of the other regions, it would be an overstatement to describe these differences as autochthonous.⁴⁶ Rather, the differences merely reflect the developments in international human rights law.⁴⁷

⁴¹ See generally, the African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁴² African Charter, Art 2-12.

⁴³ Ibid, Art 14-18.

⁴⁴ Ibid, Art 19-24.

⁴⁵ See Benedek W, 'Peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights' in Kunig P, Benedek W & Mahalu C, (eds.) *Regional protection of human rights by international law: The emerging African system* (1985), p. 59; Umozurike U, *The African Charter on Human and Peoples' Rights* (1997), pp. 87-96; Onguergouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003), pp. 57-58.

⁴⁶ For this view and an analysis of the distinctive features of the African Charter, see Umozurike U, 'The African Charter on Human and Peoples' Rights', (1983) 77 *American Journal of International Law*, pp. 911-913.

⁴⁷ Ibid.

The first notable feature relates to the numerous ‘claw-back’ clauses in the Charter’s provisions, which limit the enjoyment of some rights to the discretion of domestic jurisdictions.⁴⁸ The issue of ‘claw-back’ clauses and how they limit rights under the Charter is discussed in detail in the next chapter. Notably, however, besides the ‘claw-back’ clauses, the Charter lacks a derogation clause that would permit the suspension of certain rights and freedoms in strictly defined circumstances.⁴⁹ This has both advantages and disadvantages. One advantage is that no emergency or special circumstances can justify the suspension of the rights enshrined in the Charter.⁵⁰ States parties are therefore obliged to uphold the rights enshrined in the Charter in good as in bad times. The disadvantage of having no derogation clause in the Charter, on the other hand, is that during emergencies or special circumstances, a state may choose to disregard the Charter in its entirety.⁵¹

There are numerous and significant examples of international instruments that contain an express derogation clause. These include Article 15 of the European Convention on

⁴⁸ ‘Claw-back’ clauses are provisions in the Charter that condition the enjoyment or implementation of rights on national legislation. See Mutua M, ‘The African human rights system in a comparative perspective’, (1993) 3 *Review of the African Commission on Human & Peoples’ Rights*, P. 7; Anthony A, ‘Beyond the paper Tiger: The challenge of a human rights court in Africa’, (1997) 32 *Texas International Law Journal*, p. 518; Buergenthal T, *International human rights* (1995), p. 234.

⁴⁹ See Murray R, *The African Commission on Human and Peoples’ rights and international law* (2003), pp. 123-126; Harris D, O’Boyle & Warwick C, *Law of the European Convention on Human Rights* (1955), pp. 489-506.

⁵⁰ In Communication 105/93, 130/94 & 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples Rights (Annex V), the African Commission stated, *inter alia*, that governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. See also Communication 212/98, *Amnesty international v. Zambia*, Twelfth Annual Activity Report of the African Commission on Human and Peoples Rights (Annex V); Naldi G, ‘Limitation of rights under the African Charter on Human and Peoples’ Rights: The contribution of the African Commission on Human and Peoples’ Rights’, (2001) 17 *South African Journal of Human Rights*, p. 113-114.

⁵¹ Murray R, ‘The African Charter on Human and Peoples’ Rights 1987-2000: An overview of its progress and problems’ (2001) 1 *African human Rights Law Journal*, p 2.

Human Rights, Article 4 of ICCPR and Article 27 of the American Convention on Human Rights.⁵² At the national level, constitutions of some countries, such as South Africa, also have these clauses.⁵³

From the analysis of some of the human rights instruments, it may be concluded that at least three types of circumstances may permit states to derogate from rights⁵⁴: (i) in the event of an exceptional public danger that threatens the existence of the state;⁵⁵ (ii) during a war or other public danger threatening the life of the nation;⁵⁶ and (iii) during a war or any other crisis situation that threatens the independence or security of a state.⁵⁷ Hence, any armed conflict, whether internal or international, may be the basis for such derogation.

Because of the absence of a derogation clause in the Charter, a state is able to disregard, for political reasons, its responsibilities while ill-advisedly reducing the democratic space between the separation of powers and civil liberties.⁵⁸ The UN Sub-Commission on Human Rights echoed the importance of derogation clauses, by inviting all states ‘whose legislation contains no explicit clause that guarantees the legality of the implementation of a state of emergency, to adopt clauses in accordance with international norms and principles...’⁵⁹ This indicates that international human rights norms attach importance to derogation clauses.

⁵² See Sermet L, ‘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*, p. 143.

⁵³ See Constitution of the Republic of South Africa (1996), Art. 37.

⁵⁴ Sermet L, ‘The absence of a derogation clause from the African Charter on Human and Peoples’ Rights: A critical discussion’, note 52 above, p. 143.

⁵⁵ Art 4 ICCPR.

⁵⁶ Art 15 European Convention.

⁵⁷ Art 27 American Convention.

⁵⁸ Sermet L ‘The absence of a derogation clause from the African Charter on Human and Peoples’ Rights, note 52 above, p. 153.

⁵⁹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res1995/33, Question on human rights and states of exception, 35th session, 24 August 1995.

The second notable feature of the Charter relates to its social and economic rights' provisions. Arguably, the intention of incorporating this genre of rights in the Charter was to give effect to the International Covenant on Economic, Social and Cultural Rights (ICESR) at the regional level.⁶⁰ The Charter's approach, however, differs from that of the ICESR in that it avoids the incremental language of progressive realisation of this category of rights. Instead, the obligations that states parties assume with respect to these rights are clearly stated as being of immediate application. Thus, the Charter places economic, social and cultural rights on the same footing as other rights.⁶¹

The African Commission on Human and Peoples' Rights acknowledged the difficulty posed by 'the present hostile economic circumstances'⁶² but reminded the states parties that the Charter required immediate implementation of the rights it contained.⁶³ Because realisation of socio-economic rights in the Charter is not subjected to availability of resources, the Charter is said to be overly ambitious and unrealistic.⁶⁴ Accordingly, it presents a challenging normative framework for the implementation of this category of rights by states parties.⁶⁵

⁶⁰ Adopted and opened for signature, accession and ratification by General Assembly resolution 2200 A (XXI) of 16 December 1966; entered into force 3 January 1976, in accordance with Article 27.

⁶¹ Mbazira C, '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*, p. 339.

⁶² Presentation of the Third Annual Activity Report by the then Chairman of the Commission, Professor U O Umozurike to the 26th Session of the Assembly of Head of States and Government of the Organisation of African Unity, 9-11 July 1990, in African Commission on Human and Peoples' Rights, Documentation, 3rd Annual Activity Report of the African Commission on Human and Peoples' Rights of 28 April 1990 (1990), *Documents of the African Commission*, p. 201.

⁶³ Ibid. See also Mbazira C, 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples Rights: Twenty years of redundancy, progression and significant strides', note 61 above, p. 341.

⁶⁴ Odinkalu C, 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in Evans M & Murray R, *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002), p. 196.

⁶⁵ Ibid.

It is also useful to mention that the Charter adopts a different approach to that of the European and Inter-American human rights systems by encapsulating all the three generations of rights in a single instrument. The European Convention on the Protection of Human Rights and Fundamental Freedoms⁶⁶ (hereinafter ‘European Convention’) does not contain social, economic and cultural rights. Instead, the articulation of these rights in Europe was left to the European Social Charter (ESC)⁶⁷ and the Organisation for Security and Cooperation in Europe (OSCE).⁶⁸

In the Americas, the American Declaration of Rights and Duties of Man⁶⁹ had elaborate provisions on economic, social and cultural rights which were, however, not repeated in the Inter-American Convention on Human Rights (hereinafter ‘the American Convention’).⁷⁰ In 1988, the General Assembly of the Organisation of American States (OAS) eventually adopted a Protocol on Economic, Social and Cultural Rights (the San Salvador Protocol) which reduced into a treaty economic, social and cultural rights recognised under the Inter-American Human Rights system.⁷¹

Thirdly, the Charter incorporates peoples’ rights in its provisions. These rights include equality of all peoples,⁷² right to existence and self-determination,⁷³ right to sovereignty over group wealth and natural resources (including the right to dispose of the same),⁷⁴

⁶⁶ 4 November 1950, 213 UNTS 221.

⁶⁷ See the European Social Charter, 18 October 1961, 529 UNTS 89, entered into force 26 February 1965.

⁶⁸ See Blored A, ‘The human rights dimension of the OSCE: Past, present and prospects’, *OSCE Office for Democratic Institutions and Human Rights (ODIHR) Bulletins 3* (1995), p. 16.

⁶⁹ Res. XXX, 9th International Conference of American States, Bogota, Columbia, 30 March to 2 May 1948, Final Act, p. 38.

⁷⁰ Inter-American Convention on Human Rights (The Pact of *San Jose*), 22 November 1969, entered into force 18 July 1978.

⁷¹ Odinkalu C, ‘Implementing economic, social and cultural rights under the African Charter on Human and Peoples’ Rights’, note 64 above, p. 185.

⁷² African Charter, Art 19.

⁷³ Art 20.

⁷⁴ Art 21.

right to development,⁷⁵ right to national and international peace and security, and the right to a general satisfactory environment favourable to development.⁷⁶ Even though the Charter recurrently refers to ‘peoples’, the concept is not defined anywhere in its provisions hence creating uncertainty and unnecessary speculation on the true import of the term.⁷⁷ This observation shall be revisited at a later stage of this discussion where peoples’ rights will be discussed at length.

The Charter also imposes duties on states and individuals.⁷⁸ The Charter is founded on the premise that rights and duties exist concomitantly.⁷⁹ Thus, its preamble is categorical that ‘the enjoyment of rights and freedoms also implies the performance of duties.’ Accordingly, each of these duties embodies ‘the values of African civilisation.’⁸⁰ The principle that rights reciprocate duties also forms the basis of Article 27(2), which states that rights must be ‘exercised with due regard to the rights of others, collective security, morality and common interest.’ This implies that rights can only make sense in the social and political arena when they are coupled with duties on individuals.⁸¹

Finally, unlike the American and European Conventions, the African Charter does not provide for the establishment of a regional human rights court. This has largely been attributed, and pretentiously so, to the supposed ‘African cultural emphasis on conciliation

⁷⁵ Art 22.

⁷⁶ Art 24.

⁷⁷ Dersso S, ‘The jurisprudence of the African Commission on Human and Peoples’ Rights with respect to peoples’ rights’ (2006) 6 *African Human Rights Law Journal*, p. 360.

⁷⁸ Duties of states are contained in Arts 20(3), 21(5), 22(2), 25 and 26. Arts 27-29 impose duties on individuals. These include the following: duties to the family, society, state, other legally recognised communities and the international community; duty to respect fellow human beings; duty to preserve the harmonious development of the family, strengthen African cultural values and to preserve national security as well as promote African unity.

⁷⁹ Viljoen F, ‘Africa’s contribution to the development of international human rights and humanitarian law’, (2001) 1 *African Human Rights Law Journal*, p. 21.

⁸⁰ Preamble to the African Charter.

⁸¹ Viljoen F, ‘Africa’s contribution to the development of international human rights and humanitarian law’, note 79 above, p. 21.

rather than formal adversarial settlement of disputes.⁸² Allegedly, the drafters of the Charter were guided by the principle that the instrument ‘should reflect the African conception of human rights and should take as a pattern the African philosophy of law and meet the needs of Africa.’⁸³ This kind of motivation was indeed a misguided attempt to jeopardise the long awaited opportunity to entrench a system that would enhance the enforcement of human rights at the regional level. It was quite pretentious for conciliation to be contemplated at the regional level while adversarial settlement of disputes took the centre stage in the domestic legal systems.⁸⁴ Was the African culture to be practised only at the regional level and not the domestic one?

In any event, the absence of an African human rights court provoked heated debate and controversy that later culminated in the adoption on 9 June 1998 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.⁸⁵ Although this is quite commendable, the impact of the continental human rights court is yet to be felt since its establishment is still at the formative stages. At a later part of this chapter, the provisions of the Protocol to the African Court shall be examined in order to give a clear picture of its expected functions within the context of the African human rights system.

⁸² Umozurike U, ‘The African Charter on human and people’s rights’, note 46 above, p. 909.

⁸³ See OAU CAB/LEG rev 1 at p. 1

⁸⁴ Mutua M, ‘The African human rights court: A two-legged stool?’, (1999) 21 *Human Rights Quarterly*, p. 342.

⁸⁵ See Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights. Adopted on 8 June 1998, Reprinted in *Human Rights Law Journal* (1999) 20/4-6, pp. 269-271. See also Mubangizi J, ‘Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains’, (2006) 6 *African Human Rights Law Journal*, p. 147; Mutua M, note 85 above, p. 342.

3.2.1.2 Individual human rights under the Charter

3.2.1.2.1 Civil and political rights

The African Charter recognises the indivisibility and interrelatedness of rights. Specifically, it emphasises that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.⁸⁶ Thus, it intends to underscore the symbiotic relationship subsisting in the inter-dependence of rights whereby one category of rights cannot survive without the other. This relationship notwithstanding, the Charter guarantees a broad range of civil and political rights which now form the bulk of the African Commission's jurisprudence. The commission has over the last two decades, or so, entertained numerous communications alleging violations of civil and political rights under the Charter. What follows therefore is a discussion of these rights and their scope in the light of the commission's jurisprudence.

3.2.1.2.1.1 Right to non-discrimination

Every individual is entitled to enjoy the rights and freedoms recognised and guaranteed in the 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.⁸⁷ The exclusion of individuals from enjoying the rights in the Charter on the basis of these distinctions may amount to discrimination. 'Discrimination' means any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights.⁸⁸ Although discrimination is a particular form of differentiation, the two concepts are distinct. Discrimination refers to differentiation on subjective criteria

⁸⁶ African Charter, Preamble, para 8.

⁸⁷ Art. 2.

⁸⁸ Communication 241/2001, *Purohit and Moore v. Gambia*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples Rights (Annex VII), para 61.

like those mentioned in Article 2 of the Charter.⁸⁹ This does not, however, rule out affirmative action that may be undertaken to redress past inequality.

The African Commission has had the opportunity to interpret Article 2 in a number of cases. For instance, in *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia*⁹⁰, the Zambian government expelled West African nationals on grounds that they were living in Zambia illegally and that the African Charter did not abolish the requirements for visas and the regulation of movement over national borders between member states. The commission held that the nature of the expulsion by the Zambian government was discriminatory on nationality basis. The commission further stated that Zambia, by ratifying the African Charter, was committed to 'secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals.'⁹¹

The commission also found a violation of Article 2 in *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Interafricaine des Droits de l'Homme (OMCT, AIJD, CIJ, UIDH) v. Rwanda*.⁹² The communication alleged the expulsion of Burundian refugees from Rwanda as well as summary executions of Tutsis and political opponents, among other human rights violations. The commission found that the violations of the rights of the individuals in this case were on the basis of their being Burundian nationals, members of the Tutsi ethnic group or members of opposition parties, and as such violated Article 2 of the Charter. The commission concluded that:

⁸⁹ Umozurike U, *The African Charter on Human and Peoples' Rights*, note 45 above, p. 32; Onguergouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*, note 45 above, pp. 77-78.

⁹⁰ *Rencontre Africaine pour la De fense des Droits de l'Homme v. Zambia* (2000) AHRLR, (ACHPR 1996), p. 321.

⁹¹ *Ibid*, para 22.

⁹² Communication 27/89, 46/91, 49/91, 99/93, *Organisation Mondiale Contre la Torture & Others v. Rwanda*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X).

There is considerable evidence, undisputed by the government, that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2.⁹³

It is evident that discrimination has been practised in many African states, more so against non-nationals. Mass expulsions, discrimination at the workplace, and subjection to unfavourable social and economic conditions, among other vices, have been experienced by foreign nationals in many African states.⁹⁴ The latest of such activities was the series of xenophobic attacks on foreigners living in South Africa. Between April and May 2008, foreigners were targeted, and some attacked and killed, by some South African nationals. As a result of the nationwide attacks, more than 30,000 people were internally displaced and another 30,000 returned to their countries for fear of further attacks.

Such discriminative practices, however, have often constituted a flagrant violation of Article 2 of the Charter, among other provisions. It is appreciated that African states are generally faced with many challenges, mainly of economic nature. In the wake of such difficulties, some resort to radical legislative and other measures to protect their nationals and their economy from non-nationals. Whatever the situation, however, such measures should not be taken to the detriment of the enjoyment of human rights.⁹⁵

Some governments have also been accused of promulgating legislation that is discriminative against some of its citizens. For instance, in *Purohit and Moore v.*

⁹³ Ibid, para 22.

⁹⁴ Boukongou J, 'The appeal of the African system for protecting human rights', (2006) 6 *African Human Rights Law Journal*, p. 278.

⁹⁵ Communication 159/96, *Union Interafricaine des Droits de l'Homme & Others v. Angola*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X), para 16.

*Gambia*⁹⁶, the communication alleged that the principal legislation governing mental health in Gambia, namely the *Lunatics Detention Act of 1917*, was outdated and discriminative in effect. The complainants contended, as there were no review or appeal procedures against determination or certification of one's mental state for both involuntary and voluntary mental patients, the legislation did not allow for the correction of an error assuming a wrong certification or wrong diagnosis had been made.⁹⁷ In such circumstances, they further contended, if an error was made and there was no avenue to appeal or review the medical practitioners' assessment, there would be a great likelihood that a person could be wrongfully detained in a mental institution.⁹⁸ In finding a violation of Article 2 and 3 of the Charter, the commission stated:

Clearly the situation presented above fails to meet the standards of antidiscrimination and equal protection of the law as laid down under the provisions of Articles 2 and 3 of the African Charter and Principle 1(4)⁹⁹ of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.¹⁰⁰ The African Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being.¹⁰¹ Like any other human being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity.

⁹⁶ Communication 241/2001, *Purohit and Moore v. Gambia*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples Rights (Annex VII).

⁹⁷ *Ibid*, para 27.

⁹⁸ *Ibid*.

⁹⁹ Principle 1(4) provides: 'There shall be no discrimination on the grounds of mental illness.' 'Discrimination' means any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights [footnote retained].

¹⁰⁰ GA Res 46/119, 46 UN GAOR Supp. (No. 49) at 189, UN Doc. A/46/49 (1991) [footnote retained].

¹⁰¹ Article 3 of the UN Declaration on the Rights of Disabled Persons, UNGA Resolution 3447(XXX) of 9 December 1975, provides 'Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible.' [footnote retained].

This right should be zealously guarded and forcefully protected by all states party to the African Charter in accordance with the well established principle that all human beings are born free and equal in dignity and rights.¹⁰²

The African Commission's observation in this regard is quite commendable because it draws the nexus between the right to non-discrimination and human dignity. In other words, discrimination undermines a person's dignity by suggesting that he or she is inferior to the rest. Human dignity is an inherent basic right to which all human beings, regardless of their capabilities or disabilities, as the case may be, are entitled to without discrimination. It is therefore an inherent right which 'every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.'¹⁰³

It must, however, be noted that the scope of the right to non-discrimination does not exclude reasonable measures intended to protect or support individuals who are disadvantaged by reason of their race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.¹⁰⁴ Such measures are generally referred to as affirmative action or 'positive discrimination.' Some states, such as South Africa, have come up with concepts like 'fair discrimination' to justify affirmative action.¹⁰⁵ Hence, differentiation will not amount to discrimination if it is intended to redress imbalances in society and if it does not result to the violation of the right to equality and other associated rights. This essentially means that there is a very faint line between differentiation and discrimination.

¹⁰² Universal Declaration of Human Rights of 1948, Article 1 [footnote retained]. *Purohit and Moore v Gambia*, note 96 above, paras 35–38.

¹⁰³ *Ibid*, para 57.

¹⁰⁴ See Umzurike U, *the African Charter on Human and Peoples' Rights*, note 45 above, p. 32.

¹⁰⁵ See generally chapter two of the Constitution of South Africa (1996), *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA); and the *Employment Equity Act*.

The right to non-discrimination is closely linked to the right to equality.¹⁰⁶ Article 3 of the Charter guarantees every individual the ‘twin-rights’ of equality before the law and equal protection of the law.¹⁰⁷ This essentially means that the law should not have regard for race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Like the right to non-discrimination, the right to equality is not absolute, but rather recognises relative equality. Relative equality allows for a differential treatment of individuals proportionate to their circumstances.

In *Union Interafricaine des Droits de l'Homme, Federation International des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Senegal and Association Malienne des Droits de l'Homme (UIDH, FIDH, RADDHO, ONDH and AMDH) v. Angola*¹⁰⁸, the communication alleged the expulsion of West Africans from Angola without the opportunity to challenge the matter before the domestic courts. The commission held that states parties are under obligation to ensure that persons living in their territory, whether nationals or non-nationals enjoy the rights guaranteed under the Charter. Thus, it found that the victims’ right to equality before the law was trampled on, in violation of Article 3 of the Charter, because of their origin.¹⁰⁹

The right to equality and equal protection of the law requires that no law shall be discriminatory either of itself or in its effect.¹¹⁰ Hence, this right would be violated when, for example, a public authority in the performance of the functions of a public office discriminates against a person. The same could be said of a law that treats people in a discriminatory manner in respect of, for example, access to shops, hotels, lodging-houses,

¹⁰⁶ Onguergouz F, *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*, note 45 above, p. 77.

¹⁰⁷ African Charter Art 3(1) & (2).

¹⁰⁸ Communication 159/96, *Union Interafricaine des Droits de l'Homme & Others v. Angola*, Eleventh Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex II), para 1.

¹⁰⁹ *Ibid*, para 18.

¹¹⁰ See section 82 of Constitution of the Republic of Kenya 1963, as amended in 1999.

public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

Most communications before the commission that alleged the violation of Article 3 also alleged the violation of Article 2 of the Charter. Thus, it is inevitable to conclude that the right to non-discrimination and the right to equality are closely related, if not intertwined.

3.2.1.2.1.2 Right to life and integrity of the person

Article 4 of the Charter guarantees the right to life in much precise terms. It begins with affirming the inviolability of human beings then proceeds to acknowledge the entitlement to respect for life and integrity of the person.¹¹¹ The provision prohibits arbitrary deprivation of the right to life. This right has been regarded as the most fundamental right on the basis of which other rights accrue.¹¹² As a matter of fact, a person cannot claim any other right if his or her right to life has been violated. Generally, this right is non-derogable except in certain circumstances judicially recognised or resulting from lawful acts of war or self-defence.¹¹³ However, in some national jurisdictions, such as South Africa, this right is non-derogable even in times of emergencies.¹¹⁴

The Charter is silent on what might constitute arbitrary deprivation of the right to life. In the absence of a working definition from both the Charter and the commission, arbitrary deprivation of the right to life should be understood to mean extra-judicial killings.¹¹⁵

¹¹¹ Article 4 states, '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'.

¹¹² See Nmehielle O, *The African human rights system* (2001), p. 85.

¹¹³ See Davidson S, *The Inter-American human rights system* (1992), pp. 262-263; Onguergouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*, note 45 above, p. 91.

¹¹⁴ See Constitution of South Africa (1996), Art. 37.

¹¹⁵ See Murray R, 'Report on the 1996 Sessions of the African Commission on Human and Peoples' Rights- 19th and 20th Sessions: 26 March- 4 April, and 21-23 October 1996', (1997) *18 Human Rights Law Journal*, p. 19.

This reasoning could be deduced from *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Inter africaine des Droits de l'Homme v. Rwanda*, where the commission observed that extra-judicial killings of Rwandan villagers by the Armed Forces violated the right to life guaranteed by the Charter.¹¹⁶

The commission's response to the violation of the right to life has generally been unsatisfactory because it has not only failed to provide the definition of the right to life within the context of the Charter, but has also failed to find its violation in certain instances. For example, in *International Commission of Jurists v. Rwanda*¹¹⁷, it failed to find a violation of the right even when it was informed of the extra-judicial killings that were taking place in Rwanda. Instead, it requested permission from the Rwandan government to conduct on-site investigation of the allegations.¹¹⁸

Despite the quick response from the government, the commission did not immediately send a mission to Rwanda. It was until March 1994, after about four years from the time of its request, when it decided to send a two-person mission with the assistance of the United Nations.¹¹⁹ Visiting Rwanda four years after a communication had been lodged was both unfortunate and undesirable. The commission should have used that opportunity to elaborate on the context of the right to life as contemplated in the Charter.

¹¹⁶ Communication 27/89, 46/91, 49/91, 99/93, *Organisation Mondiale Contre La Torture and Association Internationale des juristes Democrates), Commission Internationale des Juristes (C.I.J) Union Inter africaine des Droits de l'Homme v. Rwanda*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X).

¹¹⁷ Communication 49/91, *International Commission of Jurists v. Rwanda*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X).

¹¹⁸ Nmehielle O, *The African human rights system*, note 112 above, p. 87.

¹¹⁹ Ibid.

In *Orton and Vera Chirwa v. Malawi*¹²⁰, the commission also failed to clarify the scope of this right. Although the communication alleged violation of the right to fair trial, right to liberty and freedom from torture, the commission went ahead to find the violation of the right to life. Mr. and Mrs. Chirwa, who were under political persecution from the then government of Kamuzu Banda, had their death sentences commuted to life imprisonment. They were held in solitary confinement, denied good food, adequate medical care, shackled for long periods of time in their cells and prevented from seeing each other for years. Mr. Chirwa later died in prison while the case was pending before the commission. The commission found that Malawi had violated not only the right to fair trial, liberty and freedom from torture but also, the right to life was violated circumstantially.¹²¹ The findings of the commission are unsatisfactory in as far as it failed to comprehensively interpret those provisions that had been violated by Malawi.

In *Interights et al (on behalf of Mariette Sonjaleen Bosch) v. Botswana*¹²², the communication related to the conviction for murder and subsequent sentencing to death of Mariette Bosch in Botswana, allegedly in violation of Article 4 of the Charter. The complainants argued, among other things, that the death penalty had been imposed in breach of the Charter. While accepting Botswana's argument that the death penalty was not *per se* in breach of the Charter, the commission cited Inter-American jurisprudence which stated that the death penalty should be imposed only after full consideration of the circumstances of the offence and of the offender.¹²³ It found that the court in respect of Mariette Bosch had looked at the circumstances fully. The commission also observed that:

¹²⁰ Communications 64/92, 68/92 and 72/92, *Orton and Vera Chirwa v. Malawi*, Eighth Annual Activity Report of the African Commission on Human and Peoples Rights.

¹²¹ Ibid.

¹²² Communication 240/2001, *Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana*, Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VII).

¹²³ Ibid, para 52.

... it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty. This is illustrated by the UN General Assembly's adoption of the 2nd Optional Protocol to the ICCPR and the general reluctance by those States that have retained capital punishment on their Statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a 'Resolution Urging States to envisage a Moratorium on the Death Penalty' and therefore encourages all States party to the African Charter on Human and Peoples' Rights to take all measures to refrain from exercising the death penalty.¹²⁴

It then 'strongly urged the Republic of Botswana to take all measures to comply with the Resolution urging States to envisage a Moratorium on the Death Penalty.'¹²⁵ Despite not finding a breach of the Charter, the commission also required the defendant state to 'report back to the African commission when it submits its report in terms of Article 62 of the African Charter on measures taken to comply with this recommendation.'¹²⁶

This appears to be contradictory, although not dissimilar, to the approach that has been adopted by other international bodies.¹²⁷ The commission had previously held that where a trial which ordered the death penalty was not fair and so violated Article 7 of the Charter, the subsequent execution will further violate the right to life under Article 4.¹²⁸ Murray observed that although individual commissioners have sometimes appeared to suggest that the death penalty is a violation of the guarantee of the right to life in Article 4 of the Charter, the commission as a whole has not taken this position.¹²⁹

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ See in this regard the ICJ's approach in the *Legality of the Use of Force (Yugoslavia v 10 NATO States)* cases, ICJ Reports, (2004), p. 3. See also Murray R, 'Developments in the African human rights system 2003-04', (2006) 6/1 *Human Rights Law Review*, p. 169.

¹²⁸ Communication 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

¹²⁹ Murray R, 'Developments in the African human rights system 2003-04', note 127 above, p. 169.

In the examination of state reports, commissioners have reportedly asked states whether they have abolished the death penalty.¹³⁰ For example, at the 31st Session of the commission in May 2002, one commissioner asked the delegation from Cameroon: ‘the death sentence is still in the criminal code but it has been said that for more than 15 years there has been no execution. Are there any efforts to guarantee the right to life and thus abolish the death sentence?’¹³¹ This essentially means that the commissioner perceived the abolition of the death sentence as a guarantee to the right to life. Once again, it failed to seize this moment to define the scope of the right to life as contemplated in the Charter.

In the *Resolution Urging the State to Envisage a Moratorium on the Death Penalty*¹³², the commission urged states to review their approach and consider abolishing the death penalty. The commission stated that it:

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.... Calls upon all states 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 death penalty; (c) reflect on the possibility of abolishing death penalty.¹³³

From the foregoing, it is imperative to note that the commission is not unequivocal on the abolition of the death penalty. Rather, it gives states two options, the first being limiting the imposition of the death penalty only to the most serious crimes and the second being considering on the possibility of abolishing the penalty. Thus, it can be said that the right to life in the context of the African human rights system does not exclude judicial

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Adopted at 26th Ordinary Session on 15 November 1999, ACHPR/Res.42(XXVI), p. 99.

¹³³ *Resolution Urging the State to Envisage a Moratorium on the Death Penalty*, ACHPR/Res.42(XXVI), p. 99.

execution. Generally, the commission still has a lot to do with regard to the clarification of the right to life. The commission is yet to interpret Article 4 in the light of issues such as the right to life of a foetus, and other controversial components of the right to life that have come before the UN and other regional mechanisms.¹³⁴ The importance of the right to life in Africa cannot be overlooked. This is especially because it is one of those rights that have been violated with impunity by successive brutal regimes which have engaged in endless power struggles and extra-judicial killings.¹³⁵

3.2.1.2.1.3 Right against all forms of slavery, slave trade, torture and cruel, inhuman or degrading treatment

Article 5 of the Charter protects a number of related rights; namely, (i) the right to the respect of the dignity inherent in a person; (ii) the right to recognition of one's legal status; and, (iii) the right against all forms of exploitation and degradation of people particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.¹³⁶ The right to the respect of the dignity inherent in a human being is the basis of the human rights concept. This concept, as already discussed in the previous chapter, acknowledges that every individual has legal entitlements (rights) by virtue of being human. It is on the basis of this acknowledgement of one's legal status that Article 5 recognises the fact that slavery is a dehumanising practice because it exploits people. Slave trade has been one of the greatest violations of human rights ever to be committed in Africa.¹³⁷ Slave trade and slavery in their contemporary forms include practices such as: illegal sale and traffic in

¹³⁴ Nmehielle O, *The African human rights system*, note 112 above, p. 88.

¹³⁵ *Ibid*, p. 85.

¹³⁶ Article 5 states: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.

¹³⁷ For a detailed discussion on how the trade affected human rights in Africa, see Chapter two of this thesis.

human beings, pledging of young girls for debts, forced marriages in exchange of dowry; use of domestic servants for extremely low pay; child labour; and, forced labour.¹³⁸

The problem presented by the provisions of Article 5 relating to slavery is that of enforcement. Slavery is a violation that cannot easily be traced to states because it is mostly perpetrated by individuals.¹³⁹ It is often rooted in traditional and religious practices.¹⁴⁰ The fact that this practice stems from non-state quarters accounts for the few complaints the African Commission has so far received in this area.

In *S.O.S Esclaves v. Mauritania*¹⁴¹, the complainant alleged that, in some cases, the government of Mauritania supported the perpetrators of slavery, which was still a common practice in the country.¹⁴² The communication stated, *inter alia*, that ten adults were sold and bought as slaves; children from four families were enslaved by their parents' masters; two women were married to their masters against their will; and six people and their families were disposed of their ancestral property by their parents' masters.¹⁴³ The communication was, however, found inadmissible for non-exhaustion of domestic remedies.¹⁴⁴

In *Bah Ould Rabah v. Mauritania*¹⁴⁵, the complainant and his family were forcefully expelled from their ancestral home by a man named Mohamed Bah on the grounds that

¹³⁸ Ankumah E, *The African Commission on Human and Peoples' Rights* (1996), p. 119. See also Nmehielle O, *The African human rights system*, note 112 above, p. 89.

¹³⁹ Nmehielle O, *ibid*, p. 89. See also Onguergouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*, note 45 above, p. 109.

¹⁴⁰ See Ankumah E, *The African Commission on Human and Peoples' Rights*, note 138 above, p. 119, where the author discusses some of these dehumanising traditional practices.

¹⁴¹ Communication 198/97, *S.O.S Esclaves v. Mauritania*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

¹⁴² *Ibid*, para 1.

¹⁴³ *Ibid*, para 2.

¹⁴⁴ *Ibid*, para 17.

¹⁴⁵ Communication 197/97, *Bah Ould Rabah v. Mauritania*, Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VII).

the deceased mother of the complainant was his slave. Subsequently, the house bequeathed to her descendants and the whole estate around it became legally the property of Mohamed Bah, the alleged 'owner' of the deceased.¹⁴⁶ The complainant therefore alleged violation of Article 5 of the African Charter. The government of Mauritania claimed that the dispute was between two citizens who were members of the same family and that the allegations could not be justified as slavery.¹⁴⁷

The commission observed that the consequences of slavery still existed in the respondent state. It therefore called on all public institutions in Mauritania 'to persevere in their efforts so as to control and eliminate all the offshoots of slavery.'¹⁴⁸ It then ordered the government to 'take the appropriate steps to restore the plaintiff his rights.'¹⁴⁹ The commission, as has been its custom, failed to specify the 'appropriate steps' the government of Mauritania needed to take to restore the plaintiff's rights. It also did not elaborate on the content of the right against slavery, especially in its contemporary application. This indeed is an overt failure on the part of the commission.

Article 5 also provides for the prohibition of all forms of torture, cruel, inhuman or degrading punishment and treatment. The term 'torture' is still highly debatable and has generated divergent views in academic circles.¹⁵⁰ In Article 1 of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT), torture is defined as:

¹⁴⁶ Ibid, para 1.

¹⁴⁷ Ibid, para 26.

¹⁴⁸ Ibid, paras 29 & 31.

¹⁴⁹ Ibid.

¹⁵⁰ See Cullen A, 'Defining torture in international law: A critique of the concept employed by the European Court of Human Rights' (2003) 34 *California Western International Law Journal*, p. 29, where the author sees the need for a less definitive and broader view of the concept of torture. See also Mujuzi J, 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights', (2006) 6 *African Human Rights Law Journal*, p. 429.

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.

Torture is still a persistent problem in Africa. It has been said that this practice is usually employed by both governments and individuals, mainly to counter dissent and to impose ideas or authority on others.¹⁵¹ According to Nmehielle, in Africa, ‘torture, cruel, inhuman and degrading punishment are constant tools in the hands of many dictators to smother their opponents.’¹⁵² Mujuzi notes that due to this, it is unsurprising that the African Charter puts torture in the same category as slavery and slave trade, and categorises them as ‘forms of exploitation and degradation.’¹⁵³

From the commission’s jurisprudence, it can be deduced that torture includes acts such as beatings usually carried out by security forces, long periods of detention without charge or trial, overcrowded detention cells and prisons and detention in solitary cell. In *Krishna Achuthan (on behalf of Aleke Banda)*, *Amnesty International (on behalf of Orton and Vera Chirwa v Malawi*¹⁵⁴, for example, the commission held that conditions of

¹⁵¹ Statement made at an international seminar ‘African cultures and the fight against torture’ available at http://ww2.fiacat.org/en/article.php3?id_article=41, last accessed 31 July 2007. See also Mujuzi J, ‘An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples’ Rights’, note 150 above, p. 429.

¹⁵² Nmehielle O, *The African human rights system*, note 112 above, p. 90.

¹⁵³ Mujuzi J, ‘An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples’ Rights’, note 150 above, p. 429.

¹⁵⁴ Communication 64/92, 68/92, 78/92, *Krishna Achuthan (on behalf of Aleke Banda)*, *Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*. The Commission was also seized with other communications alleging the violation of this right. However, they were dismissed for failing to meet the admissibility requirement. See, for example, See *Nziwa Buyingo v. Uganda*, Communication No. 8/88;

overcrowding and acts of beating and torture that took place in prisons in Malawi contravened this provision of the Charter. The commission has also found the holding of a prisoner in handcuffs, airless and dirty cells, chained by foot to the wall in the cell, and the denial of medical attention in situation of deteriorating health to be acts of torture and cruel, inhuman and degrading treatment.¹⁵⁵

In *Curtis Francis Doebbler v. Sudan*¹⁵⁶, eight Muslim university students on a picnic were arrested and charged with committing, in a public place, acts contrary to public morality prohibited under Article 152 of the *Sudanese Criminal Law of 1991*.¹⁵⁷ The alleged offensive acts consisted of girls kissing, wearing trousers, dancing with men, crossing legs with men, and sitting and talking with boys.¹⁵⁸ They were subsequently convicted and sentenced to fines and lashes. The lashes were executed in public under the supervision of the national court. The complainant alleged that the punishment violated Article 5 of the African Charter. In finding a violation and requesting the abolition of the penalty of lashes by Sudan, the African Commission observed as follows:

Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological

Hilarie v. Benin, Communication no. 17/88; and *El Hadji Boubacare v. Benin*, Communication no. 18/88 Law Reports of the African Commission Series A, Volume 1, ACHPR/LR/A1 (1997).

¹⁵⁵ Communication 137/94, 139/94, 156/96, 161/97, *International PEN, Constitutional Rights Project, and Civil Liberties Organisation, Interights (on behalf of Ken Saro-Wiwa Jr.) v Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V) (hereafter 'the Saro Wiwa case').

¹⁵⁶ Communication 236/2000, *Curtis Francis Doebbler v. Sudan*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VII). See also Banderin M, 'Recent developments in the African regional human rights system', (2005) 5/1 *Human Rights Law Review*, p. 133.

¹⁵⁷ Article 152 of the *Sudanese Criminal Law of 1991* provides as follows: '1. Whoever commits, in a public place, an act, or conducts himself in an indecent or immoral dress, which causes annoyance to public feelings, shall be punished, with whipping, not exceeding forty lashes, or with fine, or with both. 2. The act shall be deemed contrary to public morality, if it is so considered in the religion of the doer, or the custom of the country where the act occurs.'

¹⁵⁸ Communication 236/2000, *Curtis Francis Doebbler v. Sudan*, note 156 above, para. 3.

suffering, but which humiliate or force the individual [to act] against his will or conscience.¹⁵⁹

While ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case, the commission stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.¹⁶⁰ In this regard, the commission observed that no government has the right to apply physical violence on individuals for offences because that would be tantamount to sanctioning state sponsored torture under the Charter.¹⁶¹

The commission further rejected the argument by Sudan that the lashings were justified because the authors of the petition committed acts found to be criminal according to the laws in force in the country. It did not, however, address Sudan's argument that 'it was better for the victims to have been lashed rather than hold them in detention for the said criminal offences and as such deny them of the opportunity to continue with their normal lives.'¹⁶² This is a relativist argument often advanced to establish that lashing is less cruel, inhuman or degrading than imprisonment. The argument, however, fails to appreciate that a punishment does not lose its degrading character just because it is a more effective deterrent.¹⁶³

The commission's jurisprudence on the violation of Article 5 of the Charter is rather scanty because it is yet to articulate on what amounts to torture, cruel, inhuman and degrading punishment in the context of the African Charter as has been done in the

¹⁵⁹ Ibid, para 36.

¹⁶⁰ Para 37.

¹⁶¹ Para 42.

¹⁶² Para 34.

¹⁶³ Banderin M, 'Recent developments in the African regional human rights system', note 156 above, p. 133.

European and Inter-American systems.¹⁶⁴ This may partly be attributed to the few communications alleging the violation of this right. The fact that there are few complaints on the violation of this right, however, does not necessarily depict the situation on the ground. This is because, and sadly so to state, many practices which violate these provisions continue to persist throughout the continent.¹⁶⁵ Notably, corporal punishment still punctuates the criminal laws of many African states.¹⁶⁶ Certain religious and cultural practices such as amputation of limbs as criminal punishment are also common.

Although the commission has not evolved substantial jurisprudence on the right against torture and inhuman or degrading treatment, it has all the same taken initiatives to elaborate on, and protect this right. For instance, it adopted a *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)*.¹⁶⁷ The Robben Island Guidelines (RIG) approaches the question of torture in three broad ways: prohibition, prevention, and responding to the needs of victims.¹⁶⁸ Specifically, the

¹⁶⁴ See, for example, *Tyrer v. UK* (1978) 2 *ECHR*, p. 1, where the court held that birching by order of a judicial authority in the Isle of Man amounted to degrading punishment and violated Article 3 of the European Convention. Similarly the court held in *Campbell and Cosans v. UK* 1982 4 *ECHR*, p. 293 that although birching in Scottish schools did not violate Article 3 of the Convention *per se*, suspension of the applicants from school refusing to submit to the punishment was in breach of parental convictions against corporal punishment protected under Article 2 of Protocol No. 1.

¹⁶⁵ Nmehielle O, *The African Human Rights system*, note 112 above, p. 90.

¹⁶⁶ For instance, Section 18 of the Criminal Code of Southern Nigeria and S 68 (1)(f) of the Penal Code of Northern Nigeria, which authorise flogging for prescribed offences. S 55(1)(d) of the code allows the reasonable chastisement of a wife by her husband, if they are married under the customary law. See Umzurike U, *The African Charter on Human and Peoples' Rights*, note 45 above, p. 44.

¹⁶⁷ *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)*, adopted by the African Commission at its 32nd ordinary session, 17-23 October 2002, Banjul, The Gambia, Sixteenth Annual Activity Report (2002-2003).

¹⁶⁸ For a detailed discussion on these guidelines see, Mujuzi J, 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights', note 150 above, p. 440.

guidelines require states to, *inter alia*: criminalise torture; combat impunity for both nationals and non-nationals who commit acts of torture; establish complaints and investigation procedures to which all persons can bring their allegations of torture; take steps to ensure that conditions of detention comply with international standards; and train and empower, among others, law enforcement officers so that they refrain from using torture.¹⁶⁹

The guidelines also oblige states to ensure that all victims of torture and their dependants are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support.¹⁷⁰ Remarkably, the guidelines recognise families and communities which have been affected by the torture and ill-treatment of one of its members as torture victims.¹⁷¹ A detailed discussion of these guidelines is beyond the scope of the present study.

Suffice it to state that in spite of it being a step towards the right direction; the RIG is not binding on states, as it is a mere declaration and not a treaty. Additionally, its purported enforcement mechanism is said to be very weak. This is because, the guidelines establish a follow-up committee of only five members with the mandate to organise seminars, to disseminate the RIG, to develop and propose to the commission strategies to promote and implement the RIG at national and regional levels, to promote and facilitate the implementation of the RIG within member states, and to draft a progress report to the African Commission at each session. This is clearly too much work for only five individuals. The commission could also give effect to the guidelines when pronouncing its findings and recommendations to communications alleging the violation of this right.¹⁷²

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

In another initiative the commission liaised with certain institutions, especially prison authorities, in some European countries in an effort to gain an insight on how, among other things, torture can be prevented in places of detention.¹⁷³ Commissioners have in the past visited countries such as France. The commission has also granted observer status to many NGOs that deal with torture.¹⁷⁴ It is hoped that with time, the commission's jurisprudence on the violation of this right will evolve to address the perturbing levels of torture, inhuman and degrading treatment or punishment on the continent.

3.2.1.2.1.4 Right to liberty and security of the person

Article 6 of the Charter provides that 'every individual shall have the right to liberty and to the security of his 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.' This Article guarantees individuals physical liberty by prohibiting unlawful arrests and detention. The enjoyment of this right, however, is subject to reasons and conditions laid down by law. The right to liberty and security of the person requires the state to have justifiable grounds for depriving a person of his or her liberty, and further requires such deprivation to be in accordance with stipulated procedures.¹⁷⁵

The Charter is not explicit on what 'law' this right should be subjected to: is it international law or domestic legislations? One might argue that the drafters intended the term 'law', as used in this Article, to mean international law. This is because there is imminent danger in subjecting the formulation of the parameters of this right to domestic legislation. The danger is to the effect that what is 'law' in a certain domestic jurisdiction

¹⁷³ See Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, para 27 & Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, para 30.

¹⁷⁴ For a detailed discussion of the role of NGOs in the African human rights system, see Motala Z, 'Non-governmental organisations in the African system', in Evans M & Murray R, *The African Charter on Human and Peoples' Rights* (2002), pp. 246-279.

¹⁷⁵ Nmehielle O, *The African Human Rights system*, note 112 above, p. 92.

may be an oppressive legislation that facilitates the violation of this right.¹⁷⁶ Essentially, we would agree with the proposition that the law to be relied on in limiting this right must be consistent with the standards recognised under international law.¹⁷⁷

The African Commission has had the opportunity to address communications alleging violation of Article 6 of the Charter. In *Henry Kalenga v. Zambia*¹⁷⁸, for example, the complainant, who was detained without trial, petitioned the commission for his release. Zambia's Ministry of Legal Affairs later informed the commission of his release, after being in detention for three years. The commission proceeded to declare the matter amicably resolved without consulting the victim. The conclusion of the case by the commission without developing its jurisprudence on this right or pronouncing the appropriate relief was rather disappointing. Similarly, in *International Pen v. Burkina Faso*¹⁷⁹, where the victim alleged unlawful detention, a notification to the commission of the release of the victim was enough for it to declare the matter amicably resolved.¹⁸⁰

The commission's approach of declaring communication's amicably resolved without giving substantive reasoning was not taken lightly.¹⁸¹ Subsequently, it resolved to adopt a new approach of contacting the petitioner(s) to inquire whether other forms of relief are desirable besides release from detention.¹⁸² It also found violation of Article 6 where a victim was detained for seven years without trial.¹⁸³ While this is a welcome step in the

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Communication 11/88, *Henry Kalenga v. Zambia*, ACHPR/LR/A1 (1997).

¹⁷⁹ Communication 22/88, *International Pen v. Burkina Faso*, ACHPR/LR/A1 (1997), p. 7.

¹⁸⁰ Nmehielle O, *The African human rights system*, note 112 above, p. 93.

¹⁸¹ See, for example, the arguments in Ankumah E, *The African Commission on Human and Peoples' Rights*, note 138 above, p. 123.

¹⁸² A good example cited by Nmehielle is communication 62/91, *Committee for the Defense of Human Rights (Jennifer Madike) v. Nigeria*, ACHPR/LR/A1 (1997), p. 60, where despite receiving information that the detainee had been released, the commission inquired of the petitioner if it wished to pursue the case further. See Nmehielle O, *The African human rights system*, note 112 above, p. 94.

¹⁸³ Communication 103/93, *Alhassan Abubaka v. Ghana*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X), that the detention of the victim in this case. In

right direction, the commission must go ahead to determine the award of compensation in cases where it finds a violation of Article 6, or any other provisions of the Charter.¹⁸⁴ The fact that Article 6 does not make specific provisions regarding compensation should not in any way deter the commission from applying the standards known in international law, especially as authorised in Article 60 of the Charter.¹⁸⁵

3.2.1.2.1.5 Right to a fair trial

Article 7 guarantees the right to a fair trial in the following terms:

1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
 - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - (c) the right to defence, including the right to be defended by counsel of his choice;
 - (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

This Article lays down some essential components of a fair trial namely: (i) fair hearing; (ii) the right of appeal; (iii) presumption of innocence; (iv) defence by counsel of one's

Communication 39/90, *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*, Eighth Activity Report of the African Commission on Human and Peoples' Rights (Annex VI); Tenth Activity Report of the African Commission on Human and Peoples' Rights (Annex X).

¹⁸⁴ Nmehielle O, *The African human rights system*, note 112 above, p. 94.

¹⁸⁵ Ibid. Article 60 provides that: 'The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.'

choice; (v) trial by an impartial court or tribunal; (vi) individual criminal responsibility; and (vi) prohibition of ex-post facto laws.

Article 7(1)(a) guarantees the right to an effective appeal to competent national organs against acts violating fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force. According to the construction of the commission, the term ‘appeal’ seems to refer to the right to lodge an appeal to a higher court, where one exists. In *The Constitutional Rights Project (Zamani Lekwot & 6 Others) v. Nigeria*¹⁸⁶, the victims were convicted and sentenced to death under the *Nigerian Civil Disturbances (Special Tribunal) Act*. The petitioners contended, *inter alia*, that there was a violation of the right of appeal under Article 7(1)(a) of the Charter. The commission held that to foreclose any avenue of appeal to ‘competent national organs’ in criminal cases violates Article 7(1)(a) of the African Charter.

The commission had earlier held section 11(4) of the Nigerian *Armed Robbery and Firearms (Special Provisions) Act*¹⁸⁷, which restricted appeals, to be a violation of the right to appeal guaranteed under Article 7(1)(a) of the Charter.¹⁸⁸ Similarly, the commission has also found ‘the system of executive confirmation, as opposed to appeal, provided for in the institution of special tribunals’ to be contrary to Article 7(1)(a).¹⁸⁹ In other words, special tribunals are not entitled to substitute the right to appeal with the system of executive confirmation. The phrase ‘competent national organs’ in Article 7(1)(a) has been said to envisage ingredients such as the expertise of the judges and the

¹⁸⁶ Communication 87/93, *The Constitutional Rights Project (Zamani Lekwot & 6 Others) v. Nigeria*, ACHPR/LR/A1 (1997), p. 104.

¹⁸⁷ The sub-section provided that ‘no appeal shall lie from a decision of a tribunal under this Act or from any confirmation or dismissal of such decision by the governor.’ See Nmehielle O, *The African human rights system*, note 112 above, p. 96.

¹⁸⁸ Communication 60/91, *Constitutional Rights Project (Wahab Akumu, G Adegga & Others) v. Nigeria*, p. 58.

¹⁸⁹ Communication 48/90, *Amnesty International & Others v. Sudan*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V), para 69.

inherent justice of the laws under which they operate.¹⁹⁰ Consequently, ‘to deprive a court of the personnel qualified to ensure that they operate impartially denies the right to individual’s to have their case heard by such bodies.’¹⁹¹

Reference to ‘court or tribunal’ in the subsection indicates that the Charter applies to all courts and tribunals, whether specialised or ordinary.¹⁹² Thus, the commission has maintained that a military tribunal, *per se*, is not offensive to the rights in the Charter, nor does it imply an unfair or unjust process; neither is such a tribunal negated by the mere fact of being presided over by military officers.¹⁹³ Such tribunals may, however, present serious problems in areas of equitable, impartial and independent administration of justice. For them to be recognised, at least in the context of subsection 7(1)(a) of the Charter, they must be subject to the same requirements of fairness, openness, justice, independence, and due process as any other ordinary court.¹⁹⁴

Article 7(1)(b) deals with the presumption of innocence, which is a criminal law principle that requires a person to be presumed innocent until proved guilty. In criminal cases, the burden of proof always lies with the prosecution. In most military dictatorships, however, this right has always been infringed in a bid to secure quick justice.¹⁹⁵ The commission has found violation of this right in a number of cases.¹⁹⁶ For instance, in *Annette Pagnouille v. Cameroon*¹⁹⁷, the commission held that the detention of the complainant for

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² See Udombana N, ‘The African Commission on Human and Peoples’ Rights and the development of fair trial norms in Africa’ (2006) 6 *African Human Rights Law Journal*, p. 312.

¹⁹³ Ibid, citing *Civil Liberties Organisation & Others v. Nigeria*, ACHPR (2001), paras 27 & 44.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ See for example, 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)*, Seventh Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex IX); Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex VI).

¹⁹⁷ Communication 39/90, *Annette Pagnouille v. Cameroon*, Tenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex X).

two years after he had served his sentence of imprisonment on the suspicion that he ‘may cause problems’ was a violation of his right to be presumed innocent.

In *Media Rights Agenda and Others v. Nigeria*¹⁹⁸, Mr. Niran Malaolu and three other staff of a Nigerian newspaper, *the Diet newspaper*, were arrested by armed soldiers at the editorial offices of the newspaper in Lagos on 28 December 1997. Neither Mr. Malaolu nor his three colleagues were informed of the reasons for their arrest or shown a warrant of arrest.¹⁹⁹ Three of the arrestees were later released, but Mr. Malaolu continued to be held without charges until 14 February 1998, when he was arraigned before a special military tribunal for his alleged involvement in a coup. Throughout the period of his incarceration, he was not allowed access to his lawyer, doctor or family members.²⁰⁰ On 28 April 1998, the tribunal, after a secret trial, found the accused guilty of concealment of treason and sentenced him to life imprisonment.²⁰¹ The African Commission held that his right to a fair trial, including the right to be presumed innocent until proven guilty, had been breached.²⁰²

The sub-section also requires proof of guilt to be conducted by a competent court or tribunal. To facilitate this process, the state must employ competent and qualified umpires to preside over cases. These umpires must be impartial and independent of executive influence.²⁰³ In *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria*²⁰⁴, the commission found a bench composed of members of the armed forces and police to be partial and therefore in violation of Article 7(1)(b). A

¹⁹⁸ Communication 224/98, *Media Rights Agenda and Others v. Nigeria*, Fourteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, (Annex V).

¹⁹⁹ *Ibid*, para 4.

²⁰⁰ *Ibid*, para 7.

²⁰¹ *Ibid*, paras 8.

²⁰² *Ibid*, para 43.

²⁰³ See Communication 71/92, *Rencontre Interafricaine pour la Defense des Droits de l’Homme v. Zambia*, Tenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex X).

²⁰⁴ Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v. Nigeria*.

competent court is one whose judges (or magistrates) are duly qualified, meeting both legal and natural qualifications such as integrity.²⁰⁵

Suffice it to state that presumption of innocence, as contemplated in Article 7(1)(b), demands that the arrestee should be informed of the reasons for his being arrested. Such information must also be availed timely to avoid miscarriage of justice. This would allow the person to prepare his defence and where necessary, prove his innocence. It is unfortunate, however, that the Charter does not provide for, among other things, the right of arrestees to be informed, in a language that they understand, of reasons for their arrest and the charges against them. It was the African Commission's *Resolution on the Right to Recourse Procedure and Fair Trial* that attempted to fill this gap. This resolution shall be revisited later in this part.

Article 7(1)(c) guarantees every person the right to defence. The African Commission has defined this to envisage 'all sorts of elements required to prepare for one's defence.'²⁰⁶ One such element that is expressly stipulated in the Charter is the right to be defended by Counsel of one's choice. Thus, trial without being defended was held to be a violation of Article 7(1)(c).²⁰⁷ The guarantee of the right to be defended by 'Counsel' of one's choice is problematic if 'Counsel' is understood to mean a fully qualified and admitted lawyer.²⁰⁸ It has correctly been suggested that the term 'Counsel' should be taken to mean 'legal representative' and nothing more.²⁰⁹

²⁰⁵ Umozurike U, *The African Charter on Human and Peoples' Rights*, note 45 above, p. 44.

²⁰⁶ See Communication 144/95, *William Curson (acting on behalf of Severo Moto) v Equatorial Guinea*, Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex II), para 21.

²⁰⁷ 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*, Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex IX); Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VI).

²⁰⁸ See Ankumah E, *The African Commission*, note 138 above, p. 126.

²⁰⁹ Heyns C, 'Civil and political rights in the African Charter', in Evans M & Murray R, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002), p. 158.

The commission found a violation of the provision when Defence Counsel was harassed during a trial to the point where he withdrew from the case.²¹⁰ A similar finding was made when a Defence Counsel was allegedly assaulted by soldiers.²¹¹ It has also been held that the right to be defended by Counsel of one's choice implies that one has the right of access to a lawyer when being detained without trial.²¹²

In *Media Rights Agenda and Others v. Nigeria*²¹³, the complainant alleged, *inter alia*, that Mr. Malaolu was denied the right to be defended by lawyers of his choice and was, instead, assigned a military lawyer by the tribunal, in contravention of the right to a fair hearing.²¹⁴ The African Commission, relying on paragraph 2(e)(i) of its *Resolution on the Right to Recourse and Fair Trial*, conceded that there was a violation of the accused's basic guarantees.²¹⁵ In *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*²¹⁶, the African Commission was called upon to rule that, by denying Mr. Gaetan Bwampamye's Counsel the right to plead his case, the Criminal Chamber of the Ngozi Court of Appeal held a hearing which was not equitable in terms of the African Charter.²¹⁷ The communication alleged, *inter alia*, although the Criminal Chamber of the Court of Appeal accorded the prosecution the right to make oral submissions, the Defence Counsel was denied the same.²¹⁸

²¹⁰ Ken Saro Wiwa's case, para 96. See also Heyns C, 'Civil and political rights in the African Charter', *Ibid*, p. 158.

²¹¹ *Ibid*, para 97.

²¹² Communication 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

²¹³ *Ibid*, para 11.

²¹⁴ *Ibid*, para 11.

²¹⁵ *Ibid*, para 56. Paragraph 2 (e) (i) of the *Resolution on the Right to Recourse and Fair Trial* stipulates that, 'In the determination of charges against individuals, the individual shall be entitled in particular to: (i) ... communicate in confidence with counsel of their choice.'

²¹⁶ Communication 231/99, *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

²¹⁷ *Ibid*, para 11(a).

²¹⁸ *Ibid*, paras 9-10.

The commission recalled that the right to fair trial involves ‘fulfillment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of Justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all.’²¹⁹ The commission went further to elucidate the components of the right to equal treatment by stating that it means:

... in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner.²²⁰

The commission’s observations were indeed very constructive given that it interpreted the right to defence broadly enough to include equality of treatment of the accused persons and the prosecution. Where parties to a dispute are not afforded equal opportunities during trial, it is likely that justice would be compromised. Additionally, the commission held that the right to defence also implies, at each stage of the criminal proceedings, the accused and his counsel should be able to reply to indictment of the public prosecutor.²²¹

Although the Charter guarantees the right to legal representation, it fails to make provision for legal aid or assistance. The European²²² and Inter-American²²³ human rights

²¹⁹ Ibid, para 26.

²²⁰ Ibid, para 27.

²²¹ Ibid, para 28.

²²² See European Convention, Art 6(3)(c), which guarantees the right of a person charged with criminal offence to: ‘defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so requires.’

systems have provisions for legal assistance. A distinction can be drawn on the circumstances under which free legal assistance is granted in the European and American systems. Under the European system, legal assistance is a right in criminal cases 'where [the accused] does not have sufficient means to pay for legal assistance' and 'when the interest of justice so requires' that the person should be granted such assistance.²²⁴

Under the American system, on the other hand, legal assistance is an inalienable right to be assisted by state-provided Counsel. This right accrues to an accused person under two circumstances; first, if the accused does not wish to defend himself or herself personally and, secondly, if the accused fails to engage his or her counsel within the time period established by law.²²⁵ By extension, this means that legal assistance is granted to ensure a speedier rendition of justice to the accused person.

A combined reading of the above provisions of the European and American Conventions leads one to effectively conclude that the provision of free legal aid or assistance could be necessitated by at least two circumstances; namely, that (i) the interest of justice so requires and, (ii) the person is indigent, meaning that he or she does not have sufficient means to pay for legal representation. Boukongou contends, the determination of 'interest of justice' in criminal cases is based on the seriousness of the offence and the severity of the sentence, whilst in civil cases it is based on the complexity of the case and the ability of the party to adequately represent himself or herself; the rights to be affected; and the likely impact of the outcome of the case on the wider community.²²⁶ This reasoning partly explains why free legal aid and assistance in many African countries is granted to indigents in capital offences.

²²³ See Art 8(2)(e) of the American Convention, which stipulates the: 'inalienable right to be assisted by Counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself or herself personally, or engage his or her own Counsel within the time period established by law.'

²²⁴ European Convention, Art 6(3)(c).

²²⁵ American Convention, Art 8(2)(e).

²²⁶ Boukongou J, 'The appeal of the African system for protecting human rights', note 94 above, p. 290.

It cannot be gainsaid, the right to legal aid and assistance is an integral component of fair trial as it ensures that indigent persons are not denied fair hearing due to their insufficient, or lack of means to hire competent Counsel. However, the provision of legal aid and assistance is a capital-intensive undertaking, which many African states have found very difficult to accomplish effectively from their own resources.²²⁷ One can legitimately wonder about access to the African Commission in the case of persons in distress or destitute, especially as no state makes provision for legal aid for the submission of cases to an international authority.²²⁸

A serious thought should be given to ways and means the African human rights system, which is in an environment characterised by abject poverty, could attend to indigent complainants. Arguably, many poor people across the continent are unable to file complaints with the commission due to inadequate financial means. Resource constraints notwithstanding, states need to commit themselves to legal assistance if the right to fair hearing is to be guaranteed.

Article 7(1)(d) guarantees the right of an accused to be tried within a reasonable time by an impartial court or tribunal. The Charter's reference to 'reasonable time' is to ensure that proceedings are not unduly prolonged. The rationale for the provision is to safeguard the speedy rendition of justice to ensure effectiveness and credibility.²²⁹ Reasonableness of the duration of proceedings, however, depends on the particular circumstances of a case. The commission held the detention of a victim for seven years without trial to be a

²²⁷ Udombana N, 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa', note 193 above, p. 312.

²²⁸ Ibid.

²²⁹ Nmehielle O, *The African human rights system*, note 112 above, p. 99, where the author cited the European Court of Human Rights' decision in *H v. France*, A 162-A para 58 (1989).

violation of the right to be tried within a reasonable time under article 7(1)(d).²³⁰ Similarly, detention without trial was termed as a violation of this provision.²³¹

The commission has also interpreted what might reasonably constitute an impartial court or tribunal under Article 7(1)(d). In *Constitutional Rights Project (Akumu) v. Nigeria*²³², the impartiality provision was dealt with in relation to the special tribunals that had been created to deal with cases involving robbery and firearms. The commission stated:

The Robbery and Firearms (Special Provision) Act, Section 8(1), describes the constitution of the tribunals, which shall consist of three persons: one judge, one officer of the Army, Navy or Air Force and one officer of the Police Force. Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of the government, the same branch that passed the Robbery and Firearms Decree, whose members do not necessarily possess any legal expertise. Article 7(1)(d) of the African Charter requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance of, if not actual, lack of impartiality. It thus violates Article 7(1)(d).²³³

Accordingly, it could be said that impartiality under this provision has a nexus with independence from executive interference. A court or tribunal that is not independent from executive interference is obviously not expected to be impartial, especially where the executive is a party to a case.²³⁴

²³⁰ Communication 103/93 *Alhassan Abubakar v. Ghana*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X).

²³¹ See communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VIII).

²³² Communication 60/91, *Constitutional Rights Project (in Respect of Sehab Akumu, G Adegade and others) v. Nigeria*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VI).

²³³ *Ibid.*

²³⁴ Nmehielle O, *The African Human rights system*, note 112 above, p. 100.

The last of the legal protections afforded to an accused person by Article 7 of the Charter is the prohibition of ex post facto laws. Article 7(2) prohibits retroactive punishment. The Article also provides for individual criminal responsibility. The provision prohibits the introduction of new offences with retrospective effects. Article 7(2) is, however, not confined to prohibiting the retrospective application of criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty and the principle that criminal law must not be extensively construed to an accused detriment.²³⁵

In *Media Rights Agenda and Constitutional Rights Project v. Nigeria*²³⁶, the commission stated that Article 7(2) must be read to prohibit not only infliction of punishment for acts not constituting crimes at the time they were committed, but to retroactivity itself.²³⁷ It further observed that, 'an unjust but un-enforced law undermines . . . the sanctity in which the law should be held.'²³⁸ The commission has also been seized with communications alleging transfer of criminal liability to persons related to the accused. Members of an accused person's immediate and extended families have in certain instances allegedly been arrested, detained and even prosecuted for offences they did not commit.²³⁹ The commission has, however, not dealt with this issue comprehensively.

Although the Charter and the commission seem to attach significance to the right to fair trial, certain pertinent aspects of this right have been overlooked. For instance, the Charter does not provide for public hearing. This is regrettable because some African states have been notorious in holding what Bello called 'secret proceedings', which are

²³⁵ Ibid, p. 101.

²³⁶ Communications 105/93, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

²³⁷ Ibid, para 59.

²³⁸ Ibid, para 60.

²³⁹ See Nmehielle O, *The African human rights system*, note 112 above, p. 101, citing examples such as, Communication 103/93 *Alhasan v. Ghana*, *supra*, p. 116; Communication 108/93, *Monja v. Madagascar*, *supra*, p. 125; and Communication 142/94, *Njoku v. Kenya*, p. 141.

largely unfair to the accused person.²⁴⁰ The Charter also does not provide for the right of an accused person to be assisted by an interpreter which is particularly essential in Africa because a majority of the accused are indigenous, whereas court proceedings are usually conducted in foreign languages such as English, Portuguese, Spanish, Arabic or French.²⁴¹ This limitation in language, coupled with complex court procedures emphasise the need to have interpreters for accused persons.²⁴²

Further, the Charter does not guarantee the right against self-incrimination or double jeopardy or compensation for miscarriage of justice.²⁴³ These shortcomings in the Charter will be discussed in detail in the next chapter. It is important to mention, however, that the commission has tried to overcome the shortcomings and deficiencies of the Charter in relation to this right by adopting a number of resolutions. For instance, at its 11th Ordinary Session, it adopted a resolution on the right to a fair trial.²⁴⁴ The resolution underscores the importance that the commission attaches to the right to fair trial. It recalled Article 7 of the African Charter and stressed that ‘the right to a fair trial is essential for the protection of fundamental human rights and freedoms.’²⁴⁵ In summary, the resolution amplifies Article 7 of the Charter as follows²⁴⁶:

(a) All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations.

(b) Persons who are arrested shall be informed, at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them.

²⁴⁰ See Bello E, ‘The African Charter on Human and Peoples’ Rights: An analysis’, (1985) *Recueil Des Cours*, p. 156.

²⁴¹ Nmehielle O, *The African human rights system*, note 112 above, p. 102.

²⁴² Ankumah E, *The African Commission on Human and Peoples’ Rights*, note 138 above, p. 131.

²⁴³ Nmehielle O, *The African human rights system*, note 112 above, p. 103.

²⁴⁴ See *Resolution on the Right to Recourse Procedure and Fair Trial*, Fifth Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1991-1992, ACHPR/RPT/5th, (Annex VI). See also Ankumah E, *The African Charter on Human and Peoples’ Rights*, note 138 above, p. 127.

²⁴⁵ *Ibid*, preamble.

²⁴⁶ *Ibid*, para 2.

(c) Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released.

(d) Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court.

(e) In the determination of charges against individuals, the individuals shall be entitled in particular to—

- (i) have adequate time and facilities for the preparation of their defence and communicate in confidence with counsel of their choice;
- (ii) be tried within a reasonable time;
- (iii) examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses against them; and
- (iv) have the free assistance of an interpreter if they cannot speak the language used in the court.

Additionally, in 1996, the commission, at its 19th ordinary session, adopted the *Resolution on the Respect and the Strengthening of the Independence of the judiciary*.²⁴⁷ Among other things, it called on African countries to repeal all legislation that are inconsistent with principles of judicial independence, especially on the appointment and posting of judges; incorporate universal principles on judicial independence in their legal systems; and refrain from taking actions that could directly or indirectly threaten the independence and the security of judges and magistrates.²⁴⁸

The resolution was significant for several reasons. In the main, Judges have, in numerous occasions, been subjected to all forms of intimidation and persecution for carrying out their constitutional mandate.²⁴⁹ The judiciary is particularly consigned and confounded

²⁴⁷See *Resolution on the Right to Recourse and Fair Trial*, Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights.

²⁴⁸ Ibid, para 1.

²⁴⁹ Udombana N, 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa', note 192 above, p. 313. See also Rishmawi M (ed.), *Attacks on justice: The harassment and persecution of judges and lawyers* (2000) (reporting measures taken in different countries that affect judges or undermine the judiciary and the legal profession).

into impotence by military regimes in many African countries. This has serious negative implications to the right to fair trial, since the harassment of judges ‘makes them to look over their shoulders in the dispensation of justice.’²⁵⁰ Additionally, *the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* were adopted by the African Commission in May 2003.²⁵¹ The principles and guidelines are very comprehensive, covering most of the recognised elements of the right to a fair trial and due process under international human rights law.²⁵²

Some of the specific elements covered are: judicial training; the right to an effective remedy; court records and public access; *locus standi*; the role of prosecutors; access to lawyers and legal services; legal aid and legal assistance; independence of lawyers; cross-border collaboration among legal professionals; access to judicial services; military courts; arrest and detention; criminal charges and trials; juvenile trials; victims of crime; abuse of power; and traditional courts.²⁵³ The Principles and Guidelines therefore encompass almost all recognised pre-trial, in-trial and post-trial rights.

The scope of this study does not permit a comprehensive analysis of these resolutions, guidelines and principles. Noteworthy, their adoption is a major leap towards the effective enforcement of the rights enshrined in Article 7 of the Charter. It is hoped that the commission will articulate them in its jurisprudence whenever it is seized with communications alleging violation of Article 7 or any other relevant provision of the Charter.

²⁵⁰ Udombana N, ‘The African Commission on Human and Peoples’ Rights and the development of fair trial norms in Africa’, note 192 above, p. 313.

²⁵¹ *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*4.

²⁵² Ibid.

²⁵³ Ibid.

3.2.1.2.1.6 Right to freedom of conscience and religion

Article 8 guarantees the protection of two interrelated rights- right to freedom of conscience and religion. The Article stipulates that:

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Right to freedom of conscience entitles a person to hold a belief or conviction, be it of cultural, religious, political or any other nature. The rationale of entrenching this right is to allow an individual to hold a thought or belief that is independent of a state's or other entity's control *per se*.²⁵⁴ Freedom of conscience in its broader sense envisages the right to profess and practice one's religion. This right, as contemplated under Article 8, includes the freedom to manifest one's religion or belief in public or in private, alone or with others, without the state's intervention.²⁵⁵ This could be in the form of worship, teaching, practice and religious observance, among other activities.²⁵⁶ Though not expressly provided in the Charter, freedom of religion could also include freedom to maintain or change one's religion or belief.²⁵⁷

The right to freedom of conscience and religion under the Charter, however, is subject to law and order. The Charter appears to be keen to ensure the balance between freedom of conscience and religion, on the one hand, and on the other, the protection of individuals or society from religious or pseudo-religious practices, which may infringe other people's rights.²⁵⁸ While states parties have the discretion to determine whether a particular religion or belief is appropriate, that discretion must not be exercised contrary to Article 8

²⁵⁴ Nmehielle O, *The African human rights system*, note 112 above, p. 104.

²⁵⁵ *Ibid*, p. 105.

²⁵⁶ *Ibid*. See also Harris J, *et al*, *Law of the European Convention on Human Rights* (1998), p. 361.

²⁵⁷ *Ibid*.

²⁵⁸ Nmehielle O, *The African human rights system*, note 112 above, p. 105.

of the Charter. In this regard, the African Commission has been faced with complaints alleging the violation of this Article.

In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire*²⁵⁹, the complainants, who were Jehovah's Witnesses, were allegedly persecuted by the government of Zaire on the basis of their religious beliefs. The commission held that such persecution violated Article 8 since the former Zaire government had presented no evidence that the practice of their religion in any way threatened law and order. The commission has also held that freedom of religion has to be exercised in a way that does not violate the equal protection of the law, as guaranteed by the African Charter. Thus, it ruled against imposition of sharia trials and guaranteed the right of everyone to be tried by a secular court if they wish.²⁶⁰ It is important to note, however, that in some African States, freedom of religion is limited to the practice of a certain religious faith. An example is Libya where Islam has been proclaimed to be state religion, and the Koran part of the Libyan laws.

The African Commission recently held that the freedom to manifest one's religion or belief does not in itself include a general right of the individual to act in accordance with his or her belief.²⁶¹ Rather, while the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. In *Gareth Anver Prince v. South Africa*²⁶², a South African citizen alleged the Law Society of South Africa had refused to register him for practice, given his disclosure of two previous convictions for the possession of

²⁵⁹ 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*, Ninth Activity Report of the African Commission on Human and Peoples' Rights (Annex VIII).

²⁶⁰ 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*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V), para 73.

²⁶¹ Communication 255/2002, *Gareth Anver Prince v. South Africa*.

²⁶² *Ibid.*

cannabis and his stated intention to continue to use it because its use was required by his Rastafarian religion. He alleged violation of, among other provisions, Article 8 of the African Charter. The African Commission held that the restrictions on the use and possession of cannabis were reasonable and a legitimate limitation of Article 8.²⁶³ Indeed, participating in one's religion should not be at the expense of the overall good of the society. Minorities like the Rastafarians may freely choose to exercise their religion, yet that should not grant them unfettered power to violate the norms that keep the whole nation together.²⁶⁴

3.2.1.2.1.7 Right to freedom of expression

Article 9 guarantees the right to freedom of expression in the following terms: '1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.' The right to freedom of expression is the cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion as it enables the society, when exercising its options, to be sufficiently informed.²⁶⁵

The importance of freedom of expression is demonstrated by the many cases considered by the African Commission involving Article 9 violations.²⁶⁶ The commission observed

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Nmehielle O, *The African human rights system*, note 112 above, p. 107. See also Davidson S, *The Inter-American human rights system*, note 113 above, p. 310.

²⁶⁶ See, *inter alia*, communications: 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others v. Sudan*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights; 102/93, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights; 147/95, 149/96, *Sir Dawda K Jawara v. The Gambia*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights; 137/94, 139/94, 154/96, 161/97, *International PEN and Others v. Nigeria*, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights; 232/93, *John D. Ouko v. Kenya*, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights; 224/98, *Media Rights Agenda v. Nigeria*, Fourteenth Annual Activity Report of the African Commission

in *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*²⁶⁷, that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country.²⁶⁸

The African Charter gives two aspects of this right namely: (i) the right to receive information and (ii) the right to express and disseminate one's opinion. Access to information is fundamental to encouraging transparency and accountability in the way the government and public authorities operate. Thus in *Amnesty International v. Zambia*²⁶⁹, the commission observed that the failure of the government to provide two deportees with reasons for the action taken against them 'means that the right to receive information was denied to them.'²⁷⁰

In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*²⁷¹, where the communication dealt with the proscription of newspapers by the military government in Nigeria, the commission held, *inter alia*:

The proscription of specific newspapers by name and the sealing of their premises, without a hearing at which they could defend themselves...amounts to harassment of the press. Such actions not only have the effect of hindering the directly affected persons in disseminating their opinions, but also pose an immediate risk that journalists and newspapers not yet affected by...the Decree will subject themselves to self-censorship...

on Human and Peoples' Rights; 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda and Others v. Nigeria*, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights.

²⁶⁷ Communication 105/93,128/94,130/94,152/96, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*, *ibid*.

²⁶⁸ *Ibid*, para 54.

²⁶⁹ Communication 212/98, *Amnesty International v. Zambia*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex).

²⁷⁰ *Ibid*, para 33.

²⁷¹ Communications 140/94, and 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

Decrees like these pose a serious threat to the public of the right to receive information not in accordance with what the government would like the public to know. The right to receive information is important: Article 9 does not seem to permit derogation, no matter what the subject of the information or opinion and no matter the political situation of a country.²⁷²

In this regard, the commission was emphasising the non-derogable nature of the right to receive information. The commission's observations would, however, not have been complete had it not re-emphasised that the right was to be exercised within the confines of a pre-established law. It is clear, from the wording of Article 9(2), that the right to express and disseminate one's opinion may be restricted by law. This does not mean that national law can restrict this right to the extent that it becomes ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.²⁷³ With regard to the restriction of rights through domestic legislation, the commission has stated that restrictions should be as minimal as possible and not undermine rights guaranteed under international law.²⁷⁴ Thus, any restrictions on rights should be the exception and not the rule.²⁷⁵

The commission has expressed the importance of the right to freedom of expression by adopting resolutions to elaborate it beyond the Charter provisions. For instance, it has adopted a *Resolution on the Right to Freedom of Expression*²⁷⁶, and a *Declaration of Principles on Freedom of Expression in Africa*.²⁷⁷ While the 2002 Declaration identified

²⁷² Ibid, para 38.

²⁷³ Communications 140/94, and 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Thirteenth Activity Report (Annex V), para 40.

²⁷⁴ 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*, Thirteenth Activity Report (Annex V), para 80.

²⁷⁵ Ibid.

²⁷⁶ Adopted at the 11th Ordinary Session of the African Commission, 2–9 March 1992.

²⁷⁷ Adopted at the 32nd Ordinary Session of the African Commission, 17–23 March 2002.

freedom of expression ‘as a cornerstone of democracy’²⁷⁸ and stated that ‘respect for freedom of expression ... will lead to ... the strengthening of democracy’²⁷⁹, the commission had not in its previous decisions on Article 9 specifically linked the right to freedom of expression to the strengthening of democracy in Africa.²⁸⁰

The case of *The Law Offices of Ghazi Suleiman v. Sudan*²⁸¹ provided the commission with an opportunity to clarify its jurisprudence on the provisions of Article 9 of the Charter and also to express its view on the important link between freedom of expression and the promotion and protection of democracy in Africa.²⁸² The communication alleged that Mr. Ghazi Suleiman, a Khartoum based lawyer and human rights advocate was prohibited from travelling to deliver a public human rights lecture in Sinnar, Blue Nile State, in the Sudan. He alleged that he had been threatened by some state security officials that if he made the trip he would be arrested.²⁸³ The author complained, *inter alia*, of a violation of Article 9 of the Charter. In upholding the complaint, the African Commission observed:

In adopting the Resolution on the Right to Freedom of Association, the African Commission noted that governments should be especially careful that “in regulating the use of this right, that the competent authorities should not enact provisions which would limit the exercise of this freedom ... [and that] ... the regulation of the exercise of the right to freedom of association should be consistent with State’s obligations under the

²⁷⁸ Ibid, first preambular paragraph, *Declaration of Principles on Freedom of Expression in Africa*.

²⁷⁹ Ibid, fourth preambular paragraph.

²⁸⁰ Banderin M, ‘Recent developments in the African regional human rights system’, note 156 above, p. 130.

²⁸¹ Communication 228/99, *The Law Offices of Ghazi Suleiman v. Sudan*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, (Annex VII).

²⁸² See the analysis of this nexus in Banderin M, ‘Recent developments in the African regional human rights system’, note 156 above, p. 130.

²⁸³ Communication 228/99, *The Law Offices of Ghazi Suleiman v. Sudan*, note 281 above, para 3.

African Charter on Human and Peoples' Rights.²⁸⁴ Mr. Ghazi Suleiman's speech is a unique and important part of political debate in his country.²⁸⁵

The commission affirmed the views of the Inter-American Court of Human Rights which held that:

Freedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.²⁸⁶

The commission could therefore be taken to mean that when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the corresponding right of others to receive information and ideas.²⁸⁷ Hence, speech that contributes to political debate must be respected and protected. In light of the important role of the right to freedom of expression in the fledging democracies in Africa today, these observations and findings by the commission must be welcomed as a landmark decision.

²⁸⁴ See Resolution on the Freedom of Association, *adopted* at the 11th Ordinary Session in Tunis from 2 to 9 March 1992. [Footnote retained].

²⁸⁵ *The Law Offices of Ghazi Suleiman v. Sudan*, note 281 above, para 46.

²⁸⁶ *Ibid*, para 49, quoting from *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 American Convention on Human Rights) Advisory Opinion OC-5/85, Serie A. N.5, November 1985 at para.70.

²⁸⁷ Communication 228/99, *The Law Offices of Ghazi Suleiman v. Sudan*, note 281 above, para 50.

3.2.1.2.1.8 Right to freedom of Association

According to Article 10(1), every individual is entitled to the right to free association.²⁸⁸ This right envisages a number of components. For example, it contemplates the freedom of individuals to come together for the protection of their interests by forming a collective entity which represents them. These interests may be of a political, economic, religious, social, cultural, professional or labour union nature.²⁸⁹ However, this does not mean that such an individual has an absolute right to become a member of a particular association. Rather, an association may decide not to admit or continue the membership of an individual without necessarily infringing on his right to freedom of association.²⁹⁰

Equally, an individual cannot be compelled to become a member of an association nor disadvantaged if he or she chooses not to do so. This right therefore precludes compulsion to join an association, but subject to Article 29 of the Charter.²⁹¹ Article 29(4) imposes duties on individuals ‘to preserve and strengthen social and national solidarity, particularly when the latter is threatened.’ This provision, read together with Article 10(2) limits the right to freedom of association to the effect that an individual could be forced into association in order to strengthen social and national solidarity.²⁹²

In *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria*²⁹³, the commission found that the tribunal which had convicted Saro-Wiwa and his fellow accused of murder did so

²⁸⁸ Art 10(1) states: ‘Every individual shall have the right to free association provided that he abides by the law.’

²⁸⁹ Nmehielle O, *The African human rights system*, note 112 above, p. 110.

²⁹⁰ Ibid.

²⁹¹ Art 10(2) provides: ‘Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.’

²⁹² See Heyns C, ‘Civil and political rights in the African Charter’, note 209 above, p. 169.

²⁹³ In communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa jr and Civil Liberties Organisation v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V).

because they were members of a political group. Their freedom of association as expressed through their membership in that group was thus violated.²⁹⁴ The right to freedom of association has also been interpreted to include the right to dissociation.²⁹⁵

The commission has cited many instances where the right to freedom of association may be violated.²⁹⁶ These include: banning of political parties²⁹⁷, being arrested as a result of one's political belief²⁹⁸ and the prohibition of any assembly for a political purpose in a private or a public place.²⁹⁹ With regard to laws limiting the right to freedom of association, the commission has held that they should include an objective description that makes it possible to determine the criminal nature of an organisation.³⁰⁰ Apart from its jurisprudence, the commission has also adopted a resolution on the right to freedom of association with a view to strengthen the provisions of Article 10 of the Charter.³⁰¹ The resolution provides, *inter alia*, that:

²⁹⁴ Ibid, para 108.

²⁹⁵ Communication 101/93, *Civil liberties Organisation in Respect of the Nigerian Bar Association v. Nigeria*, Eighth Annual Activity Report of the African Commission on human and Peoples' Rights (Annex VI).

²⁹⁶ See this observation in Heyns C, 'Civil and political rights in the African Charter', note 209 above, p. 169.

²⁹⁷ Communications 147/95 and 149/96, *Sir Dawda K. Jawara v. The Gambia*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V), para 68.

²⁹⁸ Communication 205/97, *Kazeem Amitu v. Nigeria*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V), para 22.

²⁹⁹ 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*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V), para 82.

³⁰⁰ Communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaines des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droits, Association Mauritanienne des Droits de l'Homme v. Mauritania*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V), para 107.

³⁰¹ *Resolution on the Right to Freedom of Association, adopted by the African Commission on Human and Peoples' Rights*, at its 11 Ordinary Session (Documents of the African Commission, p. 225).

competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards; ... in regulating the use of the right to association, the competent authorities should not enact provisions which will limit the exercise of the freedom and such a regulation should be consistent with state obligations under the Charter.³⁰²

Though the resolution may not be seen as dramatic in clarifying the provisions of the Charter on the right to freedom of association, it serves the purpose of emphasis. What is important, however, is that the commission interprets the right bearing in mind the emphasis it has given to it in the resolution.

3.2.1.2.1.9 Right to freedom of assembly

The right to freedom of assembly complements the right to freedom of association. Article 11 of the 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 right to freedom of assembly allows individuals to indulge in meetings, picketing, protest marches and demonstrations, as long as the assemblers aim to express a common opinion. In *Commission Internationale de Juristes v. Togo*³⁰³, the commission found that the shooting at peaceful demonstrators by the Togolese military was a violation of the right to assembly. Since the purpose of the right is to protect assembly as a means of communicating opinion, the assembly must be ‘peaceful’ and unarmed. Actions or laws aimed against armed or violent assemblies will therefore not constitute an infringement of the right to assemble.³⁰⁴

³⁰² Ibid.

³⁰³ Communication 91/93, *Commission Internationale de Juristes v. Togo*.

³⁰⁴ Nmehielle O, *The African human rights system*, note 112 above, p. 113.

3.2.1.2.1.10 Right to freedom of movement

Article 12 of the Charter stipulates as follows:

1. Every individual shall have the right to freedom of movement and residence within the border of a state provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and public order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

The provisions of Article 12 could be divided into three main classes of rights: (i) freedom of movement within and freedom to return to an individual's country of origin or residence; (ii) the right to seek and obtain asylum; and, (iii) the right not to be expelled extra-judicially or en mass.³⁰⁵ Freedom of movement in the context of the Charter applies to 'every person', including aliens or stateless persons. This freedom is, however, subject to the sovereign power of a state to regulate and control the entry of aliens into its territory. This means in effect that an alien does not *per se* have an unqualified right to enter, reside or remain in a particular country. The Charter does not make provision against the expulsion of a person from the territory of a state which he or she is a citizen or national.³⁰⁶ This is rather strange given that many Africans have over the years been sent to exile by their countries, for holding or perpetuating divergent political views.

³⁰⁵ Nmehielle O, *The African human rights system*, note 112 above, p. 114.

³⁰⁶ *Ibid.*

With regard to the rights of asylum seekers, Article 12(3) is quite an unusual provision in the sense that it provides that one has the right not only to seek but also to obtain asylum.³⁰⁷ Nmehielle correctly observed that, while a person may not be prevented from seeking asylum, the granting of asylum is entirely a different matter dependent upon the will of a state.³⁰⁸ Whether or not a person should obtain or be granted asylum rests with the law of the territory in which asylum is sought and international law.³⁰⁹ Further, the Charter gives persecution as a condition for the exercise of the right to seek and obtain asylum but does not indicate the grounds for the persecution. Generally, a person is afforded refugee status if he or she has been persecuted or has a well founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion.³¹⁰

Article 12(4) and (5) prohibits two forms of expulsion of persons from the territory of a state party to the Charter. First, an alien lawfully admitted to any such territory may only be expelled pursuant to a decision reached in accordance with the law; Secondly, the mass expulsion of non-nationals. The Charter goes on to define mass expulsion as one aimed at national, racial, ethnic, or religious group. Unlike the prohibition of the expulsion of lawfully resident non-nationals in member states, the prohibition of mass expulsion aims to protect groups of persons based on nationality, ethnicity, race and religion, whether or not such groups of persons are lawfully residing in the expelling state.³¹¹ Mass expulsion has been an issue of concern in Africa. A notable example was the expulsion of Nigerians from Ghana in 1969.³¹²

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ See Art 12(3) of the African Charter.

³¹⁰ See Art 1(2) of the Geneva Convention Relating to the Status of Refugees, 1951. See also Nmehielle O, *The African human rights system*, note 112 above, p. 114.

³¹¹ Ankumah E, *The African Commission on Human and Peoples' Rights*, note 138 above, p. 140.

³¹² Ibid.

3.2.1.2.1.11 Right to participate in the government of one's country

Article 13 guarantees the right to participate in the government of one's country in the following terms:

1. Every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country;
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 13 presents different facets in which the right to participate in the government of one's country may be enjoyed. Article 13(1), for example, provides that citizens may enjoy this right either directly or through freely chosen representatives. This seems to guarantee participation in decision making through a legislative body such as parliament. Essentially, this means that, subject to relevant electoral laws, citizens of a state party to the Charter are entitled to participate in periodic elections either as candidates or voters.³¹³

The purpose of Article 13(1) of the Charter is therefore to allow an individual, without apparent legal disability, to participate in periodic elections, exercise his or her voting rights, and participate in the conduct of public affairs directly or through freely chosen representatives.³¹⁴ By extension, the provision requires state authority to be based on the sovereignty of the people. Hence, this right is infringed when any group or person seizes the reigns of government and imposes themselves on the rest of the population.³¹⁵

³¹³ See Mbondenye M, 'The right to participate in the government of one's country: An analysis of Article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis', (2009) *African Human Rights Law Journal* (forthcoming in 2009).

³¹⁴ Umozurike U, *The African Charter on Human and Peoples' Rights*, note 45 above, p. 32.

³¹⁵ *Ibid.*

Article 13(1) should be read in tandem with Article 20(1) which recognises the right of peoples to self-determination. This nexus was recognised by the African Commission in a case concerning an attempted secession from Zaire by Katanga.³¹⁶ Although the commission held that there was no violation of Article 20, it could be inferred, from its observations, that massive human rights violations as well as the denial of the right of political participation under Article 13(1) could constitute transgressions of the Charter on such a scale that it would justify secession.³¹⁷ In another case, the commission held that to participate freely in government entails, among other things, the right to vote for the representative of one's choice and to have the results of free expression of the will of voters respected.³¹⁸ The commission has also found a ban on members of a former government and parliament after a coup to be in violation of their Article 13(1) rights.³¹⁹

The right to participate in the government of one's country cannot be fully enjoyed unless citizens have the right to equal access to, for example, public services and property.³²⁰ The drafters of the Charter, in recognition of this fact, incorporated these important rights under Article 13(2) & (3). These two provisions resonate the importance of democratic governance in which citizens have unfettered rights to participate, as well as a reasonably unrestrained right of access to public property and services. Unfortunately, the issue of equal access to public services and property in many African states has remained very controversial and complicated for reasons ranging from legal complexities, political involvement, corruption and extreme poverty.³²¹

³¹⁶ Ibid. See also Communications 75/92, *Katangese Peoples' Congress v. Zaire*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VI).

³¹⁷ Ibid, para 6.

³¹⁸ Communication 102/93, *Constitutional Rights Project v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V), para 50.

³¹⁹ Communications 147/95 and 149/96, *Sir Dawda K. Jawara v. The Gambia*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V), para. 67.

³²⁰ Mbondenyi M, 'The right to participate in the government of one's country', note 313 above, p. 14.

³²¹ Achieng' J, 'Protests against land reforms in Kenya' available at http://www.afrol.com/News/ken008_landreform2.htm, last accessed 15 March 2008.

This situation is exacerbated by the fact that some states still largely rely on laws and policies promulgated by colonial governments, which in many cases prevent the most disadvantaged groups from accessing public services and property that they need to survive. Due to such policies and laws, equitable land allocation and distribution in post-colonial Africa, for example, has not as yet been achieved.³²² Political contests in most African states have therefore become all the more charged because of what is at stake; those who achieve political power benefit from widespread abuses, including theft and misappropriation of public resources.³²³

Many African states have been paying lip service to the citizens' right to participate in their government despite its fundamental importance to nation building. Consequently, Africans have been victims of governments of exclusion such as dictatorships, military rule, or single-party autocracies. Ethnicity, corruption and vote rigging have also had a hand in derailing the democratic process in the continent.

The importance of this right is resonated in the CAAU. The Act condemns and rejects unconstitutional change of government.³²⁴ In fact, the CAAU categorically states that a government that seizes power through unconstitutional means shall not be allowed to participate in the activities of the Union.³²⁵ The AU has a variety of options on how to deal with an unconstitutional government, including imposition of sanctions.³²⁶ At the time of compiling this chapter, Zimbabwe and Kenya were wallowing in political crises. Both countries were faced with disputed presidential elections which brought to question the legitimacy of their governments. In Kenya, the AU initiated a mediation process that led to the signing of an Accord on power-sharing between the warring political

³²² Mbondenyi M, 'The right to participate in the government of one's country', note 313 above.

³²³ Ibid.

³²⁴ See Constitutive Act of the African Union, Art 4 (p).

³²⁵ Ibid, Art 30.

³²⁶ Article 23 provides as follows: '2. ...any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly'.

factions.³²⁷ The AU's initiative in this regard is welcomed. One still waits to see the response of this pan-continental body with regard to the situation in Zimbabwe.

3.2.1.2.1.12 Right to property

Article 14 provides for the protection of the right to property, stating that 'the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.' The right to property guaranteed under this provision is the right to own property, hold it and to dispose of it. In *UIDF, FIDH, FADDHO, ONDH, AMDH v. Angola*³²⁸, the commission observed that the deportation of the non-nationals in this case called into question rights guaranteed under the Charter such as property rights. It concluded that the deportation of victims, thus separating them from their property constituted a violation of Article 14 of the Charter.

From the wording of Article 14, it can correctly be concluded that the enjoyment of the right to property is subject to encroach upon 'in the interest of public need or in the general interest of the community and in accordance with the provisions of the law.' The Charter, however, does not define what constitutes public or community interests. Additionally, it does not provide for compensation of state encroachment (acquisition) victims. The fact that state acquisition should be in accordance with appropriate laws is not sufficient enough to indicate whether the Charter subscribes to compensation of victims.³²⁹ However, 'in accordance with appropriate laws' could be construed to mean 'in accordance with international standards on state acquisition'.³³⁰

³²⁷ For a detailed account see Mbondenyi M, 'The right to participate in the government of one's country', note 313 above, p. 14.

³²⁸ Communication 159/96, *UIDF, FIDH, FADDHO, ONDH, AMDH v. Angola*, Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex II).

³²⁹ Nmehielle O, *The African human rights system*, note 112 above, p. 119.

³³⁰ *Ibid.*

Thus, when interpreting Article 14 of the Charter, regard could be had to corresponding provisions of other human rights systems. Contextually, the Article is narrower than the corresponding provision of the American Convention, which is more progressive in the recognition of the right to property than any other regional human rights instrument.³³¹ Its Article 21(2) stipulates that ‘no one shall be deprived of their property except upon payment of just compensation, for reasons of public utility or social interest...’

The African Commission and the court can thus ensure that the power of the state to encroach upon private property for public or community interest is not abused, by requiring states to adhere to the international law principle of payment of just and adequate compensation. As a general observation, the above discussion on civil and political rights clearly indicates that the jurisprudence of the commission is yet to attain the standards of other international judicial mechanisms, such as the Inter-American and European human rights systems. As Murray notes, this may be partly because the commission is faced with the difficult task of overcoming the shortcomings in the way in which the Charter has been drafted.³³²

In all fairness though, it is important to note that the commission, as of recent, has shown some willingness to be creative in its interpretation of the Charter provisions.³³³ There are certain instances, however, where it failed to expound on certain rights even when the opportunity arose. This is not very encouraging especially given that the substantive rights in the Charter are not elaborate. It is hoped that the establishment and operationalisation of the African Court on Human and Peoples’ Rights will reverse this trend. The inadequacy of the civil and political rights provisions of the Charter, their possible reform, as well as the failure of the commission to amplify them shall be discussed extensively in the next chapter.

³³¹ Ibid. See the American Convention, Article 21.

³³² Murray R, ‘The African Charter on Human and Peoples’ Rights 1987-2000’ note 51 above, p. 1.

³³³ Ibid, p. 3.

3.2.1.2.2 Economic, social and cultural rights

The Charter guarantees the protection of a number of economic, social and cultural rights. As noted earlier in this chapter, the approach of the Charter with regard to this category of rights is a marked departure from that of other regional human rights systems. The Charter puts economic, social and cultural rights at par with other rights such as civil and political rights. Its Preamble categorically provides that:

...Civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and ... the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.³³⁴

Whether or not the Charter purports to give more priority to economic, social and cultural rights than to civil and political rights is an issue that is debatable. Gittleman fears giving priority to this category of rights over others would ‘undoubtedly grant a state greater latitude to restrict or violate civil and political rights.’³³⁵ This sentiment reflected the prevalent misunderstanding and suspicion of the nature of economic, social and cultural rights and their place in the human rights paradigm. Whatever the Charter purports, it must be understood that human rights are interrelated and indivisible. Perhaps, what the drafters of the Charter wanted to emphasise in the Preamble of the Charter is the importance of economic, social and cultural rights in the human rights discourse.³³⁶

The most contentious issue on the Charter’s economic, social and cultural rights provisions relates to their enforceability.³³⁷ For many decades, socio-economic rights have been regarded as secondary rights. Mbazira rightly notes that, ‘civil and political rights are thought to be ‘absolute’ and ‘immediate’, whereas economic, social and

³³⁴ African Charter, Preamble, para 8.

³³⁵ See Gittleman R, ‘The African Charter on Human and Peoples’ Rights: A legal analysis’ (1982) 22 *Virginia Journal of International Law*, p. 687.

³³⁶ Nmehielle O, *The African human rights system*, note 112 above, p. 124.

³³⁷ See for example, Nmehielle O, *The African human rights system*, note 112 above, p. 124; Ankumah E, *The African Commission on Human and Peoples’ Rights*, note 138 above, p. 144.

cultural rights are held to be programmatic; to be realised gradually and therefore not to be ‘real’ rights.³³⁸ The argument that socio-economic rights are not justiceable is based on the conception that these rights require vast resources for their implementation. This view, however, is blind to the fact that not all socio-economic rights can be implemented immediately.³³⁹

Indeed, the ICESCR attests to this fact by requiring states to ‘take steps to the maximum of [their] available resources, with a view to progressively achieving the full realisation of the rights . . .’³⁴⁰ Although the UN Committee on Economic, Social and Cultural Rights has said that some of the obligations are of immediate effect, this does not necessarily mean that states are compelled to do the impracticable.³⁴¹ The argument on impracticability of enforcement of socio-economic rights is also blind to the fact that the enforcement of some civil and political rights may be equally impracticable. The right to life, for example, imposes an obligation on the state to provide security to its citizens.³⁴² But this does not mean that murders are not committed. It is impracticable to provide every citizen with a policeman at his or her guard.³⁴³

One would therefore agree with Ankumah that economic, social and cultural rights are justiceable under the Charter, but there is the need for their progressive realisation, taking into consideration the circumstances faced by the state parties.³⁴⁴ This aspect of the

³³⁸ See Mbazira C, ‘A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa’s Development’, (2004) 4 *African Human Rights Law Journal*, p. 36. See also Eide A ‘Economic, social and cultural rights as human rights’, in Eide A, Krause C & Rosas A, (eds.) *Economic social and cultural rights: A text book* (2001), p. 10; Arambulo K, *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights* (1999), p. 58.

³³⁹ Ibid.

³⁴⁰ Art 2(1) ICESCR.

³⁴¹ Mbazira C, ‘A path to realising economic, social and cultural rights in Africa?’ note 338 above, p. 38, citing General Comment No 3 (Fifth session, 1990) [UN doc E/1991/23] *The nature of the states’ obligations* (Art 2, para 1 of the Covenant) para 1.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ See Ankumah E, *The African Commission on Human and Peoples’ Rights*, note 138 above, p. 144.

argument as well as the obstacles to the enforcement of this category of rights under the African human rights system will be discussed in detail in the next chapter. It is expedient, however, to examine their normative framework under the Charter.

3.2.1.2.2.1 Right to equitable and satisfactory conditions of work

Article 15 of the Charter guarantees the right to equitable and satisfactory work conditions as follows: ‘Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.’ According to Ankumah, this provision obligates states to adopt programmes and other measures to create job opportunities for every person.³⁴⁵ This interpretation should be criticised in as far as it construes the ‘right to work’ to mean the imposition of an obligation on the state to create job opportunities, more so, for every person.

Umzurike argued, and rightly so, that the Charter does not guarantee the right to work *simpliciter* because that would have been an impossible task, given the economic situation of African states.³⁴⁶ Faced with the scarcity of industries and a limited wage system, a majority of Africans are peasant farmers and petty traders.³⁴⁷ Rather, this Article obligates states parties to adopt measures and programmes that would ensure a conducive work environment.³⁴⁸ One would think in terms of measures such as: fair and equitable wages; the right to promotion where appropriate; the right to follow one’s vocation and to change employment; reasonable work hours; right to be paid vacation (leisure and rest); safe working conditions; and non-discrimination of individuals in their place of work.³⁴⁹

³⁴⁵ Ibid.

³⁴⁶ Umzurike U, *The African Charter on Human and Peoples’ Rights*, note 45 above, p. 65.

³⁴⁷ Ibid.

³⁴⁸ Nmehielle O, *The African human rights system*, note 112 above, p. 125.

³⁴⁹ See in this regard, the International Covenant on Economic, Social and Cultural Rights, and the European Social Charter, which clearly define the parameters of this right.

The right to work under satisfactory conditions also precludes sexual harassment at the work place. States parties are therefore obligated to come up with suitable legislation and policies to prohibit such vices that may render work conditions un-equitable and unsatisfactory. It should be noted, however, that the Charter, unlike Article 7 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), does not expressly guarantee the right to rest, leisure, limited working hours and paid holidays. Arguably, a broad interpretation of the phrase ‘equitable and satisfactory conditions’ would encompass all these aspects of the right.³⁵⁰

The African Commission found a violation of Article 15, among other provisions, in *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*.³⁵¹ The victim in this case was a magistrate who had been tried and sentenced to 5 years imprisonment. Upon his release, the government of Cameroon refused to reinstate him to his position as a magistrate. Under an Amnesty law of 23 April 1992, persons granted amnesty and who had public employment were to be reinstated. The commission held that by not reinstating Mr. Mazou to his former position, the government was in violation of Article 15.³⁵²

3.2.1.2.2.2 Right to health

Article 16 of the Charter guarantees everyone the right to enjoy the best attainable state of physical and mental health. States parties to the Charter are obliged to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.³⁵³ The measures contemplated in this Article include, but are not limited to: elimination of epidemics; availing health services to the

³⁵⁰ Nmehielle O, *The African human rights system*, note 112 above, p. 125.

³⁵¹ Communication 39/90, *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*, Tenth Annual activity Report of the African Commission on Human and Peoples’ Rights (Annex X).

³⁵² *Ibid*, p. 56.

³⁵³ See Article 16 (1) & (2).

people through construction of adequate hospitals and health centres; promulgation of appropriate health policies; establishing appropriate legal standards that empower people to demand action against the violation to their right to health; and provision of free vaccinations, drugs and other healthcare services.³⁵⁴

In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire*³⁵⁵, the complainants alleged, amongst other things, that the former Zaire government had failed to provide them with basic services. The commission found that the failure of the government to provide basic services such as safe drinking water and electricity constituted a violation of the right to health. It also held that the shortage of medicines was a breach of the duty to protect the health of the people under Article 16 of the Charter. While it was innovative to link the provision of basic services to the right to health, the interpretation of the right by the commission in this case is somewhat overbroad. Not all basic services are linked to health. It would be appropriate for the commission to specify that the failure by the government to provide basic services is a violation of the right to health only to the extent to which the failure violates this right.³⁵⁶

3.2.1.2.2.3 Right to education

Article 17 of the Charter guarantees the right to education.³⁵⁷ This right entails a number of components, such as the right to primary education, the right to secondary education, the right to higher education, the right to fundamental education, the right to choice of schools and the principle of free primary (basic) education.³⁵⁸ While Article 17 lacks the

³⁵⁴ Umozurike U, *The African Charter on Human and Peoples' Rights*, note 112 above, p. 65.

³⁵⁵ 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 Temoins de Jehovah v. Zaire*.

³⁵⁶ Nmehielle O, *The African human rights system*, note 112 above, p. 127.

³⁵⁷ The Article provides: '1. Every individual shall have the right to education. 2. Every individual may freely take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the state.'

³⁵⁸ Umozurike U, *The African Charter on Human and Peoples' Rights*, note 45 above, p. 66.

specificity on the content of the right to education, other international instruments are more elaborate.

Under the European Convention, for example, the right is treated as a civil and political right.³⁵⁹ This gives it more force in terms of the obligation imposed on states to enforce it. Under the Inter-American system, it is one of the economic, social and cultural rights which are subject to the individual complaint procedure under Article 44 of the American Convention. In the American and European systems, as well as the ICESCR, the right is guaranteed more elaborately than in the African Charter. The Charter provisions overlook aspects such as the right to choice of education and the right to teach.³⁶⁰ The right to choice of education is important because it allows parents to decide the kind of education they think is appropriate for their children. It corresponds with the right of parents to have their children educated in conformity with their own religious, cultural, moral and philosophical convictions.³⁶¹ Article 17(2) & (3) could thus be read to mean that education is intended to facilitate the promotion of cultures, morals and traditions of communities.³⁶²

The African Commission emphasised on the importance of the right to education in *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire*³⁶³, when it stated that the closure of universities and secondary schools, as alleged in the communication, constituted a violation of Article 17. The commission has also taken the initiative to strengthen the provisions of Article 17 by defining the scope of the right to education in its guidelines for state reporting.³⁶⁴ The guidelines indicate that the right to education

³⁵⁹ See Article 2, First Protocol to the European Convention.

³⁶⁰ Nmehielle O, *The African human rights system*, note 112 above, p. 130.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Communication 25/89, 47/90, 100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire*.

³⁶⁴ See Old Guidelines for National Periodic Reports, section II (B) (42)-(59), cited in Nmehielle O, *The African human rights system*, note 112 above, p. 129.

comprises the right to primary education, secondary education, post-secondary education, fundamental education, the right to choice of schools and the principle of free and compulsory education for all.³⁶⁵

3.2.1.3 Collective and peoples' rights under the Charter

The African Charter provides for collective and peoples' rights. These rights, also known as 'solidarity', 'group' or 'third generation' rights, because they can be realised only through the concerted efforts of all the actors on the social scene, are the latest to be recognised by the international community.³⁶⁶ Accordingly, they cannot be claimed by any person in an individual capacity. They are rights that belong to individuals as a community, be it ethnic or national.³⁶⁷

While this may be the case, it should be noted, however, the African Charter does not subordinate individual rights to collective rights. Instead, the Charter establishes a link between the inalienable rights of the individual and of the group in a contextual manner.³⁶⁸ Thus, it recognises the importance of the co-existence of both categories of rights. Indeed, one of the paragraphs in its Preamble emphasises this relationship by stating that member states of the OAU/AU recognise, 'on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection, and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights.'³⁶⁹ This paragraph emphasises the need to look at human rights holistically, meaning, from both the individual and group (peoples) perspective.

³⁶⁵ Ibid, p. 129.

³⁶⁶ Vasak K, 'For the third generation of human rights: The rights of solidarity', (Inaugural Lecture, 10th Study of the International Institute of Human Rights, Strasbourg, July 1979).

³⁶⁷ Umozurike U, *The African Charter on human and peoples rights*, note 45 above, p. 70.

³⁶⁸ See the argument in this regard in Boven T, 'The relations between peoples' rights and human rights in the African Charter' (1986) 2/4 *Human Rights Law Journal*, p. 191.

³⁶⁹ African Charter, Preamble, para 5.

Although the Charter provides for peoples' rights, it does not define the content of the rights. The absence of at least a working definition for the term 'peoples' in the Charter has opened it up to different interpretations.³⁷⁰ The result is that no agreement and certainty exist as to when and how peoples' rights apply to particular cases. Accordingly, the term 'peoples' in the Charter has been said to embody many different aspects.³⁷¹ One of them relates to peoples subject to colonial or alien domination. Seen from this perspective, the Charter uses the term to underscore the struggle for the eradication of colonialism in Africa.³⁷² According to Heyns, some of the provisions on peoples' rights under the Charter reflect a reaction to the continental experience of slavery and colonialism.³⁷³

The term also refers to the population of a state as a whole.³⁷⁴ Murray cites different occasions when the African Commission mentioned, for example, the protection of the 'people of Rwanda', 'people of Togo', 'people of Liberia' and 'people of South Africa'.³⁷⁵ Another interpretation of the term as employed in the Charter signifies the people of Africa in general.³⁷⁶ The preamble to the Charter mentions the awareness of African states of their duty to 'achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence'.³⁷⁷ Similarly, the African

³⁷⁰ Dersso S, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights', note 77 above, p. 360.

³⁷¹ Ibid.

³⁷² Ibid. The author noted that Art 2(1)(d) of the OAU Charter states that one of the objectives of the OAU was 'to eradicate all forms of colonialism from Africa', p. 767.

³⁷³ Heyns C, 'The African regional human rights system: The African Charter', note 29 above, p. 679.

³⁷⁴ Dersso S, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights', note 77 above, p. 361. See in this regard Art 23(2)(b) of the African Charter.

³⁷⁵ See Murray R & Wheatley S, 'Groups and the African Charter on Human and Peoples' Rights', (2003) 25 *Human Rights Quarterly*, p. 231.

³⁷⁶ Dersso S, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights', note 77 above, p. 362.

³⁷⁷ Ibid. See also para 8 Preamble to the African Charter.

Commission has on several occasions spoken of ‘African peoples.’³⁷⁸ Finally, ‘peoples’ is also used to refer to the distinct communities within a state.³⁷⁹ In this sense, the subjects of peoples’ rights are the different ethnic groups or inhabitants of a particular territory within a state, who on account of historical, cultural and/or existing patterns of discrimination have come to form a sense of separate identity.³⁸⁰

The African Commission has contributed to the uncertainty of the meaning of the term ‘people’, owing to the different interpretations and divergent opinion from its members. Hence, during one of the commission’s sessions, commissioner Nguema commented: ‘... I think that according to the interpretation and even the principles which are enforced in the OAU at the level of the states it is admitted that we do not have to take account of the rights of various ethnic groups to consider them as peoples’ rights.’³⁸¹ Conversely, commissioner Umozurike retorted: ‘... there is no way that people here simply means all the people of the country— it is people that have an identifiable interest, and this may be carpenters, may be tribes, may be fishermen or whatever.’³⁸²

The fact that even the commissioners seem not to agree on the definition of ‘peoples’ in the context of the Charter indicates that so far there is no standard to determine the working definition of the term for the purposes of African human rights system. In other words, it is not as yet very clear how and when a group qualifies to be a ‘people’, and

³⁷⁸ *Resolution on the Celebration of African Day of Human Rights*, Second Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex VII); *Resolution on the African Commission on Human and Peoples’ Rights*, Sixth Annual Activity Report of the African Commission on Human and Peoples’ Rights.

³⁷⁹ Dersso S, ‘The jurisprudence of the African Commission on Human and Peoples’ Rights with respect to peoples’ rights’, note 77 above.

³⁸⁰ *Ibid.* Article 19 of the Charter stipulates: ‘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.’

³⁸¹ African Commission, Examination of State Reports (Libya-Rwanda-Tunisia) General Discussions (9th session March 1991) <http://www1.umn.edu/humanrts/achpr/sess9-generaldiscussions.htm> (accessed 15 August 2007).

³⁸² *Ibid.* See also Dersso S, ‘The jurisprudence of the African Commission on Human and Peoples’ Rights with respect to peoples’ rights’, note 77 above, p. 364.

hence a subject of peoples' rights. The attribution of the term to any group of persons, such as 'fishermen' or 'carpenters', certainly emphasises the need to clarify the meaning of the concept in the African context.

Although there is no general consensus on the definition of people, some working characteristics of 'peoples' have emerged from studies made under the auspices of UNESCO.³⁸³ Such characteristics include: common historical tradition; ethnic group identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and common economic life.³⁸⁴ In addition, the group as a whole must have the will to be identified as a people or the consciousness of being a people.³⁸⁵ What follows, therefore, is a discussion of the nature and scope of this category of rights as reflected in the African Charter's provisions and the commission's jurisprudence.

3.2.1.3.1 Right to the protection of the family and other related rights

Article 18 of the Charter provides for a number of group rights. The groups envisaged therein are: the family, children, women, the aged and the disabled. It states that:

1. The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.
2. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.
3. The state shall ensure the elimination of every discrimination against women and also ensure the protection of the right of the women and the child as stipulated in international declaration and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical and moral needs.

³⁸³ See UNESCO, Meeting of Experts on International Law, Paris, February, 1990.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

The Article identifies the family as the custodian of the moral and traditional values recognised by the community. The rights guaranteed to the family may include the rights to found a family, to marry and to have a family. It may also include the right not to get married without one's consent and equality in marriage.³⁸⁶ The rationale for incorporating this provision is to ensure the peaceful existence of the family. In *UIDH, FIDH, RADDHO, ONDH and AMDH v. Angola*³⁸⁷ it was held that deportation of the victims leading to separation from their families was a violation of Article 18 of the Charter which guarantees the right to the protection of the family.

Other than promoting its physical and moral health, the Charter does not specify ways in which the state could assist the family. It is not enough for the state to create a legislative framework to secure family rights. It must, in addition, strive to create social conditions that would enable families to flourish. It has been proposed that the state could, for example, undertake special programmes geared towards training of families in order to help create a stable and positive environment in which children will be imparted with virtues and values.³⁸⁸ In addition to the promotion and protection of the family, Article 18 also obliges states to protect the rights of women and children. In addressing women's rights, states are required to ensure the elimination of every form of discrimination against women and also to ensure the protection of their rights as stipulated in international declarations and conventions.

This provision of the Charter has attracted mixed reactions arising from the juxtaposition of women with the rather complex and controversial notions of the family, tradition and morality.³⁸⁹ One view is that Article 18(3) consigns women's rights to a 'legal

³⁸⁶ Nmehielle O, *The African human rights system*, note 112 above, p. 132.

³⁸⁷ *UIDH, FIDH, RADDHO, ONDH and AMDH v. Angola*.

³⁸⁸ Nmehielle O, *The African human rights system*, note 112 above, p. 132.

³⁸⁹ See, for example, Beyani C, 'Towards a more effective guarantee of women's rights in the African human rights system', in Cook R, (ed), *Human right of women: National and international perspectives* (1994), p. 285; Butengwa F, 'Using the African Charter on Human and Peoples' Rights to secure women's access to land in Africa,' in Cook R, (ed), *Human right of women: National and international perspectives*, *supra*, p. 503; Onyango O, 'Beyond the rhetoric', *supra*, p. 47; Kois L, 'Article 18 of The African Charter

comma'.³⁹⁰ It has also been argued that it protects women in the context of the family and that outside this arena there is not much protection afforded to women.³⁹¹ It has also been criticised for failing to address numerous issues affecting the rights of women such as female genital mutilation (FGM), inheritance by women, and forced marriages.³⁹²

In spite of these observations, some of which are true, it should be understood that the intention of incorporating these provisions in the Charter was not to suppress women's rights in Africa. In Africa, women's rights are taken as seriously as other categories of rights. This fact is vindicated by the adoption of a Protocol on the rights of women.³⁹³ Arguably, the Protocol is comprehensive enough to address some of the concerns raised by the critics of Article 18(3) of the Charter. A discussion on the provisions of the Protocol is beyond the scope of the present study.

The second part of Article 18(3) guarantees the protection of the rights of child in accordance with international declarations and conventions. Children are usually vulnerable and need special support in order to fully enjoy their rights. They need family care and protection from abuse, neglect, forced labour, forced marriages, detention, among other concerns. The rights of the Africa Child have indeed been addressed more comprehensively in a separate instrument.³⁹⁴ The African Charter on the Rights and Welfare of the Child, apart from providing for substantive rights, sets up a supervisory

on Human and Peoples' Rights: a progressive approach to the women's human rights', (1997) 3 *East African Journal of Peace and Human rights*, p. 92.

³⁹⁰ Elmadmad K, 'The rights of women under the African Charter on Human and Peoples' Rights', in Benedek W & Heinz W (eds.), *Regional systems of human rights in Africa, America and Europe: Proceedings of the conference* (1992), p. 17.

³⁹¹ Nsibirwa M, 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women', (2001) 1 *African Human Rights Law Journal*, p. 41.

³⁹² Ibid. See also Kois L, 'Article 18 of the African Charter on Human and Peoples' Rights: A progressive approach to women's human rights', note 389 above, pp. 94-95.

³⁹³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the African Union in Maputo (11 July 2003).

³⁹⁴ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

organ, the African Committee of Experts on the Rights and Welfare of the Child to monitor its enforcement.³⁹⁵

With regard to the rights of the aged and disabled, Article 18(4) stipulates that this category of persons shall have the right to special measures of protection in keeping with their physical or moral conditions. Like many other aspects of the Charter, this area has not received adequate attention from the African Commission. The protection afforded aged and disabled persons must go beyond providing suitable facilities, food and specialised medical care, to providing them with opportunities to engage in productive activities which are suited to their abilities and consistent with their vocations or desires.³⁹⁶ The state may thus, be required to foster the establishment of social organisations aimed at improving the quality of life for this category of persons.³⁹⁷

Additionally, states should ensure that disabled and old persons are able to access public places such as public buildings and other social infrastructure. This is essential because, most public offices have not been designed to allow, for example, people on wheel-chairs to access them. Public lavatories and streets in most African towns and cities do not have ramps which may ease the movement of such persons. As a result, many rights— civil and political as well as socio-economic— of such persons are violated. For instance, their right to freedom of movement is significantly limited. The same could be said of their right to freedom of association in as far as they are impaired by such factors to associate with other members of the society. The African Commission should look for ways of facilitating the enjoyment of all the rights contained in the Charter by this category of persons to the fullest possible extent, without necessarily waiting for communications alleging violation of their rights.

³⁹⁵ African Charter on the Rights and Welfare of the Child, Art 44.

³⁹⁶ Nmehielle O, *The African human rights system*, note 112 above, p. 137.

³⁹⁷ *Ibid.*

3.2.1.3.2 Right to self-determination

Article 19 of the Charter defines the content of the right to self determination by providing 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.’ Article 20 expounds this provision by providing that:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
3. All peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

From the wording of the Article, it can be concluded that self determination entails the following components: (i) the right to existence (ii) the right of all peoples to freely determine their political status and to pursue their economic and social development according to the policy they have freely chosen; (iii) the right of colonised or oppressed peoples to free themselves from the bonds of dominion by resorting to any means recognised by the international community; and (iv) the right of all peoples to get assistance of the states parties in their liberation struggle against foreign domination, be it political, economic or cultural.

The Charter is categorical that the right to self-determination is unquestionable and inalienable. It is difficult, therefore, for one to agree with the argument that Article 20 of the Charter could only have been intended to underscore the colonial experience and domination of Africa.³⁹⁸ The fact that Article 20(1) guarantees all peoples the right to freely determine their political status and to pursue their economic and social

³⁹⁸ Ibid, p. 142.

development according to the policy they have freely chosen, clearly indicates that this provision was intended to survive in post-colonial Africa.

This provision essentially means that people have the right to form a government, establish and exercise control over their own institutions, and work towards their self-development. Such a government can only be formed where like-minded people with a common ideology and political belief come together.³⁹⁹ Where a group within a state is in a fundamental disagreement with other groups on issues pertaining to governance, such a group should be allowed, under the principle established in Article 20(1), to secede and form their own government. Unfortunately, this has not been the interpretation given to Article 20 of the Charter.

In *Katangese Peoples' Congress v. Zaire*⁴⁰⁰, the people of Katanga wanted to secede from the former Zaire. The commission agreed that self-determination may be exercised in a number of ways, such as independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people. The commission, however, observed that this must be fully cognisant of other recognised principles, such as sovereignty and territorial integrity.⁴⁰¹ It vehemently maintained that it was obliged to uphold the sovereignty and territorial integrity of Zaire as a member of the former OAU and a party to the African Charter.

It further ruled that in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire is called to question, and in the absence of evidence that the people of Katanga were denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, Katanga was obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.⁴⁰² From the foregoing, one could conclude that, under the African

³⁹⁹ Ibid.

⁴⁰⁰ Communication 75/92, *Katangese Peoples' Congress v. Zaire*, ACHPR/LR/A/1 (1997), pp. 91-92.

⁴⁰¹ Ibid, para 5.

⁴⁰² Ibid, para 26.

human rights system, the right to self-determination is recognised within the limits of the territorial integrity of a state. This may involve self-government, local government, federalism, confederalism, unitarism or any other form of government.

The commission also considered the issue of peoples' right to self-determination in relation to the separatist movement of Casamance in Senegal.⁴⁰³ After analysing the positions of both the government and the separatist movement, the commission rejected the claim of the separatists for the independence of Casamance from Senegal as lacking 'pertinence.'⁴⁰⁴ Although it criticised the Senegalese state because it 'had a mechanical and static conception of national unity', the commission recommended that the issue must be addressed within the framework of 'the cohesion and continuity of the people of the unified Senegalese state in a community of interest and destiny.'⁴⁰⁵ This clearly indicates the commission's preference for national unity over and above the right to secede. Notably, the commission once again failed to explain the defining features of 'people' and whether the Casamance people possess these features.⁴⁰⁶

From the analysis, Article 20(1) of the Charter seems to guarantee the right to seceded in exceptional circumstances. Be that as it may, not to recognise that there can be cases of well founded secessionist pleas is not only to turn a deaf ear to living reality, but also a blind eye to the conceptual deficiency of the old normative framework on the issue of secession.⁴⁰⁷ Rather than dismiss claims on the right to secede, the African Commission should have adopted certain prescriptive measures, which would ensure that neither

⁴⁰³ *African Commission Report on the Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VIII)(herein after the 'Casamance case').

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Dersso S, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights', note 77 above, p. 367.

⁴⁰⁷ See in this regards, Okeke C, 'A note on the right of secession as a human right', (1996) III *Annual Survey of International and Comparative Law*, p. 35.

frivolous claims are allowed to dent its competence, nor is the right denied to genuine claimants.⁴⁰⁸

Article 20(2) explicitly intended to block foreign domination. It has correctly been argued that the provision has not yet been overtaken by events, even though all African states have now attained independence.⁴⁰⁹ The provision guarantees ‘colonised and oppressed’ people the right to free themselves from the bonds of domination. ‘oppressed people’, it is observed, could well be within sovereign states because oppression manifests itself in different forms-social, economic, political *etcetera*.⁴¹⁰ Thus, the application of this provision should not be confined to freedom from colonial domination, but may be extended to contemporary forms of oppression. Finally, Article 20(3) obligates states parties to the Charter to assist people in the liberation struggle against foreign domination, politically, economically or culturally. This provision seems to have outlived its purpose and therefore it is not any relevant to the contemporary African society.⁴¹¹

3.2.1.3.3 Right over wealth and natural resources

Article 21 guarantees the right over wealth and natural resources. This right is a component right of self-determination, and has been so regarded since the adoption of the *UN Resolution on Permanent Sovereignty Over Natural Resources*.⁴¹² In the resolution, the UN General Assembly recognised ‘that the under-developed countries have the right to determine freely the use of their natural resources...in order to be in a better position to further the realisation of their plans of economic development in accordance with their national interests.’⁴¹³

⁴⁰⁸ Nmechielle O, *The African human rights system*, note 112 above, p. 145.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² G.A res. 1803 (XVII), 17 U.N. GAOR Supp. (No. 17), at 15, U.N. Dec. A/5217 (1952).

⁴¹³ Ibid.

A distinction may be drawn in the way Article 21 of the Charter guarantees this right to the ‘peoples’ and states. While it is the right of all peoples to freely use, exploit, and dispose of their natural wealth and resources⁴¹⁴, states are under obligation to exercise control over the same.⁴¹⁵ The obligations of the state in this regard are two fold: (i) to individually and collectively exercise the right to freely dispose of their wealth and natural resources with a view to strengthening African unity and solidarity⁴¹⁶; and (ii) to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.⁴¹⁷

It is not clear why international monopolies were seen as the possible foreign economic exploiters in the context of Article 21(5). States are also known to have participated in foreign exploitation, particularly during colonialism. As Umozurike observed, the drafters of the Charter seemed to have forgotten this fact too soon, especially given that many African states were barely two decades into independence at the time the Charter was adopted.⁴¹⁸

The findings and recommendations of the African Commission in *Social and Economic Rights Action Centre (SERAC) & Another v. Nigeria*⁴¹⁹ (otherwise known as the ‘*Ogoni case*’ or ‘*SERAC case*’) bring out very pertinent issues on Article 21 of the Charter. The communication was brought on behalf of the Ogoni people, alleging that the military government of Nigeria had, among other provisions, violated Article 21 of the Charter by virtue of being directly involved in oil production through the State oil company, the

⁴¹⁴ African Charter, Art 21 (1), (2) & (3).

⁴¹⁵ Ibid, Art 21(4) & (5).

⁴¹⁶ Ibid, Art 21(4).

⁴¹⁷ Ibid, Art 21(5).

⁴¹⁸ Umozurike U, *The African charter on human and peoples’ rights*, note 45 above, p. 68.

⁴¹⁹ Communication 155/96, *Social and Economic Rights Action Centre (SERAC) & Another v. Nigeria*, Fifteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V).

Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC).⁴²⁰

It was the complainant's contention that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air had serious short and long-term health impacts, including skin infections, respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.⁴²¹ The African Commission held that Nigeria violated the rights, *inter alia*, to the free disposal of one's wealth and natural resources under Article 21. It noted that:

... despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.⁴²²

With regard to the violation of Article 21(5) of the Charter, which imposes a duty on states parties to undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies, the commission stated:

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts

⁴²⁰ Ibid, para 1.

⁴²¹ Ibid, para 2.

⁴²² Communication 155/96, *Social and Economic Rights Action Centre (SERAC) & Another v. Nigeria*, note 419 above, para 58.

that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under human rights instruments.⁴²³

The commission seemed to suggest that although the Nigerian government had the right to produce oil to fulfil the economic and social rights of Nigerians as a whole, it equally had the duty to protect the interests of the Ongonis who were being affected by its activities. Hence, when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised in the Charter, it would be in violation of its obligations to protect the human rights of its citizens.⁴²⁴ There is, therefore, an obligation on governmental authorities to take steps to make sure that the enjoyment of the rights in the Charter is not interfered with by private persons.

3.2.1.3.4 Right to economic, social and cultural development

Article 22 of the Charter encapsulates the controversial right to development. This right, which is relatively new, was first enunciated by Keba M'Baye.⁴²⁵ At the request of the UN Commission on Human Rights, the UN Secretary-General made a study in which he concluded that a large number of principles based on the UN Charter and human rights texts and declarations confirm the existence of the right to development.⁴²⁶

The right to development, considered holistically, includes political, economic, social and cultural processes aimed at the constant improvement of the well-being of all individuals.⁴²⁷ This right guarantees all people free participation in the economic, social and cultural processes of their states and the fair distribution of the proceeds. Owing to its

⁴²³ Ibid, para 57.

⁴²⁴ Ibid.

⁴²⁵ See M'Baye K, 'Le droits development comme un droits de l'homme', (1982) 5 *Review Droit de l'Homme*, p. 623, cited in Umzurike U, 'The African Charter on Human and Peoples' Rights', note 45 above, pp. 49-50.

⁴²⁶ Ibid. See also UN Doc. E/CN/4/1334 (1979), para. 305.

⁴²⁷ Swanson J, 'The emergence of new rights in the African Charter', (1991) 12 *New York Law School Journal of International & Comparative Law*, p. 317.

broad spectrum, the right to development should be construed in the light of other related rights contained in the Charter, *inter alia*, the right to self-determination, the right to exercise sovereignty over wealth and natural resources, the right to a general satisfactory environment and the right to peace and territorial integrity.⁴²⁸ Although the Charter imposes a duty on the state, either individually or collectively, to ensure the exercise of the right to development, it fails to be precise on the scope of the duty and on how this right could be exercised. It is therefore up to the state to be innovative to ensure the enjoyment of this right.

3.2.1.3.5 Right to peace

The Charter guarantees all peoples the right to national and international peace and security. Accordingly, the principle of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations are to govern the relationship between African states.⁴²⁹ Article 23(2) of the African Charter obliges states to strengthen peace, solidarity and friendly relations by ensuring:

- (a) Any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other state party to the present Charter;
- (b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present Charter.

The concept of peace as a human right is entirely novel and began with the African Charter.⁴³⁰ The Charter intends to promote the principle of good and peaceful co-existence among states. Thus, a state which collaborates with terrorists or militia groups against another state tends to jeopardise the purport and intention of Article 23 of the

⁴²⁸ Ibid.

⁴²⁹ Article 32(1) of the Charter stipulates: ‘All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between states.’

⁴³⁰ Nmehielle O, *The African human rights system*, note 112 above, p. 152.

Charter. The continent has experienced gross violation of this provision of the Charter in recent times. For example, The Democratic Republic of Congo (DRC) has been accused for harbouring Ugandan and Rwandese rebels who have been attacking their governments from time to time.⁴³¹ Similarly, Uganda has been known to be the base and training ground for Congolese rebels.⁴³² This has compromised the otherwise good relationships these countries might have enjoyed by being neighbours.

The Charter provisions regarding the right to peace have some shortcomings. For example, it is difficult to see how Article 23(1) of the Charter can be enforced.⁴³³ It is true that in Africa, peace and security have become increasingly of grave concern. However, the Charter does not contain enough contents to aid the enforcement of this right. The two situations in which states are obliged to ensure the achievement of peace—solidarity and friendly relations—are not adequate, especially in the absence of political will of states parties to the Charter.⁴³⁴ It should suffice to note that the elements and the scope of the right to peace are yet to be determined. Additionally, no effort has so far been undertaken to elevate the concept beyond the level of generalities.⁴³⁵

3.2.1.3.6 Right to a general satisfactory environment

In terms of Article 24 of the Charter, all people have the right to a general satisfactory environment favourable to their development. This right is concerned with maintaining an environment fit for human habitation that poses no, or minimum, threat to human life. Environmental conservation is very important in this respect. It is important to note that the right has both individual and collective dimensions.⁴³⁶ The individual dimension is the right of any victim or potential victim of an environmentally damaging activity to obtain reparation for harm suffered, while the collective dimension imposes a duty on

⁴³¹ See generally, Human Rights Watch, *World Report 2007* (2007).

⁴³² *Ibid.*

⁴³³ Nmehielle O, *The African human rights system*, note 112 above, p. 153.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

⁴³⁶ Umozurike U, *The African Charter on human and peoples' rights*, note 45 above, p. 75.

individuals and states to cooperate to resolve environmental problems.⁴³⁷ The issue of environmental rights in Africa did not begin with the adoption of the African Charter. Rather, it was engrafted into the African human rights system in 1968 when African heads of states and governments adopted the *African Convention on the Conservation of Nature and Natural Resources*.⁴³⁸

Despite the inaction on the violation of the right to a general satisfactory environment, the right has become very important and relevant to Africa. The importance culminated from the toxic waste dumping of 1988 in some African countries by international corporations.⁴³⁹ After discovering toxic waste dumping in the continent, the former OAU took quick action to forestall future occurrences. The same year, the OAU Council of Ministers passed a resolution condemning the import of toxic wastes to Africa, and emphasised that toxic dumping is a crime against Africa.⁴⁴⁰ This resolution was followed by the adoption of the convention banning the importation of toxic waste into Africa.⁴⁴¹

When interpreting Article 24 of the Charter, it is inevitable to note that the primary responsibility lies with states to adopt measures that will effectively address environmental degradation. On the other hand, individuals ought to have the right in domestic law to institute private action against any violation of the right to a general satisfactory environment. Unfortunately, many states in Africa do not have adequate national environmental laws or policies, if at all. Thus, the realisation of this provision of the Charter is impeded.

⁴³⁷ Ibid.

⁴³⁸ See *International Legal Materials* (1989) 28, p. 649.

⁴³⁹ Nmechielle O, *The African human rights system*, note 112 above, p. 157.

⁴⁴⁰ Ibid. See also *OAU Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa*, adopted at Addis Ababa, 23 May 1998. CM/Res. 1153 (XLVIII); (1989) 28 ILM, p. 567.

⁴⁴¹ Ibid. See also *Bamako Convention on the Ban of Importation into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa*. Concluded at Bamako, 29 January 1991. (1991) 30 ILM 775.

To conclude this discussion, it must be pointed out that the African Charter is a challenging, ambitious and innovative document in the area of group or collective rights.⁴⁴² It fails to take note that these rights are weak in their content and in the manner of their enforcement. Perhaps, by making provision for these rights, the drafters of the Charter intended to respond to human rights concerns in the context of African realities, given that Africans are more group oriented than individualistic.⁴⁴³ Be that as it may, there is still a lot to be desired in as far as these rights are concerned. It is not surprising that the African Commission has handled only a handful of communications alleging their violation. The inadequacy of the Charter pertaining to this category of rights shall be revisited in the next chapter of this thesis.

3.3 Institutional mechanisms of the African human rights system

Having discussed the provisions of the African Charter as the normative basis of the African human rights system, we now embark on the review of the institutional mechanisms put in place to enforce it- the African Commission and Court on Human and Peoples' Rights. As stated earlier, both the 'political' and 'legal' components of the human rights system have institutional mechanisms with responsibility for human rights enforcement in the region. However, given the scope of the present study, our discussion shall be confined to the two institutions mentioned herein.

3.3.1 The African Commission on Human and Peoples' Rights

The African Commission was established in 1987, a year after the African Charter entered into force.⁴⁴⁴ The commission consists of eleven members (commissioners) chosen from amongst African personalities of the highest reputation, 'known for their

⁴⁴² See generally Dersso S, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights', note 77 above, pp. 358-381.

⁴⁴³ See generally Eze O, *Human rights in Africa* (1984), p. 9; Mutua M, 'The Banjul Charter and the African Cultural Fingerprint: An evaluation of the language of duties', (1995) 35 *Virginia Journal of International Law*, p. 349.

⁴⁴⁴ African Charter, Art 30.

high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.⁴⁴⁵ The eleven commissioners are elected by secret ballot by the Assembly of Heads of State and Government (AHSOG) from a list nominated by states parties to the African Charter.⁴⁴⁶ The commissioners, who serve in their personal capacity,⁴⁴⁷ are elected for a six-year term and are eligible for re-election.⁴⁴⁸ During proceedings, they elect the chairman and vice-chairman of the commission for an initial tenure of two years subject to re-election.⁴⁴⁹ In carrying out their functions, they enjoy diplomatic privileges and immunities.⁴⁵⁰ Their emoluments and allowances are provided for in the regular budget of the AU.

A commissioner's office becomes vacant due to death or resignation, or if, in the opinion of other members of the commission, the member has stopped discharging his functions.⁴⁵¹ The issue of incompetence is unfortunately not mentioned. A commissioner may be incompetent or fall short of the required standard and yet still be willing to serve. The power of the commissioners to sanction each other should have related to unavailability, incompetence or inability to maintain the necessary standard, rather than the unwillingness to serve.⁴⁵² Noteworthy, however, a commissioner can be removed by either his own action or that of his colleagues and not by the Assembly or his own national state. This strengthens his independence from those that nominate or elect him.⁴⁵³

⁴⁴⁵ Ibid, Art 31.

⁴⁴⁶ Ibid, Art 33.

⁴⁴⁷ Ibid, Art 31(2).

⁴⁴⁸ Ibid, Art 36.

⁴⁴⁹ Ibid, Art 42.

⁴⁵⁰ Ibid, Art 43.

⁴⁵¹ Ibid, Art 39.

⁴⁵² Umzurike U, *The African Charter on Human and Peoples' Rights*, note 45 above, p. 51.

⁴⁵³ Ibid.

There is a general dissatisfaction on a number of issues regarding the composition of the African Commission, ranging from the mode of election, impartiality of members, gender representation, and equitable geographic and legal cultural representation.⁴⁵⁴ These aspects shall be discussed in detail in the next chapter where the challenges to effective enforcement of human rights in Africa will be elucidated. Meanwhile, the commission's mandate is stipulated in chapter II of the Charter. Specifically, Article 45 entrusts it with four broad functions:

- Promotion of human and peoples' rights;
- Protection of human and peoples' rights under conditions laid down by the Charter;
- Interpretation of the African Charter at the request of a state party, an institution of the AU or an African organisation recognised by the AU; and
- Performance of any other tasks that may be entrusted to it by the AHSG.

In its promotional functions, the commission is expected to, among other things, engage in: information collection; formulation and development of principles relating to human rights to guide legislative actions by African governments; and, collaboration with other African and international institutions concerned with the promotion and protection of human rights.⁴⁵⁵ Evaluation of periodic reports by states is also a promotional function of the commission in as far as it seeks to determine the extent to which states parties have implemented the provisions of the Charter in their respective jurisdictions. Accordingly, Article 62 requires states parties to furnish country reports every two years.⁴⁵⁶

⁴⁵⁴ See, for example, Nmehielle O, *The African human rights system*, note 112 above, p. 172; Rembe S, *The system of protection of human rights under the African Charter on Human and Peoples' Rights: Problems and prospects* (1991), p. 25; Ankumah E, *The African Commission on Human and Peoples' Rights*, note 138 above, pp. 18-19.

⁴⁵⁵ African Charter, Art 45 (1) (a)-(c).

⁴⁵⁶ Art 62 states in part: 'each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter...'

The commission performs its protection functions in terms of Articles 47 to 60 of the Charter. In particular, Articles 47 to 54 make provision for interstate complaints while Articles 55 to 60 establish the machinery for the receipt and handling of individuals' complaints.⁴⁵⁷ What follows is a more detailed discussion of the practice of the commission in its endeavour to fulfil its mandates concordant to chapter II of the Charter.

3.3.1.1 The commission's promotional mandate

3.3.1.1.1 General promotional activities

The African Commission is mandated to promote human and peoples' rights. In particular, Article 45 (1) spells out the specifics of this mandate to include:

- (a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to governments.
- (b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations.
- (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

In exercising this mandate, the commission has over the years made efforts aimed at realising the areas outlined above. Specifically, it has come up with programmes of action and activities geared towards the promotion of human and peoples' rights. For example, at its Second Session in Dakar, Senegal in 1988, it spelt out its first Programme

⁴⁵⁷ Art 56.

of Action, outlining its research and information dissemination, quasi-legislative and cooperation activities.⁴⁵⁸

Building on this programme of action, the commission at its Eleventh Session in March 1992 finalised and adopted another Programme of Action for the years 1992-1996. The programme, as adopted, contained as its main components, the establishment of the information and documentation centre; convening seminars, workshops and training courses; promotional activities by commissioners; translation and distribution of public documents of the commission, including state reports and relevant summary records; publication of Annual Reports of the commission: the Review Bulletin, brochure and other publications; and convening inter-session working groups.⁴⁵⁹ Moreover, the commission has been cooperating with other human rights institutions in many areas relating to promotion and protection of human rights. In a bid to strengthen cooperation, the commission from its 22nd Ordinary Session has been granting observer status to Non-Governmental Organisations (NGOs).⁴⁶⁰

The commission has also been progressive on information dissemination and publication. It has so far produced and circulated several human rights documents, including *the Review of the African Commission on Human and Peoples' Rights*, its *Annual Activity Reports*, the Charter and its Rules of Procedure.⁴⁶¹ Additionally, the commission has passed a number of resolutions and recommendations in the exercise of its promotional mandate. Such resolutions have, for example, called on Sudan to allow detainees access to lawyers and doctors and asked the government to support negotiations for the settlement of the conflict with the Southern region.⁴⁶²

⁴⁵⁸ Nmehielle O, *The African human rights system*, note 112 above, p. 177. See also Doc. AHG/155 (XXIV) Annex VIII.

⁴⁵⁹ Ibid. See also Badawi E, 'The African Commission on Human and Peoples' Rights: A call for justice', in Koufa K, (ed.), *International Justice* (1997), p. 283.

⁴⁶⁰ Nmehielle O, *The African human rights system*, note 112 above, p. 178.

⁴⁶¹ Ibid. See in this regard, *African Commission on Human and Peoples' Rights, Establishment* (Information Sheet no. 1), p. 11.

⁴⁶² Ibid.

Another resolution urged African states to respect the rights of prisoners and to ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.⁴⁶³ The resolutions, some of which were discussed in the preceding part of this study, are quite many and address various aspects of the broad human rights discourse. Sadly, these resolutions have received little publicity and there are no indications that states take them seriously.

The commission has also developed a procedure by which each commissioner is assigned a number of member states for promotional activities.⁴⁶⁴ These commissioners visit these states and organise lectures, seminars, and other activities in collaboration with various institutions. The commissioners report on their promotional activities at each session of the commission. Additionally, the commission initiated the internationally recognised Special Rapporteurs mechanism that is not specifically provided for in the African Charter.

So far there are five Special Rapporteurs: the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions (appointed in 1994)⁴⁶⁵; the Special Rapporteur on Prisons and Conditions of Detention in Africa (appointed in 1996)⁴⁶⁶; the Special Rapporteur on Women's Rights in Africa (appointed in 1999)⁴⁶⁷; the Special Rapporteur on Human rights Defenders (appointed in 2004)⁴⁶⁸; and the Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa (appointed in 2004).⁴⁶⁹ It must be stated, however, for a number of reasons, including scarce resources and the lack of cooperation from some states, the Special Rapporteurs mechanism has not performed to

⁴⁶³ Murray R, 'Report of the 1996 Sessions of the African Commission on Human and Peoples' Rights,' (1997) 18 *Human Rights Law Journal*, p. 16.

⁴⁶⁴ Ibid. See African Commission on Human and Peoples' Rights, 'Geographical Distribution of Countries Among Commissioners for Promotional Activities'. Doc/OS/36e (XXIII).

⁴⁶⁵ Eighth Annual Activity Report of the African Commission, Annex VII.

⁴⁶⁶ Tenth Annual Activity Report of the African Commission, Annex VII.

⁴⁶⁷ Eleventh Annual Activity Report of the African Commission, Annex VII.

⁴⁶⁸ Seventeenth Annual Activity Report of the African Commission, Annex IV.

⁴⁶⁹ Eighteenth Annual Activity Report of the African Commission.

the commission's expectations. The challenges and shortcomings of the mechanism shall be discussed in the next chapter.

In terms of Article 45(1)(c), the African Commission is also mandated to cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights. To this end, cooperation has been sought with organisations such as the Inter-American Commission and Inter-American Court on Human Rights and other international and national human rights organisations. The commission has improved its working relations with NGOs⁴⁷⁰, National Human Rights Institutions⁴⁷¹ and more states delegates and other stakeholders now participate in its sessions. In terms of the Rules of Procedure, these organisations can attend the commission's sessions.⁴⁷²

Generally, there are a number of problems connected with the commission's efforts to enforce its promotional mandate that need to be mentioned here.⁴⁷³ From the catalogue of activities listed above, it is evident that the promotional mandate of the commission is enormous. However, promotional activities are only carried out during the inter-session period. Even so, the commissioners have restricted themselves to visiting universities and other institutions of higher learning in the countries assigned to them, giving lectures on the African Charter, African human rights issues and the work of the commission.⁴⁷⁴

⁴⁷⁰ By the 39th Ordinary Session of the African Commission, 339 NGOs had been granted observer status before the commission. See the Twentieth Annual Activity Report of the African Commission on Human and Peoples' Rights, para 20; Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', in Viljoen F, (ed.), *The African Human Rights System: Towards the Co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006), p. 14.

⁴⁷¹ Ibid. By the 39th Ordinary Session of the Commission at least seven National Human Rights Institutions had affiliate status.

⁴⁷² African Commission's Rules of Procedure, Rules 75 and 76.

⁴⁷³ For a detailed discussion of the shortcomings of the promotional activities of the commission, see the chapter that deals with the challenges in enforcing human rights law in Africa.

⁴⁷⁴ Nmehielle O, *The African human rights system*, note 112 above, p. 179.

While this is happening, an average African is ignorant, not only of his or her rights, but also of the work of the commission.⁴⁷⁵

Thus, in the process of executing its mandate, the commission should focus on more issues than it has in the past. The size of the continent and the inadequacy of material and human resources also present a problem to effective promotion of human rights in Africa. With one commissioner working part time and responsible for promoting the Charter in three to five countries⁴⁷⁶, the chances for effective promotion are slim.⁴⁷⁷ It therefore becomes necessary to operate through a network of national, international and private organisations based in those areas. Human rights promotion requires sustained activities tailored to suit the ages and the vocations of the target audience. Additionally, promotion requires publicity in the media-radio, television, newspapers— which in many African countries are still controlled by governments.⁴⁷⁸ It follows that the efforts to promote the Charter are impeded by the prevalent political climate in a country.⁴⁷⁹ The problems highlighted herein shall be discussed in detail in the next chapter.

3.3.1.1.2 The State reporting mechanism

State reporting is more of a promotional activity of the commission than it is a protective one. Article 62 of the African Charter obligates member states to submit reports every two years.⁴⁸⁰ Such reports are to indicate the legislative or other measures taken by states to give effect to the rights and freedoms recognised and guaranteed under the Charter.

⁴⁷⁵ Ibid.

⁴⁷⁶ For the distribution of commissioners among member states, see Seventeenth Annual Activity Report of the African Commission on Human and Peoples' rights (Annex III).

⁴⁷⁷ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', note 470 above, p. 14.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ The Article states in part that, 'Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter. . . .'

While obligating states to submit reports, the Charter failed to identify the organ competent to receive and review these reports.⁴⁸¹ As a result, the African Commission at its Third session adopted a resolution requesting the OAU Assembly to entrust it with the task of reviewing state reports.⁴⁸² The commission rightly noted that ‘it [was] the only appropriate organ of the OAU capable not only of studying the said periodic reports, but of making pertinent observations to states parties.’⁴⁸³

In response to this request, the OAU Assembly, as it then was, entrusted the commission with the task.⁴⁸⁴ Unfortunately, through the request, which was meant to mandate it with the task of ‘examining’ the periodic reports, the commission limited its own scope and by extension the effectiveness of the reporting mechanism.⁴⁸⁵ Nothing is specifically stated in relation to what is to be done with the ‘conclusions’ or ‘observations’ arising from the examination, as is the case, for instance, under the European Social Charter system.⁴⁸⁶ This, notwithstanding, the importance of state reporting in the promotion of human rights cannot be ignored. The African Commission has spelt out the importance or benefits of the state reporting mechanism to include the following⁴⁸⁷:

- Through the reporting system the implementation of the African Charter by states within their domestic systems is monitored.
- Through the examination of state reports, the African Commission is afforded the opportunity to understand the problems encountered by states in transforming the

⁴⁸¹ Kofi Q, ‘The African Charter on Human and Peoples’ Rights: Towards a more effective reporting mechanism’, (2002) 2 *African Human rights Law Journal*, p. 263.

⁴⁸² First Annual Activity Report of the African Commission on Human and Peoples’ Rights, p. 28.

⁴⁸³ *Ibid.*

⁴⁸⁴ Second Annual Activity Report of the African Commission on Human and Peoples’ Rights, p. 20.

⁴⁸⁵ Kofi Q, ‘The African Charter on Human and Peoples’ Rights: Towards a more effective reporting mechanism’, note 481 above, p. 263.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ The African Commission on Human and Peoples’ Rights, *State reporting procedure Information Sheet* No 4, pp. 6-7. See also Mugwanya G, ‘Examination of state reports by the African Commission: A critical appraisal’, (2001) 2 *African Human Rights Law Journal*, p. 274.

Charter into reality, and the commission may make recommendations which may be taken by states to address the problems and promote effective realisation.

- The reporting system enables states to constantly check the whole government machinery as it requires all relevant government institutions and departments to evaluate their legal regulations, procedures and practices in terms of the provisions of the Charter.
- State reporting permits the African Commission to collect information on common experiences, both good and bad, from state parties so that states may learn from each other.

On the basis of the above, state reporting should be seen as a non-contentious mechanism that allows states to present a comprehensive picture of the human rights situation in their countries.⁴⁸⁸ The mechanism gives states the opportunity to engage in constructive dialogue with the commission with a view to enhance their human rights standards. Through this dialogue the difficulties to the realisation of human rights and possible ways to address them could be identified.⁴⁸⁹

In the formative years of state reporting, the commission did not have clearly laid down procedures. Thereafter, at its Fourth ordinary session in October 1991, it adopted the ‘General Guidelines for National Periodic Reports’.⁴⁹⁰ The initial guidelines were divided into seven parts, each dealing with different aspects of rights and duties contained in the Charter.⁴⁹¹ The guidelines were, nevertheless, found not to be very useful because they

⁴⁸⁸ Murray R ‘Report on the 1997 sessions of the African Commission on Human and Peoples’ Rights- 21st and 22nd sessions: 15-25 April and 2-11 November 1997’, (1998) 19 *Human Rights Law Journal*, p. 181.

⁴⁸⁹ The African Commission on Human and Peoples’ Rights, *State reporting procedures Information Sheet no 4*, note 487 above, pp. 5-7.

⁴⁹⁰ See *Guidelines on national periodic reports*, Second Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex XII), reprinted in Naldi G, *Documents of the Organisation of African Unity* (1992), p. 155.

⁴⁹¹ These parts were: civil and political rights; economic and social rights; peoples’ rights; duties under the Charter; elimination of all forms of racial discrimination; suppression of apartheid; and elimination of all forms of discrimination against women.

were too detailed and complex, making it difficult for member states to follow.⁴⁹² The commission, realising the problems associated with the old guidelines, proceeded to amend them. These amendments were intended to aid state parties to submit reports that are clear, organised, adequate in scope and sufficient in detail.⁴⁹³ Although the initial guidelines had shortcomings, they assisted in clarifying some ambiguous provisions of the Charter, hence, deepened normative understanding thereof.⁴⁹⁴ Mugwanya succinctly captures this achievement as follows:

... while the Charter has no derogation clause, the guidelines require states to report on whether there is a provision in their laws for derogation and under what circumstances derogations are possible. Moreover, the guidelines are detailed on the information states must furnish to demonstrate that they have taken appropriate measures to give effect to individual and group rights. For instance, as regards peoples' rights to equality under Article 19, they require states to state the constitutional framework which protects the different sections of national community.⁴⁹⁵

The amended guidelines highlight eleven areas to be addressed in the reports.⁴⁹⁶ On the basis of these guidelines, the commission has evolved the procedure and practice of

⁴⁹² See Mugwanya G, 'Examination of state reports by the African Commission: A critical appraisal', note 487 above, p. 275; Nmehiell O, *African human rights system*, note 112 above, p.189; Viljoen F 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South', (1999) 44 *Journal of African Law*, p. 112.

⁴⁹³ Nmehiell O, *African human rights system*, Ibid, p. 189.

⁴⁹⁴ Mugwanya G, 'Examination of state reports by the African Commission: A critical appraisal', note 487 above, p. 275.

⁴⁹⁵ Ibid.

⁴⁹⁶ Nmehielle O, *The African human rights system*, note 112 above, pp. 189-190. These areas are: (i) the initial report should contain a brief history of the state, its form of government, the legal system and the relationship between the arms of government; (ii) basic legislation of the state, such as the Constitution and criminal codes; (iii) the major human rights instruments to which the state is party and the steps taken to internalise them; (iv) how the state is implementing the rights protected by the Charter; (v) what the state is doing to improve the condition of women, children and the disabled; (vi) what steps are being taken to protect the family and encourage its cohesion; (vii) what is being done to ensure that individual duties are observed; (viii) what problems are encountered in implementing the Charter having regard to the political,

examining state reports. Normally, examination of state reports is conducted in the commission's open sessions. However, only commissioners are allowed to pose questions to state representatives.⁴⁹⁷

Procedurally, the state representative is given the opportunity to present the state's reports, after which the commission's Rapporteur poses questions to him or her. Additional questions are posed to the representative by other commissioners and are generally not limited to the line of questions prepared by the Secretariat.⁴⁹⁸ After the question and answer session, the Rapporteur sums up, and the Chairman of the commission concludes the session. In the past, the commission had adopted the practice of not considering a member state's report if there was no person from the state to present it. The commission, however, changed its approach at its 23rd Ordinary Session.

The new approach allows two letters of notification to the state concerned to send a representative.⁴⁹⁹ The commission then goes ahead to examine the report and forward its comments to the state, should it fail to comply.⁵⁰⁰ In the case of non-submission of reports, the commission may authorise the Secretary to send to the state concerned a report or reminder on the submission of the report of additional information.⁵⁰¹ Where the state concerned does not respond to the reminder, the commission is obliged to point it out in its Annual report to the AHSR.⁵⁰²

economic or social circumstances of the state; (ix) how the state is carrying out its obligations under Article 25 of the Charter on human rights education; (x) how the state as an interested party is using the Charter in its international relations, particularly in ensuring respect for it and; (xi) any other information relevant to the implementation and promotion of the Charter.

⁴⁹⁷ Ibid. See also the African Commission on Human and Peoples' Rights, Rules of Procedure of the African Commission on Human and Peoples' Rights, revised and adopted on June 6, 1995, Rule 3 (Hereinafter 'Rules of Procedure of the African Commission).

⁴⁹⁸ Ibid. See also *Information Sheet no. 4*, note 487 above, p. 9.

⁴⁹⁹ Nmehielle O, *The African human rights system*, note 112 above, p.192.

⁵⁰⁰ Ibid.

⁵⁰¹ Rules of Procedure of the Commission, note 497 above, Rule 84(1).

⁵⁰² Ibid, Rule 84 (2).

Generally, the state reporting mechanism has encountered myriad challenges since its inception. For example, due to the failure to submit reports, the African Commission has not fully succeeded in enhancing the promotion of human rights through this mechanism. Reasons for the lack of compliance by states with their reporting obligations include a general lack of political will on the part of states parties; the fact that states parties have to file reports under other international human rights instruments to which they are signatories; the lack of a coordinated effort between state departments; and the complexity of the first reporting guidelines issued by the African Commission.⁵⁰³ Additionally, many of the reports filed have revealed a lack of seriousness in carrying out introspective self-evaluation. The deficiencies and challenges encountered in state reporting shall be discussed fully in the next chapter.

Noteworthy, however, in an apparent move to curb the issue of delayed reports, the commission, in its 5th Annual Report, recommended to the AHSG to adopt a resolution on overdue reports.⁵⁰⁴ Thus, at its 29th Ordinary Session in Cairo, the AHSG adopted a resolution that *inter alia*⁵⁰⁵:

- (2) Urges the states parties to the African Charter on Human and Peoples' Rights which have not yet submitted their reports to submit them as soon as possible;
- (3) Requests that states should report not only on the legislative or other measures taken to give effect to each of the rights and freedoms recognised and guaranteed by the African Charter on Human and Peoples' Rights but also on the problems encountered in giving effect to these rights and freedoms;
- (4) Recommends that the states in their periodic reports give information on the implementation of the right to development;
- (5) Encourages states parties which encounter difficulties in preparing and submitting their periodic reports to seek help as soon as possible from the African Commission on Human and Peoples' Rights which will arrange for assistance in this task through its own or other resources.

⁵⁰³ See Mugwanya G, 'Examination of state reports by the African Commission: A critical appraisal', note 487 above, p. 276.

⁵⁰⁴ Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VII.

⁵⁰⁵ AHG/Res (XXVIII), 1993.

This resolution is a welcome idea in as far as it seeks to redress the shortcomings of irregular or non-reporting by member states. The mere adoption of resolutions, however, will not be enough to change the ingrained negative attitudes of African governments to human rights reporting.⁵⁰⁶ Rather, a radical system of sanctions and monitoring involving the organs of the African Union would be a more effective and meaningful approach. Proposals for the reform of the state reporting mechanism shall be discussed at length in the next chapter.

3.3.1.2 The commission's protective mandate

Although Article 45(2) does not specifically state how the commission may exercise its protective mandate, chapter III of the Charter provides for the communication (complaints) procedure, which has generally been one of the ways this mandate is exercised. As already stated, the complaints procedure is conducted in terms of Articles 47 to 60 of the Charter. In particular, Articles 47 to 54 make provision for interstate complaints while Articles 55 to 60 govern individuals' complaints.⁵⁰⁷

3.3.1.2.1 Inter-state communications procedure

The African human rights system has provisions for the settlement of human rights disputes between states. However, neither the African Charter nor the Rules of Procedure of the African Commission indicate the type of disputes or violations of the Charter that are contemplated under the inter-state complaints procedure. As Nmehielle suggested, violation of Article 20 dealing with the general question of the right to self-determination and Article 23, which deals with the right to national and international peace and security, would fall within the purview of the procedure.⁵⁰⁸ Additionally, the procedure could be

⁵⁰⁶ Kofi Q, 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism', note 481 above, p. 266.

⁵⁰⁷ African Charter, Art. 56.

⁵⁰⁸ Nmehielle O, *The African human rights system*, note 112 above, p. 203.

used where a state chooses to claim on behalf of its nationals whose rights may have been violated by another state party to the Charter.⁵⁰⁹

The Charter provides for two approaches to redress inter-state complaints. Pursuant to Article 47:

If a state party to the present Charter has good reasons to believe that another state party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that state to the matter. This communication shall also be addressed to the Secretary-General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the state to which the communication is addressed shall give the enquiring state, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

The procedure under Article 47, therefore, envisages a situation where the contending states may want to resolve a dispute in a friendly manner without involving the commission. It may happen, however, that the contending states may fail to settle the issue through bilateral negotiation or by any other peaceful procedure. In such cases, Article 48 of the Charter provides that either state shall have the right to submit the matter to the commission within three weeks from the date on which the original communication is received by the respondent state.⁵¹⁰

The second procedure, which is contemplated under Article 49 of the Charter, allows a state party to proceed directly with a communication to the commission. Article 49 reads:

⁵⁰⁹ Ibid.

⁵¹⁰ Article 48 of the Charter reads 'If within three months from the date on which the original communication is received by the state to which it is addressed, the issue is not settled to the satisfaction of the two states involved through bilateral negotiation or by any other peaceful procedure, either state shall have the right to submit the matter to the commission through the Chairman and shall notify the other states involved.'

Notwithstanding the provisions of 47, if a state party to the present Charter considers that another state party has violated the provisions of the Charter, it may refer the matter directly to the commission by addressing a communication to the Chairman, to the Secretary-General of the Organization of African Unity and the state concerned.

The two procedures may be distinguished in more than one way. The most obvious distinction is that the first procedure ('Article-47 procedure') allows the amicable settlement of a dispute between contending states before they proceed to the commission, while this is not required in the second procedure ('Article-49 procedure'). The second distinction is that, while Article-47 procedure requires three months of exchange of information before the commission is seized of the complaint, Article-49 procedure indicates no such period. One would wonder why the Charter makes provision for two procedures in inter-state communications. The drafters of the Charter should rather have made one provision in which a time limit for bilateral peaceful resolution of the dispute is specified before a communication is filed with the commission.⁵¹¹

Another issue concerning the inter-state communications procedures relates to the role of the OAU/AU Secretary-General. Both procedures require states parties to address their communications to the commission and the Secretary-General. One would think that the commission should have been the only and proper institution to receive communications. The commission, at its discretion, could then use the good offices of the Secretary-General to ensure amicable settlement of disputes between states parties.⁵¹²

In an attempt to streamline the inter-states complaint procedure, the African Commission has established guidelines on the submission of inter-state communications.⁵¹³ These guidelines require the complaining state to: (i) state in writing, *inter alia*, its name, official language, and the year in which it ratified the African Charter; (ii) state the name of the accused state, its official language and the year it ratified the Charter; (iii) state the

⁵¹¹ Nmehielle O, *The African human rights system*, note 112 above, p. 201.

⁵¹² Ibid.

⁵¹³ See African Commission on Human and Peoples' Rights, Guidelines on the Submission of Communications: Information Sheet no. 2, 14 (hereafter 'Information sheet no. 2').

facts constituting the violation; (iv) indicate measures that have been taken to resolve the matter amicably; why the measure, if any, failed, or why no measure was used at all. Along this line the state must also indicate measures taken to exhaust local remedies; (v) state domestic legal remedies not yet pursued, giving reasons why this has not yet been done; (vi) state whether the case has also been referred to other international avenues, such as referral to other international settlement body like the UN or within the OAU system; and (vii) show complaints submitted to the Secretary-General of the OAU/AU and to the accused state, accompanied by any response from these two sources.⁵¹⁴

These guidelines are similar to the requirements in individual complaints in some respects. For example, under both procedures, the commission can proceed to consider a communication only after it has ascertained that all domestic remedies have been exhausted, unless it is obvious to the commission that the procedure of achieving these remedies would be unduly prolonged.⁵¹⁵ What follows below is a discussion of the individuals' complaints procedure before the commission.

3.3.1.2.2 Individuals ('other') communications procedure

Other than the inter-state communications procedure, the Charter mandates the African Commission to receive 'other communications'. Although neither the Charter nor the Rules of Procedure of the commission define the term, Article 55(1) tends to suggest that 'other communications' connotes communications that are not from a state party because it provides that:

Before each Session, the Secretary of the commission shall make a list of the communications other than those of states parties to the present Charter and transmit them to the members of the commission, who shall indicate which communications should be considered by the commission.

⁵¹⁴ Ibid.

⁵¹⁵ See also the Rules of Procedure of the Commission, note 497 above, Rule 97 (c).

An analytical reading of this provision would suggest that the Charter does not restrict or limit access to the commission by non-state complainants. This would essentially mean, therefore, that any person, group of persons or non-governmental organisation, is allowed to lodge a complaint or petition alleging violation of the Charter. Hence, the Charter has been said to be more liberal in granting access to its non-state complainant's procedure than other regional and international human rights systems.⁵¹⁶ For example, whereas the Inter-American system allows only NGOs legally recognised in the member states of the OAS to lodge complaints before the Inter-American Commission⁵¹⁷, the African system does not have such regulations.⁵¹⁸ Thus, NGOs from all over the world, with or without observer status with the commission, have enjoyed unlimited access to the commission on behalf of complainants.

In the same vein, the African Charter does not contain any primary requirement that petitioners be the actual victims of the Charter violation, neither does it require that the complainants or petitioners be within the jurisdiction of the respondent state. It is therefore expedient to examine the non-state (individuals) communications procedure in detail, in order to highlight its ramifications. The examination shall be conducted sequentially by discussing the procedure from the point a communication is lodged with the commission to when redress is offered. For purposes of clarity, the non-state complaints procedure (or 'other communications') shall herein be referred to as 'the individual communications procedure'.

3.3.1.2.2.1 Submission of individual communications

Before a communication is submitted to the Commission, certain issues must be ascertained. First, according to Rule 102(2) of the Rules of Procedure, a communication submitted against a non-party state cannot be entertained because the commission is mandated to only receive individual communications against a state party to the African

⁵¹⁶ Nmehielle O, *The African human rights system*, note 112 above, p.204.

⁵¹⁷ See American Convention on Human Rights, Art 44.

⁵¹⁸ Nmehielle O, *The African human rights system*, note 112, p.204.

Charter. The commission has also held that one cannot bring a communication against a non-state member such as an inter-state organisation.⁵¹⁹ Secondly, as stated earlier, the complainant need not be or know the victim. Additionally, it is not necessary to be actually resident in, be a national of, or at the time of complaining, be present in the state against which the allegation is made.⁵²⁰

The starting point of the individuals' communications procedure is the submission of a complaint (communication) by the individual. The Secretary of the commission is required to make a list of all individual communications and transmit them to the commissioners.⁵²¹ A communication will only be considered by the commission upon the decision of a simple majority of the Commissioners.⁵²² It is not clear whether Article 55(2) of the Charter, which provides for a simple majority decision of the commissioners prior to the determination of a communication, could be taken to mean that the commission could decline to consider a communication that meets all admissibility requirements just because a simple majority of its members so decide. One would agree with Murray that this provision could only be applicable in cases where admissibility requirements have not been met because anything to the contrary may give the commission unfettered discretion which could be abused.⁵²³

3.3.1.2.2.2 Admissibility of individual communications

Once an individual communication has been received, it is incumbent upon the commission to decide whether or not the communication meets the admissibility

⁵¹⁹ See Communication 12/88, *Mohamed El-Nekheily v OAU*, Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights.

⁵²⁰ Old Rule 114 (2), deleted in amended Rules. See also Murray R, 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' rights', (1997) 46 *International and Comparative Law Quarterly*, p. 420.

⁵²¹ African Charter, Art 55(1).

⁵²² *Ibid*, Art 55 (2).

⁵²³ Murray R, 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' rights', note 520 above, p. 420.

requirements stipulated under Article 56 of the Charter. While so doing, it may set up working groups, comprising a maximum of three commissioners, to recommend on the admissibility of a communication.⁵²⁴ In the process, the commission or its working group is at liberty to request additional information relating to the issue of admissibility from either the complainant or the respondent state.⁵²⁵ The decision on admissibility can only be taken after the communication or its brief summary has been transmitted to the state party concerned to make its observations.⁵²⁶ The commission is mandated to give the state party three months within which to submit its comments.⁵²⁷

Unless the commission is compelled by exceptional circumstances to review its position, a decision on admissibility is final. Thus, if a communication is declared inadmissible its consideration will automatically come to a close. A decision on inadmissibility may, however, be reconsidered at a later date if the commission is requested to do so.⁵²⁸ Sometimes the commission invites the author to do so, as in *Alberto T. Capita v. Tanzania*, where it observed that the ‘case can be resubmitted when the local remedies have been properly exhausted or if the complainant proves that local remedies are unavailable, ineffective or unreasonably prolonged.’⁵²⁹ Where, however, a communication is declared admissible, the parties will be informed and the case will proceed to the ‘merits stage’.⁵³⁰

The principle that communications have to comply with certain admissibility requirements serves as a screening or filtering mechanism between national and

⁵²⁴ Rule 115 of the Rules of Procedure.

⁵²⁵ *Ibid*, Rule 117.

⁵²⁶ *Ibid*.

⁵²⁷ *Ibid*, Rule 117(4).

⁵²⁸ *Ibid*, Rule 118(2).

⁵²⁹ Communications 53/90 and 53/91, *Alberto T. Capita v. Tanzania*, Seventh Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex IX); Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex VI).

⁵³⁰ Rules of Procedure of the Commission, Rule 118 (1).

international institutions.⁵³¹ This requirement places a divide between sovereign states and international supervision. Viljoen correctly notes that disputes between nationals and their states should, in the first instance, be resolved at the national level.⁵³² Article 56 of the African Charter, therefore, provides such a filter by outlining seven admissibility requirements in the following terms:

Communications relating to human and peoples' rights referred to in Article 55 received by the commission shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity,
4. Are not based exclusively on news disseminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

1. The communications must indicate their authors even if they request anonymity.

Article 56(1) stipulates that communications must 'indicate their authors even if the latter requests anonymity.' This should be understood to mean that the authors should furnish the commission with their full particulars.⁵³³ This requirement was interpreted by the

⁵³¹ Viljoen F, 'Admissibility under the African Charter', in Murray R & Evans M, *The African Charter on Human and Peoples' Rights*, note 12 above, p. 62.

⁵³² Ibid.

⁵³³ Ibid.

commission to mean the authors must give their full identity⁵³⁴ and contact address.⁵³⁵ It was the commission's position that, even though the author's address is not expressly required under Article 56, the same is necessary to facilitate communication with the author.⁵³⁶ Accordingly, the author may request anonymity but still needs to state his or her name and other relevant particulars.⁵³⁷

It has been contended, and rightly so, that anonymity will sometimes be difficult to maintain as the respondent state needs to be alerted to the specific situation that gave rise to the complaint against it.⁵³⁸ The Charter and the Rules of Procedure are not clear on whether the complainant should request to remain anonymous in respect of the respondent state or the general public or even to some commissioners.⁵³⁹ It will be expedient therefore for complainants to specify how anonymity should be granted with respect to their specific communications.⁵⁴⁰

Anonymity could be enhanced by a party being represented by, for example, an NGO and the commission could use the name of the NGO in the title of the case.⁵⁴¹ Alternatively, the commission may be requested to use a pseudonym in order to protect the complainant's identity. But either way, it may be difficult to maintain anonymity in the event the respondent state is called upon to vindicate its position and counter the complainant's allegations.

⁵³⁴ Communication 70/92, Ibrahim *Diomessi, Sekou Kande, Ousmane Kabe v. Guinea*, Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex IX); Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VIII).

⁵³⁵ In communication 57/91, *Tanko Bariga v. Nigeria*, Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex IX), the Commission made it clear that an address is required because 'for practical reasons it is necessary that the Commission is able to contact the author.'

⁵³⁶ *Ibid.*

⁵³⁷ Rule 104 of Rules of Procedure.

⁵³⁸ Viljoen F, 'Admissibility under the African Charter', note 12 above, p. 67.

⁵³⁹ *Ibid.*

⁵⁴⁰ Gumedze S, 'Bringing communications before the African Commission on Human and Peoples' Rights', (2003) 3 *African Human Rights Law Journal*, p. 129.

⁵⁴¹ *Ibid.*

2. The communications must be compatible with both the African Charter and the Charter of the Organisation of African Unity (or the CAAU).

The essence of Article 56(2) is that the commission considers communications only if they are ‘compatible with’ the African Charter. Compatibility with the African Charter has various aspects. First, the communication must provide *prima facie* evidence that a right set out in the Charter has been violated.⁵⁴² In *Frederick Korvah v. Liberia*⁵⁴³, where the complainant alleged, among other things, the lack of discipline in the Liberian security police and corruption, the communication was declared inadmissible because the allegations did not ‘amount to violations of human rights under the provisions of the Charter.’⁵⁴⁴ The commission has also stated that although it is not necessary to mention specific provisions of the Charter, there must be sufficient indication of the factual basis of the violation.⁵⁴⁵

Secondly, the communication must be directed at a state party and must be submitted by someone who is competent to do so.⁵⁴⁶ Observing that numerous petitioners in the early years of the commission overlooked this requirement, Viljoen states:

In the first few years, this requirement was the cause of most findings of inadmissibility: twenty-three of the fifty-four cases found to be inadmissible until May 1999. There are four categories of countries against whom these communications were directed: non-African states, OAU member states that had not yet become states parties of the Charter; the only African non-OAU member, Morocco and the OAU itself.⁵⁴⁷

⁵⁴² Viljoen F, ‘Admissibility under the African Charter’, note 12 above, p. 69.

⁵⁴³ Communication 1/88, *Frederick Korvah v. Liberia*, Seventh Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex IX).

⁵⁴⁴ *Ibid.*

⁵⁴⁵ Communication 162/97, *Mouvement des Refugies Mauritanien au Senegal v. Senegal*, Eleventh Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex II), which was found inadmissible on the ground that the facts do not reveal a *prima facie* violation of the Charter.

⁵⁴⁶ See Viljoen F, ‘Admissibility under the African Charter’, note 12 above, p. 72.

⁵⁴⁷ *Ibid.*, pp. 72-73.

Thirdly, the communication must be based on events that have occurred within the period of the Charter's application.⁵⁴⁸ This stems from the general principle of international law that treaties 'do not bind a party in relation to any act or fact which took place in any situation which ceased to exist before the date of the entry into force of the treaty in respect of that party.'⁵⁴⁹ Thus, the commission is competent only to consider violations that are alleged to have occurred from the date of entry into force of the Charter.

In relation to states that became parties after the entry into force of the Charter, the commission has the competence to consider communications that have originated after the date of entry into force for a particular state. The date of entry into force is three months after the deposit by that state of its instrument of adherence.⁵⁵⁰ Thus, in Communication 39/90, *Annette Pagnouille v. Cameroon*⁵⁵¹, the commission reiterated that it 'cannot pronounce on the quality of court proceedings that took place before the African Charter entered into force in Cameroon', but was quick to point out that: 'if, however, irregularities in the original sentence have consequences that constitute a continuing violation of any of the Articles of the African Charter, the commission must pronounce on these.'⁵⁵²

Fourthly, the communication must be based on events that took place within the territorial sphere in which the Charter applies.⁵⁵³ The territorial requirement is to the effect that states parties to the Charter are in principle only responsible for violations that occur within their territory.⁵⁵⁴ It should be noted, however, that the requirement that a communication must be compatible with both the African Charter and the OAU Charter

⁵⁴⁸ Ibid.

⁵⁴⁹ Vienna Convention on the Law of Treaties, Article 28.

⁵⁵⁰ African Charter, Art 65.

⁵⁵¹ Communication 39/90, *Annette Pagnouille v. Cameroon*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex VI); Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X).

⁵⁵² Ibid, para 15.

⁵⁵³ Viljoen F, 'Admissibility under the African Charter', note 12 above, p. 78.

⁵⁵⁴ Ibid.

(or the Constitutive Act of the African Union) raises some controversy. It is obvious that the Constitutive Act which succeeded the OAU Charter is not a source of substantive rights in the African human rights system.⁵⁵⁵ It is understandable that a complaint pursuant to the provisions of the Charter should show a violation because the Charter contains substantive rights. What still needs to be demystified is the requirement for compatibility with the OAU Charter (or CAAU).⁵⁵⁶

3. The communications must not be written in disparaging or insulting language directed against the state concerned and its institutions or to the OAU/AU.

The Charter disqualifies communications that are written in disparaging or insulting language directed at the state complained against and its institutions, or the OAU (AU).⁵⁵⁷ No other international or regional human rights instrument contains this ‘non-disparaging language’ requirement for purposes of admissibility. One would agree with Ankumah that ‘even if this provision did not exist, it would not be prudent for a litigant to write a communication in disparaging or insulting language as it would tend to detract from the issues.’⁵⁵⁸ Apparently, the requirement seeks to ensure respect for state parties and their institutions as well as the African Union.⁵⁵⁹ It is, however, unfortunate that the phrase ‘disparaging or insulting’ language is not defined in the Charter. Thus, whether or not the language is disparaging is for the commission to determine.

The commission has found a communication inadmissible on this ground. In *Ligue Camerounaise des Droits de l’Homme v. Cameroon*⁵⁶⁰, the communication alleged

⁵⁵⁵ Odinkalu A & Christensen C, ‘The African Commission on Human and Peoples’ Rights: Development of its non-State communications procedure’, (1998) 20 *Human Rights Quarterly*, p. 253.

⁵⁵⁶ Nmehielle O, *The African human rights system*, note 112 above, p. 215.

⁵⁵⁷ African Charter, Art 56(3).

⁵⁵⁸ Ankumah E, *The African Commission on Human and Peoples’ Rights*, note 138 above, p. 64.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ Communication 65/92, *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Tenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex X).

violations of human rights in Cameroon between 1984 and 1989. It contained statements such as ‘Paul Biya must respond to crimes against humanity’, ‘30 years of the criminal neo-colonial regime incarcerated by the duo Ahidjo/Biya’, ‘regime of torturers’, and ‘government barbarism’. The commission held these statements to be insulting language.

As Odinkalu and Christensen observe, the decision of the commission in this regard sets a dangerous precedent in as far as it tends to make Article 56(3) subject to the feelings of state parties.⁵⁶¹ It deliberately dismissed the frustrations of victims of human rights abuses and fails to recognise that violations of human rights naturally evoke bitterness and anger. The commission should have asked the drafters of the communication to strike out the ‘offending or disparaging’ phrases instead of dismissing the communication in its entirety.⁵⁶²

4. The communications must not be based on news disseminated through the mass media.

This is another provision that is unique to the African Charter as no other human rights instrument provides for a similar admissibility requirement. It appears that the provision is aimed at ensuring that authors of the communication are able to investigate and ascertain the truth of the facts before requesting for the commission’s intervention.⁵⁶³ In *Jawara v. The Gambia*⁵⁶⁴, for example, the commission resonated that:

It would be damaging if the commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word ‘exclusively’. There is no doubt that the media remains the most important if not the only source of information... the issue

⁵⁶¹ Odinkalu A & Christensen C, ‘The African Commission on Human and Peoples’ Rights: Development of its non-state communications procedure’, note 555 above, p. 255.

⁵⁶² Nmehielle O, *The African human rights system*, note 112 above, p. 217.

⁵⁶³ Ibid. See also *Information Sheet no. 3*, note 487 above, p. 9.

⁵⁶⁴ *Jawara v. The Gambia*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex X).

therefore should not be whether the information was gotten from the media, but whether the information is correct.⁵⁶⁵

Thus, while it is important that allegations contained in communications be verifiable, there would be situations where authors of communications may not gain the requisite information access and therefore, must depend on the news disseminated through the mass media. The mass media ought to play a part in ensuring respect for human rights.⁵⁶⁶

5. The communications must be sent after all existing local remedies have been exhausted.

The rule on exhaustion of domestic remedies is paramount in that it provides the respondent state the opportunity to redress, within the framework of its own domestic legal system, the wrongs alleged to be done to the individual.⁵⁶⁷ Besides giving the state the first opportunity to redress alleged violations, the rule also ensures respect for state sovereignty.⁵⁶⁸ Accordingly, Article 56(5) requires admissibility of communications that ‘are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.’ The use of ‘if any’ in this sub-Article connotes that exhaustion of domestic remedies is predicated on their availability.

From the commission’s jurisprudence, Viljoen cites four possible categories of situations in which remedies may be said to be unavailable.⁵⁶⁹ These are: (i) where a decree or other

⁵⁶⁵ Ibid, para 24.

⁵⁶⁶ Nmehielle O, *The African human rights system*, note 112 above, p. 218.

⁵⁶⁷ Odinkalu C, ‘The role of case and complaints procedures in the reform of the African regional human rights system’, note 7 above, p. 227.

⁵⁶⁸ Murray R, ‘Decisions by the African Commission on individual communications under the African Charter on Human and Peoples’ Rights’, note 520 above, p. 422.

⁵⁶⁹ Viljoen F, ‘Review of the African Commission on Human and Peoples’ Rights: 21 October 1986 to 1 January 1997’, in Heyns C, (ed.), *Human rights law in Africa 1997* (1999), p. 72.

measure has ousted the jurisdiction of the courts, making judicial recourse impossible⁵⁷⁰; (ii) where pursuing a remedy is dependent on extrajudicial considerations, such as a discretion or some extraordinary power granted to an executive state official⁵⁷¹; (iii) where a situation of serious massive violations of human rights exists⁵⁷²; and (iv) where complainants are detained without trial.⁵⁷³ Arguably, the Charter does not waive the rule where remedies are inadequate or when it can be established that the due process of law is not tenable.⁵⁷⁴

The commission has on many occasions ensured that communications complied with the exhaustion of domestic remedies requirement. Thus, communications based on claims pending in national courts have been declared inadmissible for non-exhaustion of domestic remedies.⁵⁷⁵ Similarly, the commission has held that exhaustion of local remedies does not preclude exhaustion of appellate procedures.⁵⁷⁶ With regard to effectiveness of remedies, the commission found a ‘discretionary’ and ‘extraordinary’ remedy of a non-judicial nature to be both inadequate and ineffective.⁵⁷⁷ Hence, in *Civil*

⁵⁷⁰ Ibid. See also communications 137/94, 139/94, 154/96 and 161/97, *International PEN, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa jr and Civil Liberties Organisation v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V), para 76.

⁵⁷¹ Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lekwot and 6 others) v. Nigeria*, Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex VI).

⁵⁷² Communication 48/90, 50/91, 52/91, 89/93 *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of members of the Episcopal Conference of East Africa v. Sudan*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V).

⁵⁷³ Viljoen F, ‘Review of the African Commission on Human and Peoples’ Rights: 21 October 1986 to 1 January 1997’, note 569 above, p. 72.

⁵⁷⁴ See Ankumah E, *The African Commission on Human and Peoples’ Rights*, note 138 above, p. 67.

⁵⁷⁵ Communication 45/90, *Civil Liberties Organisation v. Nigeria*, note 572 above, p. 44.

⁵⁷⁶ Communication 90/93, *Paul Hays v. The Gambia*, ACHPR/LR/1, p. 105.

⁵⁷⁷ See Communication 60/91, *Constitutional Rights Project (Wahab Akumu et al) v. Nigeria*, note 155 above, p. 57.

*Liberties Organisation v. Nigeria*⁵⁷⁸, the commission held that the rule does not apply in cases where national legislation or decree ousts the jurisdiction of the court to entertain claims for breaches of fundamental rights.⁵⁷⁹

The ‘unduly prolonged’ criterion, upon which the exhaustion of domestic remedies rule could be waived, has also received the attention of the commission. In communication 59/91, *Louis Emgba Mekongo v. Cameroon*, for example, the commission decided that the fact that the complainant’s case had been pending in a Cameroonian court for twelve years was sufficient proof that procedures for exhaustion of domestic remedies had been unduly prolonged.⁵⁸⁰ The commission is yet to define the phrase ‘unduly prolonged’ under Article 56(5) of the Charter.

It has been argued correctly that the question of whether or not local remedies have been exhausted is that of fact whose burden rests upon the author or applicant of the communication.⁵⁸¹ This may be the reason why Rule 104(1)(f) of the Rules of Procedure authorises the commission to request the author to furnish clarifications regarding measures taken to exhaust local remedies or to give an explanation of why local remedies would be futile, if it is so alleged. It must, therefore, be shown that an attempt had been made to have recourse to national procedures.⁵⁸² In communication 8/88, *Buyingo v. Uganda*, the commission failed to get a response from the complainant on whether or not he had recourse to local remedies as required by Article 56 of the Charter.

It needs to be observed that the practice of the African Commission in demonstrating the burden of proof for the exhaustion of domestic remedies has not been consistent.⁵⁸³ In some cases, when the state party refuses to provide a response to allegations, the

⁵⁷⁸ Communication 45/90, *Civil Liberties Organisation v. Nigeria*, note 572 above, p. 71.

⁵⁷⁹ Ibid.

⁵⁸⁰ Communication 59/91, *Louis Emgba Mekongo v. Cameroon*.

⁵⁸¹ Nmehielle O, *The African human rights system*, note 112 above, p. 225.

⁵⁸² See communication 92/93, *International PEN v. Sudan*, Thirteenth Activity Report 1999-2000 (Annex V).

⁵⁸³ Nmehielle O, *The African human rights system*, note 112 above, p. 225.

commission accepts the facts as alleged in the complaints and makes a decision thereon. In other cases, the commission appears to be more reluctant towards the complainant's allegation.⁵⁸⁴ Rather than request for additional information from the complainant in these cases, the commission declares the communication inadmissible on the grounds that the complainant failed to provide information as to the exhaustion of domestic remedies. In developing its jurisprudence, the African Commission should avoid double standards and maintain consistency in the determination of communications.⁵⁸⁵

6. The communications must be submitted within a reasonable period from the time local remedies are exhausted or from the date the commission is seized with the matter.

Article 56(6) requires communications to be submitted within a reasonable period from the time local remedies are exhausted or from the date the commission is seized of the matter. As with the UN human rights treaties, the Charter does not state the time limit within which communications must be submitted.⁵⁸⁶ The determination of a 'reasonable period' therefore, is left upon the commission to decide. This is in contradiction with the European and Inter-American systems. Both systems allow a maximum period of six month after the date the 'final decision was taken'⁵⁸⁷ or after the notification of the final judgement.⁵⁸⁸

The fact that the Charter requires communications to be submitted within a reasonable period, without specifying the time limit, has both negative and positive implications. On the one hand, it may prejudice valid claims because what is 'reasonable period' to one member of the commission may not be likewise to another. On the other hand, this

⁵⁸⁴ Ibid. See also Odinkalu A & Christensen C, 'The African Commission on Human and Peoples' Rights: Development of its non-State communications procedure', note 555 above, p. 265.

⁵⁸⁵ Nmechielle O, *The African human rights system*, note 112 above, p. 225.

⁵⁸⁶ There is no such rule under the Optional Protocol to the ICCPR or under CAT. See Viljoen F 'Admissibility under the African Charter', note 12 above, p. 91.

⁵⁸⁷ European Convention, Art 35.

⁵⁸⁸ Inter-American Convention, Art 46(1)(b).

provision has positive implications in the sense that many African people are ignorant of the commission's procedures and if a time limit was to be prescribed, many communications would be declared inadmissible due to non-compliance.⁵⁸⁹ Additionally, this less stringent requirement takes account of the communication difficulties in many African countries.⁵⁹⁰

Some communications dealing with the exhaustion of domestic remedies have impliedly addressed circumstances that may be used in interpreting what a reasonable time is. For example, in *Mekongo v. Cameroon*, the commission declared the complaint admissible even though the complainant had spent over twelve years pursuing a discretionary presidential remedy after the conclusion of domestic proceedings. This could be taken to mean that twelve years after the exhaustion of domestic remedies was reasonable time, especially because the complainant could not lodge a communication by reason of his pursuit of a discretionary remedy. Similarly in *John Modise v. Botswana*⁵⁹¹, the commission admitted a communication that was submitted nearly fifteen years from the time judicial proceedings were concluded.

7. The communication must not relate to cases which have been settled in accordance with the principles of the Charter of the United Nations or the Charter of the Organisation of African Unity or the provisions of the African Charter.

According to Article 56(7) of the Charter, a communication is inadmissible if it has already been 'settled' under the African Charter. In other words, the rule *ne bis in idem* applies.⁵⁹² This rule prohibits 'double jeopardy' by protecting a state from being found in violation twice for one violating act or conduct. Its effect is similar to that of *autrefois*

⁵⁸⁹ Viljoen F 'Admissibility under the African Charter', note 12 above, p. 91.

⁵⁹⁰ Ibid.

⁵⁹¹ Communication 97/93, *John Modise v. Botswana*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X).

⁵⁹² Viljoen F 'Admissibility under the African Charter', note 12 above, p. 91.

acquit and *autrefois convict* principles of criminal law, which prohibit the re-trial of an accused person for an offence for which he or she had already been either acquitted or convicted.⁵⁹³

While the African Charter allows for the simultaneous submission of communications to both the African Commission and a UN treaty body such as the UN Human Rights Committee, the complainant has to abide by the first decision or finding.⁵⁹⁴ This was enunciated in *Bob Ngozi Njoku v. Egypt*⁵⁹⁵ where, before submitting the communication to the African Commission, the complainant approached the UN Sub-Commission on Human Rights with the same matter. The latter decided not to entertain it or to make any pronouncement on it and the African Commission found that the inaction by the UN Sub-Commission ‘does not boil down to a decision on the merits of the case and does not in any way indicate that the matter’ has been ‘settled’, as required by Article 56(7).⁵⁹⁶ The communication was consequently declared admissible.

In summary, it can be said that the African Charter’s provisions on admissibility are quite elaborate compared to those of other international human rights instruments. Its most positive features are the fact that authors of communications are not required to be victims and that there is no fixed period within which communications have to be submitted. Unfortunately, however, there is a requirement that communications should not be written in disparaging language. Generally, admissibility has played an important role in the findings of the commission.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid.

⁵⁹⁵ Communication 40/90, *Bob Ngozi Njoku v. Egypt*, Eleventh Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex II).

⁵⁹⁶ Ibid.

3.3.1.2.2.3 Procedure after a communication has been declared admissible

Once the communication passes the admissibility test under Article 56 of the Charter, it proceeds to the substantive consideration stage (merit stage). The admissibility decision is made known to the state party as soon as possible by the Secretary of the commission.⁵⁹⁷ At this stage, Rule 119(2) requires the state party concerned to ‘submit in writing within three months to the commission, its explanations or statements, elucidating the issues under consideration and indicating, if possible, measures taken to remedy the situation.’ The commission, however, has the discretion to extend the period if such extension serves the interests of justice. The author is also given the opportunity to comment on what the state submits.⁵⁹⁸ It is interesting to note that no time limit has been set within which the author’s comment should be received by the commission. This may be an oversight on the part of the drafters.

The commission considers the communication in the light of information submitted to it by parties in writing.⁵⁹⁹ During this stage, hearing takes place; a brief presentation of the case is made by the complainant or an NGO and the respondent state is then given the opportunity to respond to the allegations. The complainant or NGO is then asked to reply to the state’s response. After a careful deliberation based on the facts and arguments put forward by the parties, the commission retires in private to make its decision on whether it finds a violation of the Charter or not. Where the commission finds a violation, it issues recommendations to the state party concerned.⁶⁰⁰ In effect, the commission’s decisions are recommendations.

⁵⁹⁷ Rule 119 (1). This Rule requires the secretary of the Commission to submit, as soon as possible, the decision of admissibility and text of relevant documents to the state party concerned. The Rule further mandates the secretary to inform the author of the decision about the admissibility of the communication.

⁵⁹⁸ Rule 119 (3).

⁵⁹⁹ Rule 120 (1).

⁶⁰⁰ For a more detailed discussion on the Commission’s procedure in determining a communication, see Nmehielle O, *The African human rights system*, note 112 above, pp. 230-232.

There are occasions where the respondent state party completely ignores or refuses to respond to allegations made by a complainant, or to respond to the request for information by the commission. In such situations, the commission would rely on the facts as presented by the complainant and treat them as given.⁶⁰¹ The commission is, however, cautious when applying this rule. It has therefore warned that, the fact that the complainant's allegations were not contested, or were partially uncontested by the state does not mean the commission would blindly accept their veracity.⁶⁰² Thus, the commission could invoke the power vested in it under Article 46 to get information from alternative sources and from third parties.⁶⁰³ Alternatively, the commission may set up a working group of three of its members to whom it would refer the communication and which would submit final recommendations to it.⁶⁰⁴

3.3.1.2.2.4 The commission's recommendations on communications

There is no provision in the Charter that mandates the commission to make recommendations to states on every individual communications it considers. Rather, the term, 'recommendation', is mentioned in the context of special cases revealing the existence of serious or massive violation of human rights. Article 58 of the Charter stipulates that:

1. When it appears after deliberations of the commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.

⁶⁰¹ Ibid. See also *Mekongo v. Cameroon*, pp. 26-27.

⁶⁰² Ibid.

⁶⁰³ Ibid.

⁶⁰⁴ Rules 120(1).

3. A case of emergency duly noticed by the commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

From the foregoing provisions, it is obvious that the commission has no enforcement powers and its recommendations, unless the state agrees, are not capable of being executed in the national jurisdiction.⁶⁰⁵ Worst still, the powers of implementation of its reports and recommendations lie with the Assembly of Heads of States and Government. Accordingly, it functions at the mercy of states parties. It has, therefore, rightly been observed that Article 58 'would appear to suggest that not only does the commission have no jurisdiction in separate individual cases unless they are of an urgent nature, it also has no formal power to take the initiative itself.'⁶⁰⁶

It is rather unfortunate that the Charter is silent on how the African Commission should deal with communications not revealing the existence of a series of serious or massive violations of human and peoples' rights.⁶⁰⁷ As a result of this overt weakness in the Charter's provisions, some governments have in the past declined to comply with the commission's recommendations and decisions. For example, during the period of military dictatorship in Nigeria, the commission adopted decisions condemning both ouster clauses and special tribunals in the country.⁶⁰⁸ However, the government of Nigeria

⁶⁰⁵ Odinkalu C, 'Proposals for review of the Rules of Procedure of the African Commission on Human & Peoples' Rights', (1992) 21/2 *Human Rights Quarterly*, p. 543.

⁶⁰⁶ Murray R, 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights', note 520 above, p. 46.

⁶⁰⁷ In communications 27/89, 46/90, 99/93 (Joined), *Organization Mondiale Contre la Torture and three others v. Rwanda*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex X), the Commission joined four communications, which made reference to the expulsion from Rwanda of Burundi nationals who had been in Rwanda for many years for allegedly being a national risk due to their 'subversive activities', as well as the arbitrary arrest and extra-judicial executions of Rwandans, mostly being the Tutsi ethnic group. In this communication, the Commission held that the facts constituted serious or massive violations of the Charter, namely of Arts 4, 5, 6, 12(3) & 12(5).

⁶⁰⁸ See, for example, 'Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights', Second Extraordinary Session, Kampala, 18-19 December 1995

contended, among other things, that the commission, in deciding communications, acted outside its competence.⁶⁰⁹

Similarly, in respect of an individual communication brought after the military coup in 1995, Gambia raised the objection at the admissibility stage that ‘the commission is allowed under the Charter to take action only in cases that reveal a series of serious or massive violations of human rights.’⁶¹⁰ While this position is true in relation to the Charter’s provisions, the commission’s Rules of Procedure and its practice refute these arguments comprehensively. The commission developed its own Rules of Procedure in such a way as to enable it to accept communications from individuals alleging human rights violations that are not necessarily serious or massive.⁶¹¹ Thus, in responding to the above stated allegations levelled by Nigeria, the commission justified its capacity to find a violation on the merits of a communication and to subsequently issue recommendations in the following terms:

It is true that the communications procedure, as set out in Article 55 of the Charter, is quasi-judicial, in that communications are necessarily adversarial. Complainants are complaining against some act or neglect of a government and the commission must ultimately, if it is unable to effect a friendly settlement, decide for one side or the other. These actions of the commission are clearly required by the stipulations of Articles 55-59 of the Charter....This charge to ensure protection clearly refers to the commission’s duties under Articles 55-59 to protect the rights in the Charter through the communications procedure. The commission therefore cannot take the government’s contention that in deciding communications it has acted outside its capacity.⁶¹²

DOC. II/ES/ACHPR/4. See also the analysis in Viljoen F & Louw L, ‘The status of the findings of the African Commission: From moral persuasion to legal obligation’, (2004) *48/1 Journal of African Law*, p. 5.

⁶⁰⁹ Ibid.

⁶¹⁰ See communication 147/95, 149/95, *Jawara v. The Gambia*, Thirteenth Annual activity Report of the African Commission on Human and Peoples’ Rights (Annex V), para 41.

⁶¹¹ Viljoen F & Louw L, ‘The status of the findings of the African Commission: From moral persuasion to legal obligation’, note 608 above, p. 5. See also old Rule 114 replaced by 1995 Rules of Procedure.

⁶¹² ‘Account of Internal Legislation of Nigeria and the Disposition of the Charter of African Human and Peoples’ Rights’, note 608 above.

As for the argument by Gambia, the commission dismissed the proposition as ‘erroneous’, relying on Articles 55 and 56 of the Charter and its own practice of considering communications ‘even if they do not reveal a series of serious or massive violations.’⁶¹³ From the foregoing, it is now settled that the commission has innovatively interpreted its functions under the Charter and incorporated in its Rules of Procedure the mandate to consider communications and give recommendations, whether or not massive or serious violations of human and peoples’ rights have occurred.⁶¹⁴

The commission has in many instances included recommendations to its findings. Further, it has become more inclined over the years to make recommendations, which are more detailed than in the past.⁶¹⁵ Unfortunately, states do not always put the recommendations into effect. This of course, is one of the main challenges to human rights enforcement in Africa and has been described as ‘one of the major factors of the erosion of the commission’s credibility.’⁶¹⁶ This challenge shall be discussed more comprehensively in the next chapter.

Another improvement initiated by the commission involved the revision of its Rules of Procedure in 1995⁶¹⁷ to enable its decisions and recommendations to be published and not hidden in secrecy under the so-called ‘confidentiality’ clauses in the African Charter and the old Rules of Procedure. Prior to this, the decisions and recommendations were

⁶¹³ See communications 147/95, 149/96, *Jawara v. The Gambia*, para. 42.

⁶¹⁴ Viljoen F & Louw L, ‘The status of the findings of the African Commission: From moral persuasion to legal obligation’, note 608 above, p. 5.

⁶¹⁵ Ayinla A, ‘The African Union (AU) human rights agenda: the panacea to the problem of non-compliance with human rights norms in Africa?’, (2003) *LLM Thesis, Makerere University*, p. 26.

⁶¹⁶ ‘Non-Compliance of state parties to Adopted Recommendations of the African Commission: A legal approach’, 24th Ordinary Session, 22-31 October 1998, DOC/OS/50b, para. 2. See also Österdahl I, ‘Implementing human rights in Africa: The African Commission on Human & Peoples’ Rights and individual communications’, (2002), *Swedish Institute of International Law Studies in International Law*, p. 15.

⁶¹⁷ At its 18th ordinary session held in Praia, Cape Verde, 12-11 October 1995.

clouded in secrecy.⁶¹⁸ The quality of the commission's decisions or 'jurisprudence' improved as a result of the revision of the Rules of Procedure as the commissioners became aware that their work is subject to public scrutiny.⁶¹⁹

Individual communications remained confidential until the release of the Seventh Annual Activity Report (1994). In this Activity Report, the commission for the first time included an Annex with information on the individual communications submitted to it under Article 55 of the Charter. Although the information was not comprehensive, the Annex watered down the secrecy under which the entire communication procedure had been hidden.⁶²⁰ The Annex included individual information on communications that had been decided by the commission, as well as on those that had been resolved amicably.

3.3.1.2.2.5 Provisional (interim) measures and remedies

This part analyses provisional (interim) measures and remedies under the individuals' complaints procedure. The two concepts are examined under the same subtitle because they both provide some form of relief to victims of human rights violations, albeit at different stages of the proceedings. Interim or provisional measures are normally issued to avoid irreparable damage to victims, or sometimes, complainants, while a communication or petition is still under consideration by a supervisory organ of a human

⁶¹⁸ Article 59 of the Charter stipulates as follows: '1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide. ... 2. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government'.

⁶¹⁹ The reports on the decisions of the commission appear in, amongst others, *Review of the African Commission on Human and Peoples' Rights* (established by the Commission in 1991); Institute for Human Rights and Development in Africa, *Compilation of decisions on Communications of the African Commission on Human and Peoples' Rights: Extracts from the Commission's Activity Reports 1994-1999* (2000) and the *International Human Rights Reports* (since 1996). See Gutto S, 'The reform and renewal of the African regional human and peoples' rights system', note 1 above, p. 180.

⁶²⁰ *Ibid.*

rights mechanism.⁶²¹ On the other hand, remedies are awarded to redress a violation of human rights after a communication is fully determined. Notably, however, whereas interim measures provide temporary relief to the victims, remedies are of a more permanent nature. We shall revert to this point at a later stage of this discussion.

Meanwhile, it is important to note that the African Charter does not specifically provide for interim measures. Consequently, the commission decided to make provision for these measures under its Rules of Procedure. Thus, according to Rule 111:

1. Before making its final views known to the Assembly on the communication, the commission may inform the state party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation. In so doing, the commission shall inform the state party that the expression on its views on the adoption of those provisional measures does not imply a decision on the substance of the communication.
2. The commission, or when not in session, the chairman, in consultation with other members of the commission, may indicate to the parties any interim measure, the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.
3. In case of urgency [sic] when the commission is not in session, the chairman, in consultation with other members of the commission, may take any necessary action on behalf of the commission. As soon as the commission is again in session, the chairman shall report to it any action taken.

Rule 111 does not specifically state at what stage of the proceedings provisional measures may be granted. This leaves one to wonder whether these measures should be granted only to cases that have passed the admissibility test, or even to those that are yet to be admitted.⁶²² While the commission is yet to give its position on this issue, it may be argued that the circumstances of the case, irrespective of admissibility, would determine

⁶²¹ Nmehielle O, *The African human rights system*, note 112 above, p. 232.

⁶²² *Ibid.*

whether or not there should be a request for provisional measures. This may be deduced from the practice of the Inter-American Commission, where it was maintained that, in a request for provisional measures, the urgent risk of irreparable damage to persons, absolves it from the necessary requirements of the American Convention.⁶²³ Hence, ‘such precautionary measures may be requested even when the admissibility of a case has not yet been defined by the commission pursuant to Article 46 of the Convention, since, by their very nature, provisional measures arise from a reasonable presumption of extreme and urgent risk of irreparable damage to persons.’⁶²⁴

The African Commission has applied Rule 111 to request for provisional measures in some cases. For example, in *Constitutional Rights Project (Zamani Lekwot and 6 others) v. Nigeria*⁶²⁵, a Nigerian NGO submitted a complaint on behalf of Zamani Lekwot, a former Army General and six others who were sentenced to death by a military tribunal and awaiting execution. The commission requested the Nigerian government not to execute the victims until it considered the substance of the case. With this request for provisional measures the NGO instituted an action in Lagos High Court to stay the execution.⁶²⁶

The government responded by filing a preliminary objection on the grounds that the court had no jurisdiction to entertain the suit, the same having been ousted by decree. The court, however, held that it had jurisdiction to hear the case and issued an injunction against carrying out the execution pending the determination of the complaint before the African Commission.⁶²⁷ The death sentence was later commuted to five years

⁶²³ Pasqualucci M, ‘Provisional measures in the Inter-American human rights system: Innovative development in international law’, (1993) 26 *Vanderbilt Journal of Transnational Law*, p. 803.

⁶²⁴ Ibid.

⁶²⁵ Communication 87/93, *Constitutional Rights Project (Zamani Lekwot and 6 others) v. Nigeria*, 102.

⁶²⁶ *Registered Trustees of the Constitutional Rights Project v. The President of Federal Republic of Nigeria and Two others* (Unreported judgement of the High Court of Lagos State, Suit no. m/102/93) cited in Nmehielle O, *The African human rights system*, note 112 above, p. 236.

⁶²⁷ Ibid.

imprisonment. This indeed is a landmark achievement on the part of the African Commission that needs to be applauded.

On the issue of remedies, it should be recalled that an aggrieved state or individual, whose rights have been violated, has recourse for redress. This may take the form of an apology, reparations, or damages for alleged wrong doing, condemnation of the acts of the violators, injunction in the case of a continuing violation, or the removal of the sources of violation, for example, the repeal of legislation or the enactment of a new one.⁶²⁸ Unfortunately, neither the African Charter nor the Rules of Procedure of the African Commission explicitly provides for remedies to be ordered when a state party is found to be in violation of the Charter. The fact that the commission has no power to grant remedies has correctly been viewed as an ‘important reason for the inability of the commission to attain its principal objective of protecting human rights in Africa.’⁶²⁹

Even in the absence of any specific mandate, the commission has, nevertheless, gone ahead to suggest a wide range of remedies to state parties upon finding them in violation of the Charter.⁶³⁰ At one time it was accused of assaulting the sovereignty of Nigeria for ordering ‘the annulment of decrees found to be in violation of the Charter’.⁶³¹ Nigeria

⁶²⁸ Ibid, p. 236.

⁶²⁹ Enonchong N, ‘The African Charter on Human and Peoples’ Rights: Effective remedies in domestic law?’, (2002) 46 *Journal of African Law*, p. 197.

⁶³⁰ See, for example, communication 59/91 *Embga Mekongo Louis v. Cameroon* and joint communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 *Malawi African Association v. Mauritania, Amnesty International v. Mauritania, Ms Sarr Diop v. Mauritania.*), requesting a state to annul legislation that violates the African Charter (communication 101/93 *Civil Liberties Organisation v. Nigeria*), ordering the release of prisoners (communication 60/91, *Constitutional Rights Projects v. Nigeria* and communication 87/93 *The Constitutional Rights Project (in respect of Zamanni Lakwot and 6 others) v. Nigeria* and requesting the establishment of a Commission of Inquiry into human rights atrocities (joint communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 *Malawi African Association v. Mauritania, Amnesty International v. Mauritania, Ms Sarr Diop v. Mauritania.*

⁶³¹ See ‘Account of internal legislation of Nigeria and the disposition of the Charter of African Human and Peoples’ Rights’, Second Extraordinary Session, Kampala, 18-19 December, 1995, DOC.II/ES?ACHPR/4.

questioned the competence of the commission to issue remedies. Thus, the commission justified its competence by stating that:

...Nigeria is bound by the African Charter. The commission is likewise bound by the Charter, to consider communications fully, carefully, and in good faith. When the commission concludes that a communication describes a real violation of the Charter's provisions, its duty is to make that clear and indicate what action the government must take to remedy the situation. Naturally, the commission could not make such judgements with regard to states outside its jurisdiction. But in ratifying the Charter without reservation, Nigeria voluntarily submitted itself to the commission's authority in this regard.⁶³²

Regardless of the basis on which the commission grounds its authority to issue remedies, the fact still remains that the issuing of remedies is now an established practice within the African human rights system. In its practice, however, the commission, unlike other human rights supervisory and enforcement organs, has been very reluctant to award damages or reparations even in cases where it finds violations of the Charter.⁶³³ For example, in *Louise Engba Mekongo v. Cameroon*, it found that the complainant was entitled to reparations for the prejudice he had suffered, but left the valuation of the amount of such reparation to be determined in accordance with the legal system of Cameroon. It is inconceivable how the commission expected the complainant to be awarded adequate compensation by the same judicial system that had denied him justice for twelve years.⁶³⁴

States' compliance with recommendations for remedies is also another area of great concern. Although the commission recommends some forms of remedies, their enforcement is lacking. The Charter is silent on follow-up to communications, thus, confining the enforcement of the commission's recommendations to the goodwill of the states. Noteworthy, the commission has embarked on the practice of requiring states to

⁶³² Ibid.

⁶³³ Nmehielle O, *The African human rights system*, note 112 above, p. 236.

⁶³⁴ Ibid.

‘report back to the commission when it submits its next country report in terms of Article 62 on measures taken to comply with’ the remedies stated in the recommendations.⁶³⁵ It may be argued that this is not an effective follow-up mechanism because not all state parties to the Charter faithfully submit their country reports.⁶³⁶

The commission had set a good follow-up precedent in *Constitutional Rights Project v. Nigeria*⁶³⁷, where it found a violation of the Charter and recommended that the government of Nigeria should free the complainants. At its 17th Session, the commission decided to bring the file to Nigeria for a planned mission for purposes of making sure that the violation of rights had been redressed.⁶³⁸ The lack of effective remedies and follow-up procedures in the African human rights system over the years has definitely impacted on the effectiveness of the entire system as far as protection against violations of rights is concerned. It is in this regard that the creation of the African Court on Human and Peoples’ Rights is seen as a welcome idea. At least with the court in place, litigants are assured of binding and enforceable decisions against the respondent states. The parameters of the court are discussed in detail below.

3.3.2 The African Court on Human and Peoples’ Rights

Less than ten years after the African Charter and commission came into existence, there was mounting pressure to consider appropriate ways of improving the African human

⁶³⁵ Communication 211/98, *Legal Resources Foundation v. Zambia*, concluding para. See also communication 241/2001, *Purohit and Moore v. The Gambia*, concluding para.

⁶³⁶ See Wachira G, ‘A critical examination of the African Charter on Human and Peoples’ Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population’, note 31 above, p. 23.

⁶³⁷ Communication 87/93, *Constitutional Rights Project v. Nigeria*.

⁶³⁸ Wachira G, ‘A critical examination of the African Charter on Human and Peoples’ Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population’, note 31 above, p. 29.

rights system.⁶³⁹ Various possibilities were mooted, particularly, on how the efficiency of the commission could be enhanced. It was suggested that the commission could be strengthened, complemented, or replaced by a court.⁶⁴⁰ The option of strengthening the commission was rather a theoretical one because, among other shortcomings, it is not independent of its political parent, the AU.⁶⁴¹ The option of replacing the commission with a court was also not to be very noble because a court is not well-suited to promote human rights by conducting studies or organising conferences. Thus, the ‘complementarity’ option, comprising of a dual system was most preferable.⁶⁴²

The upsurge of the clamour for the creation of an African human rights court cannot solely be attributed, however, to the ineffectiveness of the African Commission. Rather, it also has to be viewed against the setting of changing world affairs. Between the late 1980s and 1990s, for example, ‘African states, having outlived their purpose as proxies during the Cold War era, came under fresh scrutiny, with the protection of human rights increasingly being mandated as a pre-condition for the granting of Western development aid.’⁶⁴³ There was therefore the need to look for ways of putting straight the already crooked human rights record that was haunting the continent. One of those ways was the creation of a regional human rights court.

Noteworthy, however, some African states not only resented the idea of a court that would challenge their judicial sovereignty but also sought the excuse that African culture gave reconciliation primacy over judicial settlement of disputes.⁶⁴⁴ That notwithstanding,

⁶³⁹ Bekker G, ‘The African Court on Human and Peoples’ Rights: Safeguarding the Interests of African States’ (2007) 51/1 *Journal of African Law*, p. 152.

⁶⁴⁰ Ibid.

⁶⁴¹ Van der Mei A, ‘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*, p. 118.

⁶⁴² Bekker G, ‘The African Court on Human and Peoples’ Rights: Safeguarding the interests of African states’, note 639 above, p. 153.

⁶⁴³ Ibid.

⁶⁴⁴ Dieng A, ‘Introduction to the African Court on Human and Peoples’ Rights’ (2005) 15 *INTERIGHTS Bulletin*, p. 3.

it was inevitable that a court would eventually be created. Thus, the idea of a regional human rights court was caught between two schools of thought; one in favour of a wholesale transfer of the commission's jurisdictions to the new court, the other defending the dual role of the commission by conferring a decision-making power on it.⁶⁴⁵ Eventually, the African Court on Human and Peoples' Rights ('the court' or 'the African court') emerged as a compromise, complementing and reinforcing the functions of the commission. The adoption of its Protocol on 9 June 1998 and its entry into force on 25 January 2004 were a major step in reinforcing the African human rights system.⁶⁴⁶

The process of establishing the court has, however, been very slow and somewhat encumbered with some challenges. These challenges shall be discussed in the next chapter but at least two of them need to be mentioned here. First, it took until 25 January 2004 (that is, longer than five years) to ensure the fifteen ratifications required for the entry into force of the Protocol.⁶⁴⁷ This is not very encouraging, given the fact that its creation was mooted for more than thirty years.⁶⁴⁸ Secondly, while preparations were underway to make the court operational, the African Union (AU) decided to merge it with the AU Court of Justice⁶⁴⁹, and suspend the process until the modalities of the merger had been considered.

⁶⁴⁵ Ibid.

⁶⁴⁶ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc OAU/LEG/EXP/AFCHPR/ PROT (III), available at <http://www.achpr.org>, last accessed 28 November 2007; reprinted in *inter alia* Murray R & Evans M (eds.) *Documents of the African Commission on Human and Peoples' Rights* (2001). The Protocol was signed in June 1998 and, 30 days after the requisite 15th ratification (Art 34 (3) of the Protocol) by the Union of the Comoros on 26 December 2003, it entered into force on 25 January 2004.

⁶⁴⁷ Viljoen F (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006), p. iii.

⁶⁴⁸ The quest for a regional human rights Court began in the 1961 Lagos Conference that was organised by the International Commission of Jurists.

⁶⁴⁹ Decision on the Seats of the Organs of the African Union, Assembly/AU/Dec.45 (III).

Obviously, there are several legal and practical implications of such a merger. With the upsurge of atrocities and other violations taking place across the continent, it is rather disturbing that the court has taken too long to come into being. It is therefore commendable that the AU has decided to continue with the ‘operationalisation’ of the court despite the fact that the complexities of the merger are still being considered.⁶⁵⁰ Thus in July 2006, the first eleven Judges of the African Court were sworn in.⁶⁵¹ This part of the study shall therefore critically examine the court as a regional mechanism for human rights enforcement in Africa. Due to the fact that it has not yet begun its proceedings, nor has it formulated its Rules of Procedure, discussion shall be confined to the provisions of the Protocol establishing it.

3.3.2.1 Establishment and composition of the Court

The African Court is established to operate within the AU framework, in accordance with Article 1 of its Protocol.⁶⁵² Accordingly, this stresses the point that the attainment of the objectives of the African Charter requires the establishment of a court to complement and reinforce the functions of the African Commission.⁶⁵³ As already stated, the court was established when the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, came into force in January 2004.

The Protocol consists of thirty-five Articles, addressing various issues pertaining to the court’s composition and operation. It provides for the appointment of eleven judges, nationals of member states of the AU, elected in an individual capacity from among

⁶⁵⁰ Decision on the Merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, Doc. EX.CL/162(VI).

⁶⁵¹ See Viljoen F (ed.), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights*, note 647 above, p. iii.

⁶⁵² Article 1 of the Protocol reads: ‘There shall be established within the Organization of African Unity an African Court Human and Peoples’ Rights hereinafter referred to as “the court”, the organisation, jurisdiction and functioning of which shall be governed by the present Protocol.’

⁶⁵³ See the last Preambular paragraph of the Protocol.

jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights.⁶⁵⁴ Caution should be taken to ensure that political considerations that previously characterised the appointment of members of the African Commission are not allowed to jeopardise the composition of the court.

The AU correctly noted that the 'moral authority, credibility, and reputation of the ... court ... will, to a large extent, depend on the composition of its first bench.'⁶⁵⁵ This is indeed true because all eyes are on the first bench, which is expected to begin the transition from the tradition of the commission. The commission has set the tradition of incompetence, lack of motivation and laxity in the way it conducts its activities. Additionally, Amnesty International rightly observed that the 'effectiveness and efficiency of the court will, to a large extent, depend on the personal and professional capacities of the judges, their skills and experience as well as their commitment and integrity.'⁶⁵⁶ It therefore proposed a checklist to ensure the nomination of the highest qualified candidates for judges as required under Article 11 of the Protocol.⁶⁵⁷ Article 14 of the Protocol stipulates that:

1. The judges of the court shall be elected by secret ballot by the Assembly from the list referred to in Article 13(2) of the present Protocol.
2. The Assembly shall ensure that in the court as a whole there is representation of the main regions of Africa and of their principal legal traditions.
3. In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

From the above provisions, it is evident that the Protocol addresses the issue of nomination of judges in a comprehensive manner to avert the possibility of regional and

⁶⁵⁴ Art 11(1).

⁶⁵⁵ Note Verbale, 5 April 2004, BC/OLC/66.5/8/Vol V at para. 3.

⁶⁵⁶ Amnesty International, *African Court on Human and Peoples' Rights: Checklist to ensure the nomination of the highest qualified candidates for Judges*, AI Index: IOR 63/001/2004.

⁶⁵⁷ *Ibid*, p. 5.

gender imbalance. In tandem with Article 14, the AU has recommended that ‘States parties should ensure that at least one (1) of the candidates they nominate is a female and that they give preference to candidates with experience in more than one of the principal legal traditions of Africa (civil law, common law, Islamic law, custom and African customary law).’⁶⁵⁸ This would allow the court to greatly harmonise the different interpretations of the Charter provisions based on religious or traditional convictions that might have contributed to its violation in some states.

Regarding the geographical composition of the bench, the AU proposed a ‘geographical representation formula’ as follows: West Africa—three, Central Africa—two, East Africa—two, Southern Africa—two and North Africa—two.⁶⁵⁹ However, this proposal was not strictly adhered to in the appointment of the first bench, given that three judges were appointed from North Africa while only one was appointed from East Africa.⁶⁶⁰ Generally, however, the distribution is fair since all the geographical regions of the continent are represented. While geographic distribution of judges is desirable, this criterion should not be overemphasised at the expense of the competence and quality of the individual judges.⁶⁶¹

The judges are elected for a period of six years and may be re-elected only once.⁶⁶² For purposes of continuity, the terms of four judges elected on the first bench expire at the end of two years, and the terms of four other judges shall expire at the end of four years.⁶⁶³ Article 15(4) provides that ‘all judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it

⁶⁵⁸ *Note Verbale*, note 655 above, para. 2.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ See Viljoen F (ed.), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights*, note 647 above, iii.

⁶⁶¹ *Ibid.*

⁶⁶² Article 15 (1).

⁶⁶³ *Ibid.* Article 15(3) provides that: ‘A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor’s term.’

deems appropriate.’ This may partly be attributed to the financial constraints facing the AU and the African human rights system. Viewed critically, this is a significant deficiency in comparison with, for example, the European system, whose judges serve on a full-time basis.⁶⁶⁴

As the African Court is an attempt to remedy the weaknesses in the protection of human rights in Africa, it would be better for its judges to serve on full-time basis. The Assembly should therefore exercise its discretion under Article 15(4) of the protocol to ‘change this arrangement’ and appropriately provide for a full-time bench.⁶⁶⁵ This discretion may be invoked as soon as the court is fully operational with a reasonable workload of cases.

Independence of the judges of the court is also guaranteed under the Protocol. Article 17 provides that independence of the judges shall be fully ensured in accordance with international law.⁶⁶⁶ It also restrains a judge from hearing cases in which he or she may have previously taken part as agent, counsel, advocates for one of the parties, or as a member of a national or international court, or a commission of inquiry, or in any other capacity.⁶⁶⁷

The Protocol expressly excludes the participation of judges in cases involving nationals from their country.⁶⁶⁸ This is quite contrary to the practice under the Inter-American system which permits judges who are nationals of member states to preside over cases involving their own states.⁶⁶⁹ The position taken by the African system is indeed noble because it gives room to transparency and accountability. A judge who presides over a

⁶⁶⁴ Under the Inter-American human rights system, judges also serve on part-time basis. See Amnesty International, *African Court on Human and Peoples’ Rights: Checklist to ensure the nomination of the highest qualified candidates for Judges*, note 656 above.

⁶⁶⁵ Baderin M, ‘Recent developments in the African human rights system’, note 156 above, p. 143.

⁶⁶⁶ Art 17(1).

⁶⁶⁷ Art 17(2).

⁶⁶⁸ Art 22.

⁶⁶⁹ See Art 55 and 41 of the American Convention.

case involving a national from his or her country may be accused of being biased in the event he or she makes a decision that is not popular among his or her colleagues.⁶⁷⁰ Further, this position minimises the likelihood of states nominating judges, not on merit, but on ulterior motives aimed at securing their personal interests.

In the course of their duties, judges of the court ‘shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law’.⁶⁷¹ Thus, a judge cannot be held liable for any decision or opinion issued in the exercise of his or her functions.⁶⁷² Whereas judges enjoy immunity, they are also prohibited from engaging in any activity that might interfere with their independence or impartiality.⁶⁷³ This provision of the Protocol accords with the recommendation by the United Nations that: ‘State parties to human rights treaties should refrain from nominating or electing to treaty bodies persons performing political functions or occupying positions which were not readily reconcilable with obligations of independent experts under the given treaty.’⁶⁷⁴

Additionally, judges enjoy security of tenure so that they may dispense their duties without any influence, fear or favour instigated by, for example, the state that nominated them. Pursuant to Article 19 of the Protocol, a judge cannot be suspended or removed from office unless by the unanimous decision of the other judges of the court. Such a decision can only be made on grounds that the judge concerned has been ‘found to be no longer fulfilling the required conditions to be a judge of the court.’⁶⁷⁵ This provision is not so clear and it leaves more questions than answers. One may wonder whether the

⁶⁷⁰ Amnesty International, *African Court on Human and Peoples’ Rights: Checklist to ensure the nomination of the highest qualified candidates for Judges*, note 656 above, p. 5.

⁶⁷¹ Art 17(3).

⁶⁷² Art 17(4).

⁶⁷³ Art 18.

⁶⁷⁴ Report of 8th Meeting of Chairpersons of the UN Treaty Bodies, UN General Assembly, UN Doc.A/52/507, para. 68.

⁶⁷⁵ Article 19 (1).

‘requirements’ to be fulfilled relate to competence or integrity. Perhaps, the Rules of Procedure of the court should elaborate these requirements to avoid confusion.⁶⁷⁶

Meanwhile, the AU Assembly is empowered by the Protocol to set-aside the decision to suspend or remove a judge.⁶⁷⁷ However, the Protocol does not state the grounds upon which the Assembly could decide to reverse such a decision. It is therefore hoped that this provision will be implemented with caution, when the need arises, so as to avert the subordination of the court to the whims of the Assembly. It should also be made clear, perhaps in the court’s Rules of Procedure, whether, how and on what grounds a suspended or removed judge can seek the intervention of the Assembly, in order to avoid unnecessary interference with the court by the Assembly.

The AHSJ is mandated to determine the seat of the court⁶⁷⁸, within the territory of one of the state parties to the Protocol.⁶⁷⁹ Although the Protocol does not specify the location of the court, it has been proposed that it will be situated in Arusha, Tanzania.⁶⁸⁰ In light of the complementary roles envisaged for the court and commission, it would have been expedient for the two institutions to be located in the same country. Currently, the Secretariat of the commission is in Banjul, The Gambia, although it also holds sessions in other member states.

The location of the court in relation to that of the commission is one issue that requires very serious consideration if regional enforcement of human rights is to be meaningful.⁶⁸¹ Arusha being more centrally located, it would be proper for the AHSJ to consider the possibility of moving the commission’s Secretariat to this venue for the two institutions

⁶⁷⁶ Amnesty International, *African Court on Human and Peoples’ Rights: An opportunity to strengthen human rights protection in Africa* (2002), p. 6.

⁶⁷⁷ Art 19(2).

⁶⁷⁸ Art 25 (1).

⁶⁷⁹ Ibid.

⁶⁸⁰ Activity Report of the Court for 2006, Assembly/AU/8(VIII). The meetings held dealt with drafting the Court’s Rules of Procedure, discussing its budget and the seat of the court.

⁶⁸¹ Amnesty International, *African Court on Human and Peoples’ Rights*, note 656 above.

to work closely. Article 25 allows the court to convene its sessions in the territory of any member state of the AU and for its seat to be changed by the Assembly after due consultation with the court. This is important because the operations and proceedings of the court will be impeded in the event its seat is engulfed in war or other related calamities.⁶⁸²

Finally, the issue of funding of the court has also been addressed in the Protocol. According to Article 32, the ‘expenses of the court, emoluments and allowances for judges and the budget of its registry shall be determined and borne by the AU, in accordance with the criteria laid down by the AU, in consultation with the court’. This is an improvement on Article 44 of the African Charter, which merely states ‘provision shall be made for the emoluments and allowances of the members of the commission in the regular budget of the Organisation of African Unity.’

3.3.2.2 Access and Jurisdiction of the court

3.3.2.2.1 Access to the court

Access to the African Court is governed by Article 5 of the Protocol. Thus:

1. The following are entitled to submit cases to the court:
 - a) The commission
 - b) The state party which had lodged a complaint to the commission
 - c) The state party against which the complaint has been lodged at the commission
 - d) The state party whose citizen is a victim of human rights violation
 - e) African Intergovernmental Organisations
2. When a state party has an interest in a case, it may submit a request to the court to be permitted to join.
3. The court may entitle relevant Non Governmental Organisations (NGOs) with observer status before the commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.

⁶⁸² Ibid.

Article 34(6), on the other hand, allows states parties to make a declaration accepting the competence of the court to receive cases under Article 5(3). It reads:

At the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive cases under Article 5(3) of this Protocol. The court shall not receive any petition under Article 5(3) involving a state party which has not made such a declaration.

From the above provisions it is clear that the Protocol grants two kinds of access to the court: direct (automatic) and indirect (optional). Direct or automatic access is granted to the potential litigants listed under Article 5(1)(a)-(e), while indirect or optional access is permitted subject to a state's declaration to that effect. In line with this classification, it may be argued that individuals may also access the court, either directly or indirectly.

A distinction could be drawn between these two approaches in the sense that individuals may access the court directly only where a state has made the declaration contemplated under Article 34(6), while indirectly, through the commission, if the latter chooses to present individual communications before the court. Since the commission (which is mandated to consider communications from individuals) has direct access to the court, it could choose to defer jurisdiction to the court on some of the individual communications.

It should be pointed out that the main reason for the inclusion of Article 34(6) is thought to have been a strategy to encourage states to ratify the Protocol.⁶⁸³ This is because the Draft Protocol had provided for direct access by individuals and NGOs to the court in 'urgent cases or serious, systematic or massive violation of human rights', but this was omitted in the final Protocol.⁶⁸⁴ The inclusion of a provision requiring a declaration by

⁶⁸³ Mutua, M 'The African human rights court: A two-legged stool?' note 84 above, p. 355.

⁶⁸⁴ Article 6 of the Draft (Nouakchott) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights 1997, OAU/LEG/EXP/AFCHPR/PROT (2), provided that: 'The court may entitle NGOs with observer status before the commission, and individuals to institute directly before it, urgent cases or serious, systematic or

states to allow access by individuals is not unique to the African Court. Other human rights instruments have similar provisions. These include: the First Optional Protocol to the International Covenant on Civil and Political Rights⁶⁸⁵; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women⁶⁸⁶; the Convention against Torture and Other forms of Cruel, Inhuman or Degrading Treatment or Punishment⁶⁸⁷; and the International Convention on the Elimination of All Forms of Racial Discrimination.⁶⁸⁸

Indirect (optional) access is also adopted by the Inter-American system. Under this system, individuals lodge their cases with the Inter-American Commission, which then determines which cases would proceed to the court.⁶⁸⁹ Individuals or NGOs interested in taking part in the proceedings are allowed to act as advisors to the Inter-American commission. Victims and their representatives also play a crucial role in making arguments on reparations and legal costs.⁶⁹⁰ Thus, in both the Inter-American and African systems, no special declaration is required to access the commissions. As Padilla observed, the commissions could be seen as ‘sieves’ to weed out frivolous and unnecessary communications that might find their way to the courts if direct access were allowed.⁶⁹¹

massive violations of human rights.’ See Baderin M, ‘Recent developments in the African regional human rights system’, note 156 above, p. 144.

⁶⁸⁵ Art 1. See also Article 41 of the International Covenant on Civil and Political Rights.

⁶⁸⁶ Arts 1 and 2.

⁶⁸⁷ Art 22.

⁶⁸⁸ Art 14.

⁶⁸⁹ Kaguongo W, ‘The questions of *locus standi* and admissibility before the African Court on Human and Peoples’ Rights’, in Viljoen F, (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights*, note 647 above, p. 85.

⁶⁹⁰ Padilla, D ‘An African human rights court: Reflections from the perspective of the Inter-American system’, (2002) 2 *African Human Rights Law Journal*, p. 185.

⁶⁹¹ *Ibid.*

The European system, during the co-existence of the European Commission and Court, also made provision for a declaration by states to allow individuals and NGOs to access the court.⁶⁹² Prior to the coming into force of Protocol 11, Articles 25(1) and 46(1) of the European Convention required the High Contracting Parties to make separate declarations to allow the European Commission and Court, respectively, to entertain communications from individuals and NGOs.⁶⁹³ Under the new arrangement, however, the European Human Rights Court may receive applications from any person, NGO or group of individuals claiming to be victims of a violation by one of the High Contracting Parties.⁶⁹⁴

The rationale for limiting individual and NGOs access to the African Court, however, needs to be queried. First, one may argue that Article 5 as read together with Article 34(6) grants the state undue protection from proceedings from individuals and NGOs on matters relating to human rights violations.⁶⁹⁵ It is needless to re-emphasise that human rights violations are mostly perpetrated by states against individuals. Thus individuals, or human rights NGOs, are more likely to be the complainants. As a matter of facts, states rarely initiate cases against each another for human rights violations.⁶⁹⁶

A good example can be deduced from the records of the African Commission. Since its inception, it has rarely received Inter-State communications in accordance with Articles

⁶⁹² See Baderin, M, 'Recent developments in the African regional human rights system' note 156 above, pp. 143-144, for a brief discussion on the proactiveness of the European Court of Human Rights in enabling individuals to participate in proceedings before it.

⁶⁹³ Murray R, 'A comparison between the African and European Courts of Human Rights', (2002) 2 *African Human Rights Law Journal*, p. 201.

⁶⁹⁴ Ibid. See also Article 34 of Protocol 11 to the European Convention.

⁶⁹⁵ O'Shea A, 'A critical reflection on the proposed African Court on Human and Peoples' Rights', (2001) 2 *African Human Rights Law Journal*, pp. 287-288.

⁶⁹⁶ Banderin M 'Recent developments in the African regional human rights system', note 156 above, p. 145.

47-49 of the Charter.⁶⁹⁷ This is despite grave human rights violations that have occurred in some African states, such as the Rwandan genocide, crisis in the DRC and the ongoing Darfur crisis in Sudan, just to mention a few examples. Rather, most of the communications before the African Commission have been initiated either by individual victims or NGOs.

Secondly, it is doubtful that many states will be considerate enough to make the declaration contemplated under Article 34(6) of the Protocol.⁶⁹⁸ States are generally reluctant to expose themselves to international scrutiny. Again, there has been an ongoing notion that the African human rights system prefers an amicable rather than adversarial dispute resolution mechanism. In view of the foregoing, the motive behind the agitation for a regional human rights court would have been better fulfilled if individuals and NGOs had been allowed automatic or direct access to the court.⁶⁹⁹

It is true that granting limited access would make the court appear as a ‘forum that evolves human rights jurisprudence aimed at enhancing the realisation of rights by states’ and not as a ‘court of first instance or an appeal court for all cases.’⁷⁰⁰ However, as it stands, the court could end up serving as an appeal forum for states against unfavourable decisions from the commission rather than a forum for individuals to obtain legally binding judicial decisions and remedies for the violation of their human rights by their states.

The latter is a more dangerous position because the court would have failed to serve one of the key purposes that led to its establishment, namely, redressing human rights violations perpetrated mainly by the state. Thus, the failure of a state to make the

⁶⁹⁷ So far, less than five inter-state communications have been presented before the commission. For the list of these cases visit: <http://www1umn.edu/humanrts/Africa/comcases/allcases.html>.

⁶⁹⁸ O’Shea A, ‘A critical reflection on the proposed African Court on Human and Peoples’ Rights’, note 695 above, 288.

⁶⁹⁹ Ibid.

⁷⁰⁰ Kaguongo W, ‘The questions of *locus standi* and admissibility before the African Court on Human and Peoples’ Rights’, note 689 above, p. 83.

declaration under Article 34(6) would frustrate the *raison d'être* of the Protocol.⁷⁰¹ One would also argue that nearly all the rights entrenched in the African Charter are enforceable against the state and not individuals. What makes the state to be the complainant, as the Protocol seems to suggest, is therefore a legal paradox.

Thirdly, access by NGOs is further restricted to 'relevant NGOs with observer status before the commission.' While it is possible to determine which NGOs have observer status before the commission, the term 'relevant' is not so clear. What constitutes a 'relevant NGO' is not known.⁷⁰² The wording of this provision therefore generates more questions than answers. Determination of a 'relevant NGO' is a mystery which only the commission could probably demystify. It may also be contended that the statement 'the court *may* entitle...' (emphasis added) in Article 5(3) gives the court the discretion to either allow or deny access to a 'relevant NGO with observer status'. This imposes a further, and unnecessary, restriction to access to the court by NGOs.⁷⁰³ Generally, this provision is very restrictive when compared to what exists in the Inter-American system, where any NGO legally recognised in one or more member states of the OAS may lodge petitions with the Inter-American Commission.⁷⁰⁴ It is hoped that the African system will follow this precedent, especially when drafting its Rules of Procedures.

Fourthly, it is not clear whether Article 34(6) places an obligation on states to make the declaration contemplated therein.⁷⁰⁵ The Article seems to suggest that states must, at one point or the other, make such a declaration because it uses the word 'shall'. Accordingly, this provision fails to impose a time limit within which the declaration is to be made.⁷⁰⁶ Article 14(1) of the International Convention on the Elimination of all Forms of Racial

⁷⁰¹ Ibid.

⁷⁰² Ibid.

⁷⁰³ Ouguergouz F, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*, note 45 above, p. 724.

⁷⁰⁴ See Article 44 of the American Convention.

⁷⁰⁵ Kaguongo W, 'The questions of *locus standi* and admissibility before the African Court on Human and Peoples' Rights', note 689 above, p. 83.

⁷⁰⁶ Ibid.

Discrimination and Article 21 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, which have similar provisions, use the term ‘may’. Hence, this provision should be read in the strict sense to require states to make a declaration to that effect.⁷⁰⁷ It is suggested that the Rules of Procedure of the court should address these issues in a very comprehensive manner in order for the court to operate efficiently. Preferably, the Rules should state the time limit within which a state should make the declaration contemplated in Article 34(6) of the Protocol.

3.3.2.2.2 Jurisdiction of the court

In legal parlance, the term ‘jurisdiction’ refers to the power of a court, tribunal or other judicial body to entertain a matter brought before it. Any judicial mechanism or organ possesses jurisdiction over matters only to the extent granted to it by the enabling legal provisions. Thus, the African Court has power to entertain cases to the extent the Protocol permits it. The jurisdictional provisions of the Protocol are very important as they determine who will have access to the court, under what conditions, and what types of violations it can entertain.

In the broader sense, therefore, the Protocol grants the court the following heads of jurisdiction: personal jurisdiction (*ratione personae*); subject matter jurisdiction (*ratione materiae*); temporal jurisdiction (*ratione temporis*); contentious jurisdiction; advisory jurisdiction and; conciliatory jurisdiction. In the narrower sense, the jurisdiction of the court could be categorised into three, namely, contentious (adjudicatory), advisory⁷⁰⁸ and conciliatory.⁷⁰⁹ Personal jurisdiction of the court, which relates to the issue of who may access the court, has been discussed at length above. What follows therefore is a discussion of the subject matter jurisdiction of the court in the light of its advisory, contentious (adjudicatory) and conciliatory powers.

⁷⁰⁷ Ibid.

⁷⁰⁸ Art 4(1) Protocol on the African Court.

⁷⁰⁹ Art 9 of the Protocol on the African Court, which provides that the court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the African Charter.

3.3.2.2.1 Contentious (adjudicatory) Jurisdiction

The court's contentious or adjudicatory powers are conferred to it by Article 3(1) of the Charter. In terms of this Article, the jurisdiction of the court extends to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.' When read together with Article 7, the material scope of the contentious jurisdiction seems to be remarkably broad. Article 7 provides that 'the court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned.'

These provisions, it has been argued, give the court a wider adjudicatory jurisdiction than the other regional human rights systems.⁷¹⁰ Accordingly, it has been observed that, whereas the European⁷¹¹ and Inter-American⁷¹² human rights courts' jurisdiction is limited to the conventions under which they were established, the African Court can consider cases brought before it under any human rights treaty ratified by the states concerned.⁷¹³ Naldi and Magliveras, for example, describe Article 3(1) as 'innovative', and said that the Article:

would appear to extend the jurisdiction of the court over any treaty which impinged on human rights in Africa, e.g., the OAU Convention on Refugees, and the African Charter

⁷¹⁰ Naldi G & Magliveras K, 'Reinforcing the African system of human rights: The Protocol on the establishment of a regional court of human and peoples' rights' (1998) 16 *Netherlands Quarterly of Human Rights*, p. 435.

⁷¹¹ European Convention, Arts 32–34.

⁷¹² American Convention, Arts 62(1).

⁷¹³ See generally the arguments in Quasigah E, 'The African Court of Human Rights: Prospects, in Comparison with the European Court of Human Rights and the Inter-American Court of Human Rights', in African Society of International and Comparative Law, *Proceedings of the Tenth Annual Conference, held in Addis Ababa 3–5 August 1998* (1998), pp. 61–62.

on the Rights and Welfare of the Child, but also UN instruments such as the International Covenants on Human Rights . . .⁷¹⁴

Hence, while some scholars have insisted that Articles 3(1) and 7 of the Protocol should be interpreted widely to allow the court to adjudicate on human rights instruments other than the African Charter⁷¹⁵, others have advocated for a narrower interpretation because, according to them, they afford the court excessively broad jurisdiction.⁷¹⁶ Some of those advocating for a narrower interpretation argue that if the court exercises its jurisdiction under these provisions, *stricto sensu*, ‘jurisprudential chaos’ might occur.⁷¹⁷ This, according to the argument, might occur in two ways.

First, the application of treaties other than the Charter would ‘creep into’ the jurisdiction of other human rights organs and could possibly lead to inconsistent interpretations and applications of those treaties.⁷¹⁸ Secondly, it is contended that, because this broad jurisdiction exceeds the competence of the African Commission as provided in the African Charter, it would permit the African Court to intrude into ‘a faculty the African Commission itself does not possess.’⁷¹⁹ This position is predicated on the fact that Article

⁷¹⁴ Naldi G & Magliveras K, ‘Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples’ Rights’, note 710 above, p. 435.

⁷¹⁵ See, for example, Mutua M, ‘The proposed African court on human and peoples’ rights: Evaluation and comparison’, note 84 above, p. 435; Mutua M, ‘The African human rights court: A two-legged stool?’, note 84 above, p. 354; Udombana N, ‘Toward the African Court on Human and Peoples’ Rights: Better late than never’, (2000) 3 *Yale Human Rights and Development Law Journal*, p. 90 and Eno W, ‘The Jurisdiction of the African Court on Human and Peoples’ Rights’, (2002) 2 *African Human Rights Law Journal*, pp. 227–228.

⁷¹⁶ See, for example, Heyns C, ‘The African regional human rights system: In need of reform?’, note 28 above, pp. 166–168; Osterdahl I, ‘The Jurisdiction *Rationae Materiae* of the African Court of Human and Peoples’ Rights: A comparative critique’, (1998) 7 *Revue Africaine des Droits de l’Homme*, p. 138.

⁷¹⁷ See, for example, Heyns C, ‘The African regional human rights system: In need of reform?’, note 28 above, p. 167.

⁷¹⁸ *Ibid.*

⁷¹⁹ Padilla D, ‘An African human rights court: Reflections from the perspective of the Inter-American system’, note 690 above, p. 193.

7 of the Protocol goes beyond Article 60 of the African Charter, which urges the African Commission simply to:

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 from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Clearly, while the African Commission is allowed to draw inspiration from the sources listed under Article 60, it is nonetheless confined to the interpretation of the African Charter. There is therefore the fear that the apparent jurisdictional asymmetry between the court and the commission could give rise to problems in future.⁷²⁰ Heyns foresees the possibility of states being deterred not only from ratification of the Protocol, but also from ratification of other human rights treaties.⁷²¹ In his view, the phrase 'any other relevant human rights instruments' under Article 3(1) should be taken to mean only those treaties that explicitly confer adjudicatory jurisdiction on the court.⁷²²

Some of the arguments for a narrow interpretation of Articles 3(1) and 7 of the Protocol are both exaggerated and unfounded. As Udombana argues, although it is true that the wording of Article 3(1) could deter some states from ratifying other treaties in future, it is rather simplistic to deny the court substantial jurisdiction purely on the basis of this argument.⁷²³ As a matter of fact, the ratification of treaties is a voluntary commitment by a state to be bound by the provisions thereof. Thus, if the jurisdiction conferred to the

⁷²⁰ Heyns C, 'The African regional human rights system: In need of reform?', note 28 above, p. 167.

⁷²¹ Ibid.

⁷²² Ibid. See also Van der Mei A, 'The new African Court on Human and Peoples' Rights: Towards an effective human rights protection mechanism for Africa', note 641 above, p. 119.

⁷²³ Udombana N, 'Toward the African Court on Human and Peoples' Rights: Better late than never', note 715 above, p. 90.

court by Articles 3(1) and 7 would scare any state from ratifying a particular treaty, the state's commitment to the promotion and protection of human rights should be queried.⁷²⁴ After all, the court could apply its discretion and wisdom to determine the cases it would adjudicate on. The argument on 'jurisprudential chaos' on the basis of different interpretations is also a bit far stretched. Differences in interpretations will obviously occur whenever various organs apply the same instruments, but this may not necessarily result to 'jurisprudential chaos'.⁷²⁵

Some of those advocating for a broader interpretation of the above provisions insist that the court does not deserve to limit itself to the spirit and letter of the African Charter. Instead it must refer to other treaties ratified by the states, including UN treaties, bilateral and multilateral treaties at regional and sub-regional levels. According to Udombana, an aggrieved person who is not adequately covered by the African Charter may bring a case in terms of the Protocol under 'any other international treaty' that provides a higher level of protection, including sub-regional treaties, such as the ECOWAS treaty.⁷²⁶ Thus, the argument goes on, conferring a wider jurisdiction on the court would expose those states that took ratification as a public relations exercise. After all, it is further contended, the court has the discretion either to consider or transfer cases to the African Commission.⁷²⁷ This should allow the court to avoid overload and to hear only those cases which have the potential to advance human rights protection in a meaningful way.⁷²⁸

The above observations cannot go uncontested. In the main, it is acknowledged that the purpose of a regional mechanism such as the African Court is to interpret and give effect to the norms and instruments promulgated at the regional level. It would, therefore, be highly unusual for an institution from one system (AU) to enforce the treaties of another

⁷²⁴ Ibid.

⁷²⁵ Ibid. See also Charney J, 'Is international law threatened by multiple international tribunals?', (1998) 27/1 *Recueil des cours*, p. 101.

⁷²⁶ Ibid. See also Mutua M, 'The African human rights court: A two-legged stool?', note 84 above, p. 354.

⁷²⁷ Art 6(3) Protocol on the African Court.

⁷²⁸ Eno W, 'The Jurisdiction of the African Court on Human and Peoples' Rights', note 715 above, p. 228.

system (UN). Reference to ‘any other relevant human rights instrument ratified by the states concerned’ could therefore mean instruments promulgated within the African region. The use of the word ‘relevant’ justifies this position.⁷²⁹ It is inevitable to note, however, that the phrasing of these Articles needs to be revisited and their meaning made clear. As they stand, Articles 3(1) and 7 are ambiguous and confusing.

3.3.2.2.2.2 Advisory Jurisdiction

In addition to contentious jurisdiction, the court is also vested with advisory powers. Accordingly, it has the discretionary competence to give advisory opinions ‘on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the commission.’⁷³⁰ A request for an opinion can be made by the AU, one of the AU organs, an AU member state, or an African organisation recognised by the AU.

Like its adjudicatory jurisdiction, the court possesses an advisory jurisdiction that exceeds that of any other regional human rights system, in the sense that it can express itself not only on the Charter but also on any other human rights instrument. The European Convention only entitles the Council of Europe’s Committee of Ministers to ask for an opinion,⁷³¹ while the American Convention allows the OAS member states and, within their spheres of competence, the OAS organs to do so.⁷³²

⁷²⁹ Heyns C, ‘The African regional human rights system: In need of reform?’, note 28 above, p. 168.

⁷³⁰ See Art 4(1) which reads: ‘At the request of a member state of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the commission.’

⁷³¹ European Convention, Art 47.

⁷³² See Pasqualucci J, ‘Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law’, note 623 above, p. 241; and Buergenthal T, ‘The Advisory Practice of the Inter-American Human Rights Court’, (1985) 79 *American Journal of International Law*, p. 1.

Some aspects of the advisory jurisdiction provisions of the Protocol need further clarification. For example, the inclusion of the AU in Article 4(1) of the Protocol does not seem to add any value to the provision because the AU, by definition, will have to be represented by one of its organs, which in their own right enjoy the right to seek an advisory opinion from the court.⁷³³ Further, the Protocol is not clear as to whether NGOs having observer status before the African Commission can request for an advisory opinion from the court.⁷³⁴

One might think that the phrase ‘any African organisation recognised by the OAU (AU)’, under Article 4(1), could be taken to include NGOs with observer status before the commission. If this is the case, such NGOs might invoke the Article 4(1) provisions and apply for an advisory opinion.⁷³⁵ It could also be argued, to the contrary, that because NGOs in principle have no direct access to the court in contentious cases, they have no right to request an opinion since they could use this opportunity to argue a case against a member state that has not accepted the court’s jurisdiction in cases brought by NGOs and individuals.⁷³⁶ It is opined that Article 4(1) should be interpreted liberally to allow NGOs to request a legal opinion from the court.

It is evident that the power of the African Court to render advisory opinions is purely discretionary. By allowing NGOs to participate, the opinions of the court could serve as a reference for a dynamic and progressive interpretation of the African Charter and other human rights treaties.⁷³⁷ Like in the case of the Inter-American Court, the Protocol should have made it possible for the African Court to give opinions on the compatibility of national legislation or practices with international human rights law.⁷³⁸ This is significant because the possibility of these organs’ obtaining clarification from the African Court

⁷³³ Van der Mei A, ‘The new African Court on Human and Peoples’ Rights: Towards an effective human rights protection mechanism for Africa’, note 641 above, p. 121.

⁷³⁴ Ibid.

⁷³⁵ Ibid.

⁷³⁶ Ibid.

⁷³⁷ Ibid.

⁷³⁸ See American Convention, Art 64(2).

could contribute to the objective application of human rights treaties and the development of universal human rights jurisprudence in the continent.⁷³⁹

3.3.2.2.3 Conciliatory Jurisdiction

In the course of its proceedings, the court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.⁷⁴⁰ As already stated, the Charter and the African system at large, favours the amicable settlement of disputes approach. Article 9 is discretionary in the sense that it uses the word ‘may’. It is not known whether the contending parties will be allowed to request for an amicable settlement of a pending case or the court would do so at its own volition.⁷⁴¹ It is advisable that cases be allowed to proceed to a completion so that the human rights jurisprudence of the African system is allowed to develop. An amicable settlement may not allow for such development.⁷⁴²

There is an apparent dilemma in conferring both conciliatory and adjudicatory powers on a single body. This has been one of the causes of disquiet in the African Commission, whose practice has leaned more towards conciliation than on adjudication. The court should give a careful thought on this arrangement when drafting its rules of procedure.⁷⁴³ This, however, should not be taken to mean that amicable settlement is an inappropriate task for a judicial body.⁷⁴⁴ Rather, expediency demands that the court should concentrate

⁷³⁹ Hopkins K, ‘The effect of the African Court on the domestic legal orders of African states’, (2002) 2 *African Human Rights Law Journal*, p. 234.

⁷⁴⁰ Art 9 of the Protocol provides that, ‘The court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.’

⁷⁴¹ Van der Mei A, ‘The new African Court on Human and Peoples’ Rights: Towards an effective human rights protection mechanism for Africa’, note 641 above, p. 121.

⁷⁴² Ibid.

⁷⁴³ Ibid.

⁷⁴⁴ For the propriety or otherwise of having a judicial body performing both adjudicatory and conciliatory functions, see generally, Whinney E, *Judicial settlement of international disputes: Jurisdiction, justiciability and judicial law-making on the contemporary international court* (1991), p. 7; Chinkin C,

on adjudicatory functions and leave the quasi-judicial functions to the commission. Thus, where the parties to a dispute agree to resolve it amicably, the court may transfer the matter to the commission for settlement. Accordingly, this would save the court's time and also that of the parties.⁷⁴⁵

3.3.2.3 Procedures of the court

Article 33 of the Protocol provides that the court shall draw up its own rules and determine its own procedures in consultation with the commission.⁷⁴⁶ As at the moment, the court's rules of procedure have not been drafted, therefore no detailed discussion on the court's procedures may be meaningful. The Protocol, however, has scanty provisions that may serve as the guidelines to some procedural aspects of the court. These provisions touch on, for example, admissibility and consideration of cases, judgements and remedies. This part therefore examines the provisions relating to such procedural aspects and recommends on how the court could comprehensively address them in its rules of procedure. In this regard, inspiration is obtained and lessons are drawn from the Universal, Inter-American and European human rights systems.

3.3.2.3.1 Admissibility and consideration of cases

The African Court is mandated to consider all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the states concerned.⁷⁴⁷ Accordingly, the yet

'Alternative dispute resolution under international law', in Evans M (ed) *Remedies in international law: The institutional dilemma* (1998), pp. 128-129.

⁷⁴⁵ Van der Mei A, 'The new African Court on Human and Peoples' Rights: Towards an effective human rights protection mechanism for Africa', note 641 above, p. 121.

⁷⁴⁶ Art 33 reads: 'the court shall draw up its Rules and determine its own procedures. The court shall consult the commission as appropriate.'

⁷⁴⁷ Art 3 of the Protocol.

to be drafted rules of procedure of the court shall lay down the detailed conditions under which cases shall be considered by the court.⁷⁴⁸

In considering cases, Article 10(1) of the Protocol requires the court to conduct its proceedings in public, except in circumstances where its Rules of Procedure shall allow it to hold them in camera. Article 3(2) seems to suggest that the court has the power to choose which cases it will examine. Thus, it could elect to deal with only the most important legal issues.⁷⁴⁹ Like its counterpart, the African Commission, the starting point of consideration of cases by the court is the admissibility stage. According to Article 6(2) of the Protocol, the court ‘shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.’ Article 56 of the Charter lays down seven admissibility requirements that must be fulfilled before a communication is considered on merit. These requirements as well as the jurisprudence of the African Commission relating thereto were discussed at length elsewhere in this chapter.

Noteworthy, the court is permitted to request the opinion of the commission before making a decision on the admissibility of a case instituted by relevant NGOs or individuals.⁷⁵⁰ In such cases, the commission is not mandated to give a ‘ruling’ but an ‘opinion’, meaning that the court would then have to give a ruling on the admissibility of such a case.⁷⁵¹ Due to this, the Protocol is thought to be initiating an unnecessary movement of a case between the court and the commission.⁷⁵² This situation is aggravated by the fact that the court may eventually decide to defer the determination of a case to the commission.⁷⁵³ Thereafter, assuming the application to be admissible, the court may decide to refer the case back to the commission for determination on merit.

⁷⁴⁸ Ibid, Art 8.

⁷⁴⁹ See Mutua M ‘The African Human Rights Court: A two-legged stool?’, note 84 above, p. 2 356.

⁷⁵⁰ Art 6(1) of the Protocol.

⁷⁵¹ Murray R, ‘A comparison between the African and European courts of Human rights, note 693 above, p. 203.

⁷⁵² O’Shea A, ‘A Critical reflection on the proposed African Court on Human and Peoples’ Rights’, note 695 above, p. 295.

⁷⁵³ Article 6 (3) provides that: ‘The Court may consider cases or transfer them to the Commission.’

The approach of the Inter-American system and its European counterpart (prior to Protocol 11 amendment) differs from that of the African system in that the commissions under both systems would make preliminary decisions on admissibility.⁷⁵⁴ This limits the movement of a case between the commission and the court. The European Court at one time held that all admissibility questions had to be raised before the commission first, and not come to the court for the first time.⁷⁵⁵ It would be expedient to have such an approach adopted under the African system; perhaps it would also bolster the African commission's protective functions.

In relation to post-admissibility consideration of cases, the Protocol does not indicate clearly the procedure to be followed or the conditions under which admissible cases may subsequently be referred to the commission.⁷⁵⁶ The Protocol only provides that 'the court may consider cases or transfer them to the commission.'⁷⁵⁷ Consequently, in exercising its discretion under Article 6(3), the court must act as its own filter and channel some cases back to the commission. This clearly demonstrates the inefficiency of a two-tier system where both organs may receive the same types of application. The scanty provisions dealing with the relationship between the commission and the court give insufficient guidance on how the machinery will operate in practice. It is hoped that these issues will be resolved in the Rules of Procedure.⁷⁵⁸

In the course of its proceedings, the court is obligated to conduct public hearings, unless otherwise required in its Rules of Procedure.⁷⁵⁹ Whereas the African Commission's complaints process has been conducted in private and little information is available on the procedure, it is encouraging to see the Protocol provide for public proceedings. In this time and age where accountability and transparency are exceedingly necessary in dispute

⁷⁵⁴ O'Shea A, 'A Critical reflection on the proposed African Court on Human and Peoples' Rights', note 695 above, p. 295.

⁷⁵⁵ *De Wilde, Ooms and Versyp v. Belgium* ECHR (18 June 1971) Ser A 12, para 48.

⁷⁵⁶ Dieng A, 'Introduction to the African Court on Human and Peoples' Rights', note 644 above, p. 5.

⁷⁵⁷ Art 6(3) of the Protocol.

⁷⁵⁸ Dieng A, 'Introduction to the African Court on Human and Peoples' Rights', note 644 above, p. 5.

⁷⁵⁹ Art 10(1).

resolution, the importance of conducting public hearings needs no special emphasis. As Murray argued, through public hearings, potential litigants will be acquainted with the procedures of the court.⁷⁶⁰ What remains is for the court, preferably in its Rules of Procedure, to define the scope of ‘public hearings’. Under the European system, for example, the concept of public hearing also requires the public disclosure of all documents.⁷⁶¹

Litigants before the court have the right to be represented by legal representatives of their choice.⁷⁶² Where the interests of justice so require, free legal representation may be provided for an indigent litigant.⁷⁶³ Given the abject poverty in many African states, it is believed that this is essential in trying to ensure that litigants, irrespective of their economic status, are heard by the court. It is necessary for the Rules of Procedure to clarify the qualifications of the legal representatives of the litigants. Additionally, the question of who should shoulder the expenses of the legal representative to the indigent litigant—whether it is the state party concerned or the court—should also be clarified.⁷⁶⁴

According to Article 26, the court shall hear submissions by all parties and, if deemed necessary, hold an enquiry.⁷⁶⁵ Such inquiries could be in the nature of on-site visits to establish allegations presented before it by the litigants. In this regard, the states concerned are obligated to assist in the process by providing relevant facilities for the efficient handling of the case.⁷⁶⁶ This provision is especially important because it

⁷⁶⁰ Murray R, ‘A comparison between the African and European courts of human rights’, note 693 above, p. 203.

⁷⁶¹ Rule 33(3) of the Rules of the European Court makes specific mention of documents being accessible to the public.

⁷⁶² Art 10(2).

⁷⁶³ Ibid.

⁷⁶⁴ Murray R, ‘A comparison between the African and European courts of human rights’, note 693 above, p. 203.

⁷⁶⁵ Art 26(1).

⁷⁶⁶ Ibid.

safeguards the victim from the mischief of a recalcitrant state that may wish to destroy or withhold crucial evidence.

Pursuant to Article 26(2), the court is empowered to receive written or oral evidence, including expert testimony. In tandem with this provision and given the vastness of the continent, the court could receive foreign depositions instead of requiring the physical presence of witnesses for *de novo* trials. Video-taped recordings of witness testimony rendered on oath with all the guarantees of due process could be used to facilitate this process.⁷⁶⁷ These economical measures can go a long way towards accelerating the litigation of cases and mitigating related expenses. This will also go a long way to reduce the length of proceedings.

As part of its procedures, the court is also empowered to adopt interim measures. Article 27(2) provides that ‘in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the court shall adopt such provisional measures as it deems necessary.’ The importance of interim measures in preventing irreparable harm to victims of violations has been discussed at length in our discussion on the procedures of the African Commission. It is expected that the rules of procedure shall address this issue comprehensively and, where need be, specify the consequences of breaching them. As already stated, states have not been taking serious the interim measures pronounced by the African Commission. Hopefully, the court will not be treated with equal contempt. Additionally, the rules of procedure should state the nature and scope of these measures because the Protocol has failed to do so.

3.3.2.3.2 Judgements of the court

The court is empowered to make findings and order appropriate remedies when there is a violation of rights.⁷⁶⁸ The judgments of the court, decided by majority of the judges,

⁷⁶⁷ Padilla D, ‘An African Human Rights Court: Reflections from the perspective of the Inter-American system’, note 690 above, p. 192.

⁷⁶⁸ Art 27(1) of the Protocol.

would be final and not subject to appeal.⁷⁶⁹ However, the court is empowered to review its decisions in the light of new evidence under conditions to be set out in its Rules of Procedure.⁷⁷⁰ In cases where the judgment of the court is not unanimous, either in whole or in part, any judge would be entitled to deliver a separate or dissenting opinion.⁷⁷¹

A novel feature of the Protocol that distinguishes the commission from the court is that it requires the court to render its judgements ‘within ninety days of having completed its deliberations.’⁷⁷² This is to ensure a speedier dispensation of justice than has been the case with the commission. It is a prerequisite that the judgments of the court be reasoned, and must be read in open court, due notice having been given to the parties.⁷⁷³ The effect of this provision is to avert the possibility of the court resorting to the initial practice of the commission where judgements were neither reasoned nor detailed.

The above provisions notwithstanding, it should be stated categorically that the ability of the system to bring about change largely depends on how binding the judgments of the African Court would be. Article 30 of the Protocol provides that state parties ‘undertake to comply with the judgment in any case to which they are parties within the time stipulated by the African Court and to guarantee its execution.’ This provision imputes on states the primary responsibility for the execution of the judgments of the court. Apart from this Article, there does not seem to be any specific recourse provided in the Protocol where a delinquent state deliberately refuses to comply with the court’s judgment.⁷⁷⁴

Apparently, Article 30 only emphasises the voluntary nature of the execution of judgments, and has nothing to do with imputing an obligation on states to ensure the

⁷⁶⁹ Art 28(2).

⁷⁷⁰ Art 28(3).

⁷⁷¹ Art 28(7).

⁷⁷² Art 28(1).

⁷⁷³ Art 28(5) & (6).

⁷⁷⁴ Hopkins K, ‘The effect of an African Court on the domestic legal orders of African states’, note 739 above, p. 238.

same.⁷⁷⁵ Accordingly, 'states undertake' does not seem to carry the requisite force to compel a recalcitrant state to comply with the court's judgement. The court does not therefore possess any express power to ensure that its judgments are adhered to, and thus appears powerless to react when its decisions are ignored. Consequently, the effectiveness of the court seems to be largely dependent on the willingness of states to comply with its decisions.⁷⁷⁶

On a more positive note, however, the Protocol provides for mechanisms which may be used to compel states to comply with the court's judgements. For example, the Protocol requires the judgments to be brought to the notice of the member states of the AU as well as the African Commission.⁷⁷⁷ Additionally, the court is required to submit, in each regular session of the AU Assembly, a report on its work during the previous year.⁷⁷⁸ The report would include cases in which a state has not complied with the court's judgment.

It should be noted that the approach adopted by the Protocol is more realistic than that of the Charter which subjects the publication of reports and rulings of the commission to prior approval by the Assembly. The involvement of the Assembly in the activities of the court, it is hoped, will compel states to comply with its judgements.⁷⁷⁹ This is because, compared to the OAU Charter, the AU Constitutive Act provides an improved framework for compliance with supranational decisions. For example, it provides for relevant sanctions against states that fail to comply with the Act.⁷⁸⁰

The AU is therefore expected to protect the integrity of the system by adopting political measures that are necessary to secure compliance with the court's judgment. Moreover,

⁷⁷⁵ Ibid.

⁷⁷⁶ Ibid.

⁷⁷⁷ Art 29(1).

⁷⁷⁸ Art 31.

⁷⁷⁹ Hopkins K, 'The effect of an African Court on the domestic legal orders of African states', note 739 above, p. 238.

⁷⁸⁰ Art 23 of the Constitutive Act of the African Union.

the involvement of the Executive Council of the AU in the monitoring of the court's judgements should be seen as an added impetus to the effective operation of the court.⁷⁸¹ The council will perhaps be instrumental in ensuring that national courts play a crucial role in the enforcement of the judgements of the African Court. In the Inter-American system, for example, the Inter-American court's judgments on reparations are to be executed in national courts.⁷⁸² Unfortunately, there is no similar provision in either the African Charter or the Protocol on the African Court. Nonetheless, the Executive Council may have a role in encouraging national courts to comply, in terms of their own laws, with the judgements of the African Court.

3.3.2.3.3 Remedies

International human rights instruments, such as the Universal Declaration of Human Rights, the ICCPR, the European Convention on Human Rights, the American Convention on Human Rights, and the Torture Convention, recognise the right of victims of human rights abuses to receive remedies for their injury. However, the primary responsibility for the implementation, monitoring and enforcement of these remedies lies in the main with the existing national mechanisms of a country: the judiciary, executive and legislature.⁷⁸³ International mechanisms only expected to play the second-fiddle. Under international law, remedies for violation of human rights are diverse and their award depends on diverse factors.⁷⁸⁴ The importance of remedies to a victim of human rights violation has been highlighted in this thesis in relation to the commission, thus, it is needless to repeat the same here.

⁷⁸¹ Art 29(2).

⁷⁸² Art 26 of the American Convention.

⁷⁸³ Waris A, 'The remedies, application and enforcement provisions of the African Court on Human and Peoples' rights', in Frans Viljoen (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*, note 647 above, p. 101.

⁷⁸⁴ Ibid.

Article 27(1) of the Protocol to the African Court deals with the issue of remedies in the following terms:

If the court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation....

Essentially, the court is given a very wide discretion to order whatever it deems 'appropriate'. This provision does not state the exact nature or type of order or remedies the court may grant. The terms 'compensation' and 'reparation' employed therein are quite vague and ambiguous. Thus, in exercising its wide discretion, the court may order remedial action in the form of specific and defined orders and remedies, for instance injunctions and sanctions.⁷⁸⁵ It is important that the court avoids a restrictive interpretation of its remedial powers by ordering adequate reparation whenever the interest of justice demands.

When awarding remedies, the court should also determine the issue of costs. The Protocol is silent on how this issue should be treated. While the Protocol provides for 'free legal representation', for example, there is no indication of who will bear the costs of such, other than the general requirement in Article 32 that 'expenses of the court, emoluments and allowances for judge and the budget of its registry shall be determined and borne by the AU.'⁷⁸⁶ The rules of procedure should therefore clarify whether parties will be allowed to make prayers for costs and how the court should determine such prayers.⁷⁸⁷

As a general analysis, the African Court has more potential to contribute to the effective enforcement of human rights in Africa than its counterpart, the commission. In order to

⁷⁸⁵ Waris A, 'The remedies, Application and enforcement provisions of the African Court on Human and Peoples' rights', note 783 above, p. 101.

⁷⁸⁶ Murray R, 'A comparison between the African and European courts of human rights, note 693 above, 218.

⁷⁸⁷ *Ibid.*

ensure its place among the eminent judicial bodies⁷⁸⁸, however, the court, through its Rules of Procedure, must think strategically of how it will operate efficiently. Thus, it is essential that it receives neither too few nor too many cases because, ‘a court which is scarcely used cannot make much of a mark. A full docket, on the other hand, though not the only requirement, provides a tribunal with a series of opportunities to display its potential.’⁷⁸⁹ Additionally, in order to be persuasive, the court may have to be innovative in the presentation of its judgements. Mechanisms such as indicating both sides of the argument, giving *ratio decidendi*, dealing with all points raised and examining issues of admissibility and jurisdiction fully and properly, are essential for its own legitimacy.⁷⁹⁰

3.3.3 Relationship between the court, the commission, the AU and other relevant human rights bodies

3.3.3.1 Relationship between the court and commission

The court has not been established to replace but to complement and reinforce the commission. This fact can be deduced from the Preamble and other provisions of the Protocol. The last paragraph of the Preamble to the Protocol emphasises that ‘the attainment of the objectives of the African Charter on Human and Peoples’ Rights requires the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights.’ In such circumstances, one would expect the Protocol to set out clearly the relationship between the commission and the court, yet it does not. Rather, as O’Shea correctly observed, the relationship between the two organs is only dealt with in the most general terms, which give little if any hint as to how the machinery actually works.⁷⁹¹

⁷⁸⁸ Such as the Inter-American and European human rights Courts.

⁷⁸⁹ Murray R, ‘A comparison between the African and European courts of human rights, note 693 above, p. 218.

⁷⁹⁰ Ibid.

⁷⁹¹ O’Shea A, ‘A Critical reflection on the proposed African Court on Human and Peoples’ Rights’, note 695 above, p. 293.

Accordingly, Article 2 provides that the court shall ‘complement the protective mandate’ of the commission. Article 8 requires that Rules of the court should indicate when cases should be brought before it ‘bearing in mind the complementarity between the commission and the court.’⁷⁹² This appears to suggest that the African Court will only consider cases which have gone through the commission, thus following the approach of the previous European arrangement, prior to the adoption of Protocol 11.⁷⁹³

Prior to the adoption of Protocol 11 to the European Convention, the European Commission looked at admissibility, would try to reach a friendly settlement, and then reported if there was a breach.⁷⁹⁴ It would send the case to the Committee of Ministers to be enforced, or it could choose to submit the case to the court, if the state concerned had accepted its jurisdiction. There was a presumption in this system that the European Commission, rather than the court, would have primary responsibility for fact-finding.⁷⁹⁵ This delegation of responsibility between a commission, that deals with disputes of facts and a court which looks at disputes of law, might be useful for the African system.⁷⁹⁶

Under the African system, the commission is conferred with both a promotional and protective mandate. It may be deduced from the provisions of Article 2 of the Protocol that the complementarity between the court and the commission does not specifically affect the promotional, but rather the protective, mandate of the commission.⁷⁹⁷ In

⁷⁹² Art 8 reads: ‘The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.’

⁷⁹³ O’Shea A, ‘A Critical reflection on the proposed African Court on Human and Peoples’ Rights’, note 695 above, p. 293.

⁷⁹⁴ Murray R, ‘A comparison between the African and European courts of human rights’, note 693 above, p. 198.

⁷⁹⁵ Ibid. See also Merrills J, *The development of international law by the European Court of Human Rights* (1993), p. 10; Clements L, ‘Striking the right balance: The new Rules of Procedure for the European Court of Human Rights’ (1999) 3 *European Human Rights Law Review*, p. 267.

⁷⁹⁶ Murray R, ‘A comparison between the African and European courts of human rights’, note 693 above, p. 198.

⁷⁹⁷ Ibid.

relation to their common protective mandate, the Protocol does not, however, contain any significant details regarding how this will be shared between the court and the commission—especially in relation to the filing of complaints by individual ‘victims’ of human rights violations and NGOs. These details have been left, perhaps, for the court to address in its Rules of Procedure.⁷⁹⁸

The Protocol also initiates a relationship between the court and the commission with regard to admissibility proceedings. Article 6(1) intimates that ‘the court, when deciding on the admissibility of a case instituted under Article 5(3) of this Protocol, may request the opinion of the commission which shall give it as soon as possible.’ Also, Article 6(2) provides that the court shall take the provisions of Article 56 of the African Charter into account when considering the admissibility of all cases. While Article 56 of the Charter sets out the general admissibility rules of the commission, it does not address the commission’s relationship with the court in that regard.

The Rules of Procedure of the court therefore need to be very comprehensive and should clarify the criteria for the admissibility of cases, spelling out clearly the relationship between the court and the commission.⁷⁹⁹ In fact, Article 33 of the Protocol stipulates that the court ‘shall consult as appropriate with the commission’ when it draws up its rules of procedure. This would be imperative in relation to the provisions of the Protocol which concern the relationship between the court and the commission.⁸⁰⁰ The commission should, also, consider revising its Rules of Procedure to ensure its good relationship with the court.

⁷⁹⁸ Ibid.

⁷⁹⁹ O’Shea A, ‘A Critical reflection on the proposed African Court on Human and Peoples’ Rights’, note 695 above.

⁸⁰⁰ Murray R, ‘A comparison between the African and European courts of human rights’, note 693 above, p. 198.

Successful functioning of the court would depend, among other things, on a viable working relationship between the commission and the court.⁸⁰¹ Such expectations would require close co-operation between the commission and the court as interdependent components of the African human rights system operating within the African Union.⁸⁰² It has been suggested that one way of ensuring that the complementarity between the court and the commission succeeds might be to vest the commission with promotional functions and the court with protective functions.⁸⁰³

The rationale for this arrangement, according to its proponents, is to enable the commission and the court to be more effective in their areas of specialisation and to enhance cooperation and mutual reinforcement between the two institutions.⁸⁰⁴ While this may be an ideal scenario, the Protocol contemplates a sharing of the protective mandate between the commission and the court.⁸⁰⁵ The Protocol's position, however, is not cast in stone. If the African human rights system is to be effective, the relationship between the court and the commission must be enhanced, even if it takes the amendment of the Protocol. The next chapter of this thesis shall comprehensively discuss and recommend on how the relationship between the two institutions could be perfected.

⁸⁰¹ Badawi I, 'The future relationship between the African Court and the African Commission', (2002) *African Human Rights Law Journal*, p. 253.

⁸⁰² Ibid. This notion is reflected in Art 3(h) of the Constitutive Act of the Union, which stipulates that the Union aims, among other things, at 'promoting and protecting human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.' See the Constitutive Act of the African Union adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo.

⁸⁰³ Kaguongo W, 'The Questions of *Locus Standi* and Admissibility before the African Court on Human and Peoples' Rights', note 689 above, p. 84.

⁸⁰⁴ Ibid.

⁸⁰⁵ Harrington J, 'The African Court on Human and Peoples' Rights', in Murray R & Evans M, *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002), p. 332.

3.3.3.2 Relationship between the court and AU and its organs

The AU and its organs have a relationship with the court in a number of areas. For example, the Assembly of the AU is paramount in the appointment of the judges of the court.⁸⁰⁶ Thus, it is instrumental in ensuring the competence or otherwise of the court. Additionally, the Assembly may reverse a decision to suspend or remove a judge from office.⁸⁰⁷ The Assembly also determines the seat of the court and may change it after due consultation with the court.⁸⁰⁸ Further, the court is required to submit to each regular session of the Assembly, a report on its work during the previous year.⁸⁰⁹ The Union also determines the expenses of the court, emoluments and allowances for judges and the budget of its registry.⁸¹⁰

Another organ of the AU that has relationship with the court is the Executive Council (formerly Council of Ministers). Article 29(2) of the Protocol indicates that the council shall monitor the execution of judgments of the court on behalf of the Assembly. Meanwhile, the African Commission does not have a direct relation with the Executive Council in as far as its reports are submitted directly to the Assembly.⁸¹¹ It would therefore be important to involve the council in the reports of the commission to ensure proper follow-up on the work of both the court and the commission, given the complementarity between them, especially in the protective mandate.⁸¹²

⁸⁰⁶ See Arts 11-15 of the Protocol.

⁸⁰⁷ Art 19 (2).

⁸⁰⁸ Art 25 (1) & (2) of the Protocol to the African Court.

⁸⁰⁹ Art 31.

⁸¹⁰ Art 32 reads: 'Expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court'.

⁸¹¹ Arts 52, 53, 54 & 58 African Charter.

⁸¹² Amnesty International, *Credibility in question: proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples' Rights*, note 656 above, p. 10.

The African Court of Justice (ACJ) is also expected to have relationship with the African human rights court, although both are encompassed in uncertainty on their future relationship. In the main, there is the ongoing debate on how to merge the two institutions.⁸¹³ The official explanation for such a merger was that it would be financially expedient to do so.⁸¹⁴ After the matter of the merged court had been referred back and forth between the Permanent Representatives Council (PRC), Legal Experts and the Executive Council, a Meeting of Governmental Legal Experts was scheduled to be held in Algiers in order to consider a draft instrument prepared by the Algerian foreign minister and former president of the International Court of Justice, Dr Mohammed Bedjaoui.⁸¹⁵

However, due to the fact that only 22 member states turned up for this meeting and that the necessary quorum was therefore lacking, a working group was constituted instead to consider the matter.⁸¹⁶ The meeting adopted a Draft Protocol on the Statute of the African Court of Justice and Human Rights, which introduced a number of fundamental changes to the Draft Protocol on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union. The Draft Protocol attempted to change the content of the Protocol Establishing the Human Rights Court, in particular making individual petitions automatic.⁸¹⁷ This attempt was resisted by a number of states

⁸¹³ See paras 4 and 5 of Assembly/AU/Dec 45(III). See also Viljoen F & Baimu E, 'Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of justice', (2004) 22/2 *Netherlands Quarterly of Human Rights*, p. 241-267.

⁸¹⁴ Ibid.

⁸¹⁵ Bekker G, 'The African Court on Human and Peoples' Rights: Safeguarding the interests of the African states', note 639 above, p. 170.

⁸¹⁶ Ibid. See also Report of the Meeting of Government Legal Experts on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, EX.CL/211(VII).

⁸¹⁷ Bekker G, 'The African Court on Human and Peoples' Rights: Safeguarding the interests of the African states', note 639 above, p, 170. See also Art 32 of the Draft Protocol on the Statute of the African Court of Justice and Human Rights, UA/EXP/Fusion courts3(I).

in that, although a modified version of this draft was tabled at the AU Summit in Khartoum in January 2006, no decision was taken on it.⁸¹⁸

Similarly, in a subsequent meeting held in May 2006, no agreement could be reached in relation to issues of jurisdiction, signature and ratification, and these matters were deferred for consideration to the AU Summit meeting in July 2006.⁸¹⁹ Again, no decision was made, prompting the legal instruments to be referred to the Ministers of Justice and Attorneys-General from member states. By delaying any decision regarding the merger of the two institutions, African states have yet again ensured that the interests of the state trump.⁸²⁰

3.3.3.3 Relationship between the court and other human rights bodies

While the question of the relationship between the court and commission has received some attention and suggestions, the same cannot be said of the relationship between the court and other regional human rights enforcement institutions, such as the Committee of Experts on the Rights and Welfare of the Child.⁸²¹ As already argued above, the court can apply human rights instruments adopted under the African system. Apart from the African Charter, other relevant human right instruments under the African system include the African Charter on the Rights and Welfare of the Child (ACRWC)⁸²² and the Protocol on the Rights of Women in Africa.⁸²³

⁸¹⁸ Ibid.

⁸¹⁹ Ibid.

⁸²⁰ Bekker G, 'The African Court on Human and Peoples' Rights: Safeguarding the interests of the African states', *supra*, p. 171.

⁸²¹ Banderin M, 'Recent developments in the African regional human rights system', note 156 above, p. 147.

⁸²² CAB/LEG/24.9/49 (1990); 9 IHRR 870 (2002).

⁸²³ See protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Article 32 of ACRWC establishes an African Committee of Experts on the Rights and Welfare of the Child with a mandate ‘to promote and protect the rights and welfare of the child.’ Part of its protective mandate is to ‘interpret the provisions of the Charter at the request of a state party, an institution of the Organisation of African Unity or any other person or institution recognised by the Organisation of African Unity, or any state party.’⁸²⁴ Article 44(1) of the ACRWC mandates the committee to ‘receive communication, from any person, group or Non-Governmental Organisation recognised by the Organisation of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter.’

Article 5 of the Protocol of the African Court does not grant access to the committee on the Rights and Welfare of the Child as it does the African Commission. Consequently, initiating a case on violation of the rights of children under the ACRWC may depend on the goodwill of states parties or African intergovernmental organisations.⁸²⁵ This position should not be encouraged given that most states have not been willing to redress human rights violations. There is, therefore, the need to address this issue in the court’s Rules of Procedure in order to enhance the relationship between the court and the committee. Fortunately, the African Women’s Protocol does not present this problem as its Article 27 confers ultimate interpretational jurisdiction of the Protocol on the African Court.⁸²⁶

The relationship between the court and other regional economic courts is also of concern. Possible conflict may arise in relation to jurisdiction especially in the area of intersection between human rights and economic development.⁸²⁷ Perhaps the African Court would do well to take such concerns on board, concentrating on ensuring that the African Charter is incorporated at both sub-regional and national levels. Viable lessons could be learned from the European experience where it has been stressed that there is the need for

⁸²⁴ Art 42(c), African Charter on the Rights and Welfare of the Child.

⁸²⁵ Banderin M, ‘Recent developments in the African regional human rights system’, note 156 above, p. 148.

⁸²⁶ Ibid.

⁸²⁷ Ibid.

regional bodies to focus on ensuring rights are enforced at the national level.⁸²⁸ One task of the African Court should therefore be to forge a relationship with the national systems.

3.4 Conclusion

This chapter has comprehensively reviewed the key institutional and normative mechanisms of the African human rights system. The system, despite its many constraints, has made some positive strides in its endeavour to meet the demands for normative, jurisprudential and institutional developments of international human rights law. As identified in this analysis, there is the need to be cautious against overambitious provisions in the normative instruments. The so-called ‘unique provisions’ have made normative framework of the system more confusing than it ought to be. Again, some of the rights contained therein need to be revisited and attuned to international standards, as suggested in the course of the study.

This chapter has also shown that the institutional mechanisms of the system have continued to register a tremendous positive impact. This is gauged from the premise that new institutions, which tend to inject ‘fresh blood’ into the system, have emerged to supplement the efforts of the African Commission in enforcing human rights in the region. The most remarkable of these institutions is the African Court, which has eventually been established after many decades of relentless activism by scholars, NGOs and other non-state actors. The study showed, among other things, that the jurisprudence of the African Commission has improved tremendously, though there is still room for further improvements. The improvements are a marked departure from the commission’s practice soon after its inception.

It is too soon to determine the probable performance of the African Court. However, it is evident that the provisions of the protocol establishing it are more progressive, and therefore more promising, than those of the Charter that established its counterpart, the

⁸²⁸ Hill L, ‘Universality versus subsidiarity: A reply’, (1998) 1 *European Human Rights Law Review* p. 75.

African Commission. As normative instruments cannot be useful without an effective enforcement mechanism, the adoption and coming into force of the Protocol to the African Court is a very welcome development. The performance of the court shall be gauged largely on the basis of how it will handle its initial cases. As yet, no application has been brought before it.

CHAPTER FOUR

THE AFRICAN HUMAN RIGHTS SYSTEM: CHALLENGES AND STRATEGIES FOR REFORM

4.1 Introduction

The African human rights system has largely been criticised for being ineffective, hence causing doubt on its potential to improve the continent's poor human rights record.¹ It is in this context that this chapter discusses the possible reforms that might make the system more effective. The issue of reforms notwithstanding, this chapter acknowledges that, although there are problems and challenges associated with the African human rights system, it has made some positive contributions in the sphere of international human rights law in its relatively short period of existence.² As shown in the previous chapters, the system has not been static but has rather evolved over time to incorporate in its norms, institutions and practice, some aspects that were not given credence during its inception.

¹ See, for example, Ankumah E, *The African Commission on Human and Peoples' Rights: Practices and procedures* (1996); Murray R, *The African Commission on Human and Peoples' Rights and international law* (2000), Ch. 2; Nmehielle O, *The African human rights system: Its laws, practice and institutions* (2001); Bondzie-Simpson, 'A critique of the African Charter on Human and Peoples' Rights', (1988) 31 *Howard Law Journal*, pp. 643-665; Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', (2001) 1 *African Human Rights Law Journal*, pp. 1-17; Mutua M, 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties', (1995) 35 *Virginia Journal of International Law*, pp. 339-380; Oloka-Onyango J, 'Beyond the rhetoric: Reinvigorating the struggle for social and economic rights in Africa', (1995) 26 *California Western International Law Journal*, pp. 1-73; Amoah P, 'The African Charter on Human and Peoples' Rights: An effective weapon for human rights?', (1992) 4 *African Journal of International and Comparative Law*, p. 226; Welch C, 'The African Commission on Human and Peoples' Rights: A five-year report and assessment', (1992) 14 *Human Rights Quarterly*, pp. 43-61.

² For a similar comment, see Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 1 above, p. 1.

The chapter acknowledges that regional enforcement of human rights law in Africa has been, and continues to be, encumbered with a myriad of challenges. ‘Challenges’ in the context of this chapter connotes the setbacks and hurdles Africa faces (or has been facing) in its quest for effective regional enforcement of human rights. These challenges may be historical, political, social, economic, institutional, and normative, among others. It is therefore necessary to examine the causes of the African human rights system’s unsatisfactory progress and ascertain to what extent the challenges can be eliminated or their effects minimised.

It is needless to emphasise that states have acted and continue to act in ways that are antithetical to their human rights obligations under the African system. This has, by extension, rendered human rights illusory in the daily lives of the majority of people on the continent.³ This perennial state of affairs aggravates the already precarious human rights situation in the region. As a result, some scholars have argued for a comprehensive reform and reinvigoration of the African system to enable it to, among other things, compel states to comply with their human rights obligations.⁴

Generally, the reform of the African human rights system may take different forms, including, for example, the amendment of certain aspects of the provisions of the African Charter⁵, the Protocol Establishing the African Court on Human and Peoples’ Rights⁶, the

³ Mugwanya G, *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003), p. XV.

⁴ See generally, Steiner H & Alston P, *International human rights in context: Law, politics and morals* (1996), p. 689; Mutua M, ‘The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties’, note 1 above, p. 339; Oloka-Onyango J, ‘Beyond the rhetoric: Reinvigorating the struggle for social and economic rights in Africa’, note 1 above, p. 1; Amoah P, ‘The African Charter on Human and Peoples’ Rights: An effective weapon for human rights?’, note 1 above, p. 226; Welch C, ‘The African Commission on Human and Peoples’ Rights: A five-year report and assessment’, note 1 above, p. 43.

⁵ Art 68 of the African Charter provides for the amendment of the Charter by a majority of state parties.

⁶ Art 35 of the Protocol provides that: ‘1. The present Protocol may be amended if a state party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the state parties to the present Protocol have been

Rules of Procedure of the African Commission⁷, or any other instrument that is relevant to the system.⁸ It might also necessitate changes in the institutional mechanisms for the enforcement of these norms. This chapter therefore examines the challenges and strategies to reinvigorate the African human rights system. For purposes of convenience, these are discussed under two separate headings, namely: normative and institutional challenges and possible ways to reinvigorate the African human rights system.

4.2 The normative mechanisms of the African human rights system

This part highlights the normative challenges of the African human rights system and suggests the possible reforms thereto. The African Charter, as stated earlier, is the main normative instrument of the African human rights system. Thus, the present debate on the reform of the system's norms shall focus more on the Charter's provisions. This part of the study does not purport to underscore every challenge or weakness of the existing normative provisions, nor does it intend to give solution to every challenge. Rather, it is an added voice to the ongoing debate on the reform and reinvigoration of the system.

When addressing the question of how to reform the Charter's provisions, two approaches may be considered. The first would be to reform the 'flawed' or 'inadequate' provisions of the Charter through interpretive and jurisprudential mechanisms. This approach contemplates a situation where the African Commission and the court are given the opportunity to interpret the Charter and bring its provisions in line with international jurisprudence.⁹ With regard to the commission, this approach is premised on Articles 60 and 61 of the Charter. Accordingly, Article 60 provides:

duly informed of it and the Court has given its opinion on the amendment. 2. The Court shall also be entitled to propose such amendments to the present Protocol as it may deem necessary, through the Secretary-General of the OAU. 3. The amendment shall come into force for each state party which has accepted it thirty days after the Secretary-General of the OAU has received notice of the acceptance.'

⁷ Rule 121 & 122 provide that the Commission can change its own rules.

⁸ Heyns C, 'The African regional human rights system: In need of reform?', (2001) 2 *African Human Rights Law Journal*, p. 156.

⁹ *Ibid*, p. 157.

The commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the 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 from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Article 61 adds:

The commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special 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 people's rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

A combined reading of the above provisions seems to suggest that, when interpreting the substantive provisions of the Charter, the commission shall 'draw inspiration from international law on human and peoples' rights', and 'take into consideration other general or special international conventions.' In this sense, the phrase 'shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of...the Charter of the United Nations,...the Universal Declaration of Human Rights, other instruments adopted by the United Nations...' could be interpreted to mean that the provisions of these instruments shall be used by the commission as persuasive precedents.

Both Articles 60 and 61 use the 'shall' term, meaning that the African Commission is under an obligation to 'draw inspiration from international law on human and peoples' rights' and 'take into consideration other general or special international conventions.' The commission could therefore interpret the rights in the Charter in line with the standards set by other regional and the universal human rights mechanisms, where

appropriate. Arguably, the Charter, as it stands, provides for its own development through the jurisprudence of the commission and the court.¹⁰ This approach, however, will only be effective if the intention is to keep reforms to the Charter's provisions to the barest minimum and under the control of the commission and the court.¹¹

The second approach calls for the comprehensive reform of the normative framework of the Charter. This approach is premised on the argument that since the Charter was drafted in a world that is either non-existent or has undergone significant transformation, it is inevitable for it to be radically reformed to reflect such changes.¹² For example, in the early 1960s, African states were unshackling from colonialism and the human rights concept was largely seen as a foreign ideology that was irrelevant to Africans. Under such circumstances, Heyns rightly opined, it was not possible for the Charter to be framed to the same extent as is presently possible.¹³ From this viewpoint it has been contended that, while the commission is entitled to exercise its mandate under Articles 60 and 61 to reinvigorate the Charter and redress its inadequacy, this is not a healthy practice in the long run, unless its interpretations are followed up by the reform of the Charter provisions.¹⁴ Law must be predictable and as a result, words used in legal texts should be given their ordinary meaning as far as is possible.¹⁵

The jurisprudence developed by the commission and the court may also not be regarded with the same degree of seriousness as the Charter provisions. It is much easier for one to understand the provisions of the Charter than peruse a lengthy judicial precedent which purports to interpret the Charter. Moreover, some of the problems inherent in the Charter, as well as other normative instruments of the African system, may be beyond the powers

¹⁰ See Murray R, 'Report on the 1996 Sessions of the African Commission on Human and Peoples' Rights 19th and 20th Sessions', (1997) 18, *Human Rights Law Journal*, p. 923.

¹¹ Heyns C, 'The African regional human rights system: In need of reform?', note 8 above, p. 157.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid. See also Nmehielle O, *The African human rights system*, note 1 above, p. 245.

of the commission and the court to rectify, even through creative interpretation.¹⁶ Under such circumstances, the intervention of the Assembly of Head of States and Government of the African Union may be required.

An all important motivation for the comprehensive reform of the Charter, according to Heyns, is the ongoing restructuring of the African human rights system that intends to place the system on a much firmer foundation.¹⁷ The OAU has been transformed to the AU and the African Commission has been supplemented by the African Court. These institutional developments need to complement the work of the existing normative and institutional mechanisms of the African human rights system. Since the emerging normative and institutional mechanisms of the system are more appealing and comprehensive than those that already exist, they provide a good indication that time is ripe to consider comprehensive reforms of the entire system to encourage uniformity.¹⁸ It is therefore pertinent to investigate the various provisions of the Charter that are in need of reform.

4.2.1 Reforming the civil and political rights provisions of the Charter

As stated in the previous chapter, the Charter is an innovative human rights instrument that incorporates into one document all the three generations of rights: civil and political rights¹⁹; economic, social, and cultural rights²⁰; and group (peoples') rights.²¹ Sadly, however, the Charter's civil and political rights provisions have a number of shortcomings, although they constitute the bulk of the substantive provisions of the Charter. First, the Charter has conspicuously omitted several internationally recognised civil and political rights.²² For example, it does not guarantee the right to privacy which

¹⁶ Heyns C, 'The African regional human rights system: In need of reform?' note 8 above, p. 158.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ African Charter, Art 2-14.

²⁰ Ibid, Art 15-18.

²¹ Ibid, Art 19-24.

²² Heyns C, 'The African regional human rights system: In need of reform?', note 8 above, p. 159.

is an important right entrenched in all the regional human rights instruments, as well as in those of the universal system.²³

The right to privacy protects individuals from unnecessary interference by the state or its agencies. It has various facets, including the right not to have: (a) their person or home searched; (b) their property searched; (c) their possessions seized; (d) information relating to their family or private affairs unnecessarily required or revealed; or, (e) the privacy of their communications infringed.²⁴ The omission of this important right from the Charter is regrettable, considering the fact that it is always infringed in many domestic jurisdictions in Africa. The police, for example, have been the most notorious violators of this right, especially when arresting suspects and undertaking seizure and searches when enforcing criminal laws and procedures.²⁵ Privacy undoubtedly embodies a very important personal right and can only be restricted with good reason and constraint.

The Charter also does not guarantee the right against forced labour. Article 5 of the Charter, where this right could possibly have fitted-in so well, protects a number of related rights, namely: (i) the right to the respect of the dignity inherent in a person; (ii) the right to the recognition of one's legal status; and (iii) the right against all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.²⁶

The right against forced labour is essential in Africa for a number of reasons. First, forced labour was a common practice during the slave trade and colonial periods. The possibility

²³ Even the constitutions of some states contain this right. See, for example, Section 76 of the Constitution of the Republic of Kenya, 1963, as amended in 2002.

²⁴ See the Bomas Draft of the Constitution of Kenya, Art 47, available at www.gov.ac.ke/bomasconstitution.2004, last accessed 12 June 2008.

²⁵ See Umzurike U, 'The significance of the African Charter on Human and Peoples' Rights' in Kalu A & Osinbajo Y, *Perspectives on Human Rights* (1992), p. 45.

²⁶ Art 5 states: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.

of this practice finding its way into the post-colonial societies cannot therefore be overlooked. Secondly, forced labour is still evident in some African cultural and religious practices.²⁷ It is not uncommon to hear of people being forced to work in order to service their debts. Although it may be against their will, such people are threatened or even sent to prison to compel them to comply with their ‘masters’ demands.²⁸ Thirdly, the right against forced labour is essential in Africa because some governments have policies that require people to do certain jobs for the state against their will. Such jobs may include helping in the construction of roads and bridges, or similar community labour involvements that are largely meant to be the responsibility of the state to its people and not vice versa.

The Charter has also failed to explicitly give credence to the right to form trade unions and other civic organisations within states. Article 10 should have incorporated this right in clear and precise terms. The Article provides that ‘(1). Every individual shall have the right to free association provided that he abides by the law. (2). Subject to the obligation of solidarity provided for in 29, no one may be compelled to join an association’. Although not explicitly stated, this Article seeks to protect the rights and freedom of individuals who unite to form a collective entity that represent their common interests and objectives. These interests and objectives may be of a political, economic, religious, social, cultural, professional or labour union nature.²⁹

The Charter should therefore have clarified the scope of the right to freedom of association under Article 10, by specifically mentioning the right to form trade unions and other civic organisations. It is not enough just to mention freedom of association without defining its scope. It is common knowledge that many governments in Africa have attempted either to suppress or outlaw the formation of trade unions and civic organisations, particularly those suspected to be a potential threat to their smooth

²⁷ See Mbondenye M, ‘Improving the substance and content of civil and political rights under the African human rights system’ (2008) 17/2 *Lesotho Law Journal*, p. 7.

²⁸ *Ibid.*

²⁹ Nmehielle O, *The African human rights system*, note 8 above, p. 110.

running.³⁰ Many NGOs and trade unions have been banned or forced to desist from criticising the government of the day.³¹ That is why it would have been expedient for the Charter to guarantee their protection.

The Charter should have gone ahead to require states to take legislative and other measures to promote and encourage trade unions and civil society participation in decision-making and in public affairs at all levels of government. It should also have provided for the guarantee of smooth running and operation of these organisations in order to curtail state interference. It is suggested that the Charter should have provided that any legislation purporting to regulate the registration or operation of civil society organisations or trade unions should ensure that: (a) registration is in the hands of a body that is independent of government or political control; (b) any fee chargeable is no more than is necessary to defray essential cost of the procedure; (c) there is a right to registration, unless there is good reason to the contrary; (d) any standards of conduct applied to organisations is formulated with input from the affected organisations; and, (e) de-registration procedures provide for a fair hearing and for a right of appeal to an independent tribunal.³²

Further, the provisions of the Charter guaranteeing the rights to liberty and security of person and those of an arrested person do not reflect international standards and are inadequate.³³ Article 6, for example, provides that ‘every individual shall have the right to liberty and to the security of his 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

³⁰ Ibid.

³¹ This was the order of the day in the single party days in Kenya. Many NGOs were either refused registration or deregistered when they commented on the inefficiency of the government of the day. See Mbondenyi M, ‘Improving the substance and content of civil and political rights under the African human rights system’, note 27 above, p. 8.

³² See the Bomas Draft of the Constitution of Kenya, note 24 above.

³³ See Arts 6 and 7 of the Charter which guarantee the right to liberty and security of person and the right to a fair trial, respectively. See also Ankumah E, *The African Commission on Human and Peoples’ Rights*, note 1 above, pp. 123-133.

arbitrarily arrested or detained.’ First, the provision, through the use of a claw-back clause, entrusts to states the responsibility to define the parameters of this right. More likely than not, this responsibility will be abused.³⁴

Secondly, the drafters of the Charter failed to acknowledge that this right goes beyond arbitrary arrest or detention to envisage important issues such as the right of every person: (a) not to be detained without trial, except in conditions that are clearly laid down under international law; (b) to be free from all forms of violence from either public or private sources; (c) not to be tortured in any manner, whether physical or psychological; and (e) not to be subjected to corporal punishment or to be treated or punished in a cruel, inhuman or degrading manner.³⁵ Thus, the Charter provisions guaranteeing these rights need to be brought in line with these standards. The same applies to the provisions on fair trial under Article 7 of the Charter which reads as follows:

1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
 - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - (c) the right to defence, including the right to be defended by counsel of his choice;
 - (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

While the above provisions are essential to a fair trial, the drafters of the Charter either deliberately ignored or accidentally omitted some important rights of an accused or arrested person. Before ‘appealing to competent national organs’ or even exercising the

³⁴ Ibid.

³⁵ See the scope of this right in, for example, the Bomas Draft of the Constitution of Kenya, note 24 above, Art. 45.

‘right to defence’, an accused person is entitled to other forms of protection. For example, he or she has the right to be informed promptly, in a language that he or she understands, of the reason for the arrest.³⁶ The person also has the right to remain silent and in this regard must be informed of the consequences of not remaining silent. Thus, the accused person should be protected from making forced confession or admission that could be used in evidence against him or her. Where the accused freely chooses to make a confession, it should be made before a competent authority mandated by law to conduct such proceedings.³⁷ An accused person or a suspect should also be detained separately from persons serving a sentence because he or she is innocent until proved guilty.

Article 7(1)(c) guarantees every person the right to be defended by Counsel of their choice. However, the Charter fails to make provision for state-provided legal assistance. By extension, it does not cater for indigent persons, who for lack of funds may fail to exercise the right to Counsel of their choice. The importance of legal representation, especially in criminal cases, cannot be overemphasised.³⁸ It is the state’s duty to legally assist indigent persons to ensure fair trial. The omission in the Charter cannot easily be reconciled with the realities faced by African masses, who are generally poor and therefore lack the means to adequately choose legal representation.³⁹ Some African countries have legal aid programmes, but these programmes are generally poorly funded and managed.⁴⁰ There ought to be minimal commitments by states and NGOs in this area, if the right to fair trial is to be enjoyed by the poor masses.

Additionally, the Charter has failed to provide that an accused person or a suspect must be brought before a court or tribunal as soon as is practically possible. Instead, Article 7(1)(d) guarantees the right of an accused to be tried ‘within a reasonable time.’ It is

³⁶ Udombana N, ‘The African Commission on Human and Peoples’ Rights and the development of fair trial norms in Africa’ (2006) 6 *African Human Rights Law Journal*, p. 313.

³⁷ Bomas Draft of the Constitution of Kenya, note 24 above, Art. 73.

³⁸ See the previous chapter of this thesis where the importance of legal aid and assistance has been discussed.

³⁹ Nmehielle O, *The African human rights system*, note 1 above, p. 98.

⁴⁰ *Ibid.*

believed that the Charter makes reference to ‘reasonable time’ to ensure that proceedings are not prolonged.⁴¹ The rationale of the provision is to ensure the speedy completion of proceedings, which has nothing to do with the presentation of an accused before a court or a tribunal to be charged. Thus, it does not cater for potential delays in the commencement of proceedings.⁴² The Charter should have stated that an accused person must be brought before a court or tribunal, for example, not later than forty eight hours after being arrested, or not later than the end of the first court day after the expiry of the forty eight hours, if the forty-eight hours expire outside ordinary court hours or on a day that is not an ordinary court day.⁴³

The Charter is also silent on the right to bail. The right of an accused person to be released on bond or bail pending trial or appeal should be mandatory, unless there are compelling reasons to the contrary. Other important rights of an accused person which have not been addressed in the Charter include: the right to judicial review of one’s detention; the right to compensation for unlawful detention or release from such detention; the right to public hearing or the circumstances under which public hearing may be excluded; the right to adequate time and facilities to prepare a defence; the right of the defence to examine and cross-examine witnesses in court and the right to an interpreter; the right of those acquitted to compensation for miscarriage of justice and; the right not to be subjected to a new trial for the same cause.⁴⁴ The drafters of the Charter turned a rather blind eye to the importance of these rights.

Article 13 of the Charter recognises the right to vote in a very superficial way. The Article guarantees every citizen the right to participate freely in the government of his country either directly or through freely chosen representatives.⁴⁵ As stated in the

⁴¹ Ibid.

⁴² Ibid.

⁴³ Bomas Draft of the Constitution of Kenya, note 24 above, Art. 73.

⁴⁴ See Mugwanya G, *Human rights in Africa: Enhancing human rights through the African regional human rights system*, note 3 above, p. 344.

⁴⁵ Art 13(1) states: ‘Every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.’

previous chapter, the right to participate freely in the government of one's country has different manifestations. For example, an individual without apparent legal disability should be able to participate in periodic elections, exercise his or her voting rights, and participate in the conduct of public affairs directly or through freely chosen representatives.⁴⁶

Arguably, the inclusion of the right to participate in government in the African Charter is partly in recognition of the fact that most egregious violations of human rights on the continent occur in conditions of political dictatorship and poor governance. Africa has experienced a series of undemocratic governments where democracy, constitutionalism, the rule of law and human rights have been ignored.⁴⁷ Military rule and undemocratic change of governments have also taken toll unabatedly.

Moreover, a large number of rulers as well as citizens have 'traded-in', for example, the right to vote, and once voted, they use the power and state machinery for their personal benefits. At best, political power is used to reward cronies and sycophants, on the one hand, and on the other hand, to punish 'dissidents' and opponents. In essence, governance and political positions are transformed into arbitrary power exercised at whims by the 'powers-that-be'.⁴⁸ Hence, in framing Article 13, the drafters of the Charter might have been compelled by the desire to wrest political power and governmental authority from the hands of the emerging post-colonial despots and vest it on citizens.

⁴⁶ The right to vote in genuine periodic elections, based on universal franchise, is recognised in Art 25(b) of the International Covenant on Civil and Political Rights. See Nmehielle O, *The African human rights system*, note 1 above, p. 118.

⁴⁷ For a detailed discussion on this, see generally, Mangu A, 'The road to constitutionalism and democracy in Africa' (2002), *LLD Thesis University of South Africa*, Chapter 3.

⁴⁸ Nmehielle O, *The African human rights system*, note 1 above, p. 118. See also, Mbondeniyi M, 'The right to participate in the government of one's country: An analysis of Article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) *African Human rights law Journal* (forthcoming in May).

Generally, the normative framework of the Charter should be enhanced by incorporating rights that were omitted or inadequately addressed but which are guaranteed under the universal and other regional human rights instruments. Variations may of course be permitted but not to the extent that the universal protection of such rights would be compromised. One way to incorporate or reform those provisions could be through the adoption of Protocols to the Charter.⁴⁹ The other way may be through the constructive and progressive interpretation of the provisions in accordance with international standards and principles. Alternatively, states parties could exercise their mandate under Article 68 of the Charter to amend the Charter as they deem it appropriate.⁵⁰

With regard to the approach that involves the constructive and progressive interpretation of the Charter's provisions, the commission's elaboration on several substantive rights is commendable.⁵¹ The commission has, for example, found Article 5 of the Charter to protect, *inter alia*, the right to life.⁵² The said Article guarantees the right against all forms of slavery, slave trade, torture and cruel, inhuman or degrading treatment. The commission's findings were to the effect that deaths resulting from torture or from trials conducted in breach of the due process guaranteed in Article 7 of the Charter violated the right to life guaranteed in Article 4.⁵³ Additionally, it has interpreted Article 5 broadly to

⁴⁹ Heyns C, 'The African regional human rights system: In need of reform?' note 8 above, p. 173.

⁵⁰ Murray R, 'Report on the 1996 Sessions of the African Commission on Human and Peoples' Rights- 19th and 20th Sessions, note 10 above, p. 19.

⁵¹ See Odinkalu C, 'The role of case and complaints procedure in the reform of the African regional human rights system', (2001) 2 *African Human Rights Law Journal*, p. 239.

⁵² Ibid. See also, Communications 48/90, 50/91, 52/91 & 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v. Sudan*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V) (*the Sudan cases*) and communications 54/91, 61/91, 98/93, 164/97 & 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayant-droit and Association Mauritanienne des Droits de l'Homme v. Mauritania*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V) (*the Mauritania cases*).

⁵³ See the *Sudan case*, para 48 and the *Mauritania case*, para 119.

guarantee the enjoyment of certain economic, social and cultural rights. On this basis, it has condemned ‘practices analogous to slavery’ such as ‘unremunerated work.’⁵⁴

Further, the commission has elaborated the contents of the right to a fair trial in both its casework and resolutions.⁵⁵ As stated in the previous chapter, the commission has extended the right to fair trial to encompass such issues as legal aid and assistance and the protection of the independence of the judiciary.⁵⁶ In the *Sudan case* cited above, it linked Articles 7(1)(d)⁵⁷ and 26⁵⁸ of the Charter to achieve protection of the independence and integrity of the judiciary.⁵⁹ The commission took the view that the purge of over 100 judicial officers by the Sudanese government deprived the courts of qualified personnel required to ensure their impartiality and thus violated these Articles. In separate decisions against Sudan⁶⁰, Nigeria⁶¹, and Mauritania⁶², the commission similarly found the practice of setting up of special courts or tribunals, contrary to the standard judicial procedures, to be in violation of both Articles 7(1)(d) and 26 of the Charter.⁶³

⁵⁴ See *the Mauritania Case*, 137. See also the argument in Odinkalu C, ‘Analysis of Paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples’ Rights’, (2001) 23 *Human Rights Quarterly*, pp. 358-365.

⁵⁵ Odinkalu C, ‘The role of case and complaints procedure in the reform of the African regional human rights system’, note 51 above, p. 240.

⁵⁶ See Resolution of the Right to a Fair Trial and Legal Assistance in Africa, adopting the Dakar Declaration on the Right to a Fair Trial in Africa, DOC/OS(XXVI)INF, p. 19.

⁵⁷ Art 7(1)(d) guarantees every individual ‘the right to be tried within a reasonable time by an impartial court or tribunal.’

⁵⁸ Art 26 reads, in part: ‘States parties to the present Charter shall have the duty to guarantee the independence of the courts. . .’

⁵⁹ Odinkalu C, ‘The role of case and complaints procedure in the reform of the African regional human rights system’, note 51 above, p. 240.

⁶⁰ *The Sudan cases*, note 52 above.

⁶¹ Communication 151/96, *Civil Liberties Organisation v. Nigeria*, Thirteenth Annual Activity Report, para 71.

⁶² *The Mauritania cases*, note 52 above.

⁶³ Odinkalu C, ‘The role of case and complaints procedure in the reform of the African regional human rights system’, note 51 above, p. 240.

The commission has also extended the application of the right to freedom of religion guaranteed in Article 8 of the Charter to the controversial problem of application of Islamic Shari'a to non-Muslims.⁶⁴ It held that Shari'a is inapplicable to non-adherents of the Islamic faith unless they voluntarily submit to it. It correctly observed that:

... it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish.⁶⁵

Significantly, the commission recommended that trials must always accord with international fair trial standards.⁶⁶ Generally, the commission should be applauded for its evolving practice of interpreting the Charter provisions progressively. In some cases, however, it remained passive and failed to develop its jurisprudence, even when an opportunity presented itself.⁶⁷ In *Henry Kalenga v. Zambia*⁶⁸, for example, where the complainant had been detained without trial, it concluded the case without developing its jurisprudence on Article 6. The complainant in this case had petitioned the commission, demanding his release. Zambia's Ministry of Legal Affairs later informed the commission of his release. The commission proceeded to declare the matter amicably resolved without expounding on Article 6. This trend by the commission should not be encouraged, if the inadequate provisions of the Charter are to be reformed.

Apart from the inadequacy of some of its provisions, the Charter also deals with the limitation of civil and political rights in a very unsatisfactory manner.⁶⁹ As stated in the previous chapter, it has no derogation clause that would permit the suspension of certain rights and freedoms in strictly defined circumstances. According to the African Commission, the absence of a derogation clause means that the Charter 'does not allow

⁶⁴ *The Sudan* cases, note 52 above, para 73.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Nmehielle O, *The African human rights system*, note 1 above, pp. 91-92.

⁶⁸ Communication 11/88, *Henry Kalenga v. Zambia*, ACHPR/LR/A1 (1997).

⁶⁹ Heyns C, 'The African regional human rights system: In need of reform?' note 8 above, p. 160.

for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war... cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.⁷⁰ It further observed that the lack of a derogation clause ‘can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.’⁷¹

The commission’s observations on the absence of a derogation clause in the Charter may be rejected for two reasons. First, a derogation clause is essential because, under some circumstances, rights should be limited in any society. This process, however, must be carefully managed, ‘in order to ensure that such limitations are done in an acceptable way.’⁷² Thus, derogation clauses serve the dual function of allowing infringements of rights and at the same time defining standards that must be met by such infringements.⁷³ The absence of a derogation clause in the Charter therefore means that states can infringe rights in cases of emergencies without being called to question.

Secondly, the commission’s approach should be rejected because, in reality, it can hardly be conducive to the protection of human rights. States under emergencies, for example, could easily ignore the Charter due to the impending danger.⁷⁴ Under such circumstances the Charter would be discredited for failing to restrain states from violating or unduly restricting the rights of their citizens.⁷⁵ One would therefore concur with Heyns to the effect that, the commission ought to reverse its interpretation of the Charter on this issue

⁷⁰ Communication 74/92, *Commission Nationale des Droits de l’Homme et des Liberties v. Chad* (1997) 4 *IHRR*, p. 94, Para 21.

⁷¹ Communication 48/90, 50/91/ 52/91 and 89/93, *Amnesty International and others v. Sudan*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V), para 79.

⁷² Heyns C, ‘The African regional human rights system: In need of reform?’ note 8 above, p. 160.

⁷³ *Ibid.* See also Higgins R, ‘Derogation under human rights treaties’ (1976-77) 48 *The British Yearbook of International Law*, p. 281.

⁷⁴ Heyns C, ‘The African human rights system: In need of reform?’ note 8 above, p. 162.

⁷⁵ *Ibid.* See also Oraá J *Human rights in states of emergency in international law* (1992), p. 210.

by acknowledging the right of states to derogate from certain Charter rights in certain defined circumstances.⁷⁶

As stated in the previous chapter, some of the rights in the Charter contain internal qualifications or provisions that limit their reach. Some of these internal qualifications, otherwise known as claw-back clauses, subject the enjoyment of rights to national or domestic laws of states.⁷⁷ Claw-back clauses have rightly been criticised since, in effect, they imply that international supervision of domestic law is limited in respect of these rights, thus defying the very reason for the existence of a regional human rights system.⁷⁸ The commission has attempted to address this inadequacy by, for example, interpreting claw-back clauses to the benefit of the complainant, in keeping with established international practice.⁷⁹ Thus, it is now settled that the phrase ‘subject to law’, which is used in some of the provisions should be understood to refer not to domestic, but instead to international law.⁸⁰ The commission’s creativity in this regard is commendable.

⁷⁶ Heyns C, ‘The African human rights system: In need of reform?’ note 8 above, p. 162.

⁷⁷ For example, Art 8 guarantees the freedom of conscience and religion ‘subject to law and order.’ Art 9(2) states: ‘Every individual shall have the right to express and disseminate his opinions within the law.’ Additionally, Art 10 guarantees the right to freedom of association to an individual ‘provided that he abides by the law.’ An individual’s freedom of movement under Art 12 is guaranteed ‘provided he abides by the law.’ Art 13 (1) guarantees citizens the right to participate freely in their governments ‘in accordance with the provisions of the law.’ The same is evident in Art 14 which permits the encroachment upon property ‘in accordance with the provisions of appropriate law.’ For the meaning of claw-back clauses, see Higgins R ‘Derogations under human rights treaties’ note 73 above, p. 281.

⁷⁸ See for example Ankumah E, *The African Commission on Human and Peoples’ Rights*, note 1 above, p. 176; D’sa R, ‘The African Charter on human and Peoples’ Rights: Problems and prospects for regional action’, (1981/83) 10 *Australian Yearbook of International Law*, p. 110; Gittleman R, ‘The African Charter on Human and Peoples’ Rights: A legal analysis’, (1982) 22 *Virginia Journal of International Law*, p. 694; Kunig P, ‘The protection of human rights by international law in Africa’, (1982) 25 *German Yearbook of International Law*, p. 155; Murray R, *The African Commission on Human and Peoples’ Rights and International Law*, note 1 above, p. 127.

⁷⁹ Odinkalu C, ‘Analysis of Paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples’ Rights’, note 54 above, p. 358.

⁸⁰ Communication 101/93, *Civil Liberties Organisation in respect of the Nigerian Bar Association v. Nigeria*, Eighth Activity Report 1994-95 Annex VII, p. 394, para 16.

However, it is important that such creativity is succeeded by a modification of the Charter. Unless this is done, states will continue to defend infringements of rights through national law with reference to the claw-back clauses in the Charter.⁸¹

Claw-back clauses, to the extent that they purport to exclude international supervision, should be scrapped from the Charter and replaced by an unequivocally phrased general limitation clause.⁸² The general clause should permit the limitation of rights only to the extent that the limitation is reasonable and justifiable.⁸³ Such a limitation should take into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and freedoms by any individual does not prejudice the rights and freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.⁸⁴

Limitation of rights must be imposed only in strictly defined circumstances. The Charter as an instrument intended to lay down the minimum standards for all states parties should, as far as possible, leave no lacuna that may be misconstrued or manipulated by states. Domestic practice reveals that governments are always fast to exploit any loopholes or perceived loopholes in bills of rights to the detriment of the enjoyment of rights.⁸⁵

From the above analysis, one would agree with the observation that the Charter, as far as civil and political rights are concerned, has the capacity to be reformed. Unfortunately, 'its positive features are often under-estimated or overlooked, and its capacity for

⁸¹ Heyns C, 'Civil and political rights under the African Charter', note 8 above, p. 161.

⁸² Ibid.

⁸³ See Art 36 of the Constitution of the Republic of South Africa, 1996. See also Section 33 of the Bomas Draft Constitution of Kenya, note 24 above.

⁸⁴ Ibid.

⁸⁵ Nmehielle O, *The African human rights system*, note 1 above, p. 66.

metamorphosis is yet to be fully explored.⁸⁶ It has been shown that the Charter can be made more effective through a dynamic and purposeful interpretation of its civil and political rights provisions. In certain cases, it may be needful to amend the Charter provisions through the adoption of relevant Protocols. We also concur with the view that the commission is faced with the difficult task of overcoming the shortcomings in the way in which the Charter has been drafted though it has shown some willingness to be creative in this regard.⁸⁷

Noteworthy, a great impediment to the realisation of civil and political rights in Africa is constituted by, among other factors, illiteracy, ignorance and poverty.⁸⁸ To the many rural dwellers and the urban poor in Africa, the lack of awareness or means make it impossible for them to assert their rights. The cost of litigation is prohibitive, whereas legal aid services, where available, may be limited to serious criminal cases and rarely dispensed for civil matters. It follows that the rights entrenched in the Charter may to many be mere paperwork, irrelevant to their existence.⁸⁹ It has been argued that the stage of development of most third world states makes economic growth their most important preoccupation; that in order to satisfy this need it is necessary to detract from civil and political rights.⁹⁰ Delivering a public address at the University of Toronto, former Tanzanian President, Nyerere asked:

What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as

⁸⁶ Odinkalu C, 'The individual complaints procedure of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law and Contemporary Problems*, p. 398.

⁸⁷ Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: an overview of its progress and problems', note 1 above, p 2.

⁸⁸ Mubangizi J, 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and gains' (2006) 6 *African Human Rights Law Journal*, p. 160.

⁸⁹ Ibid.

⁹⁰ Ibid.

his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity.⁹¹

Nyerere tried to highlight the apparent insubordination of civil and political rights to economic rights as far as Africa is concerned. Such conceptualisation of this category of rights indeed contributed to their low esteem in Africa. Nyerere's statement should not be interpreted as an excuse for ignoring or violating civil and political rights. The only reasonable interpretation is that civil and political rights are meaningful in the context of certain minimum living standards. The relevance of all categories of rights cannot be overlooked, given that human rights are interrelated, interdependent and indivisible.

4.2.2 Reforming the economic, social and cultural rights and other substantive provisions of the Charter

The Charter guarantees the protection of a number of economic, social and cultural rights. Like civil and political rights, it does not comprehensively guarantee some economic, social and cultural rights in accordance with international standards. For example, the Charter, under Article 15, guarantees the right to equitable and satisfactory work conditions.⁹² However, unlike Article 7 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), it does not expressly guarantee the right to rest, leisure, limited working hours and paid holidays. This right also goes hand-in-hand with other rights, such as the right of workers to go on strike, which have not been included in the Charter.

⁹¹ Reproduced in *Africa Contemporary Record* (1969-1970) 2, p. 30-31; Howard R, 'The Full-Belly Thesis: Should Economic Rights take priority over civil and political rights? Evidence from Sub-Saharan Africa', (1983) 5 *Human Right Quarterly*, pp. 467-490.

⁹² Art 15 provides: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.'

Further, Article 16 guarantees the enjoyment of the best attainable state of physical and mental health.⁹³ It then provides that ‘states parties... shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.’ The provision, however, does not include at least some minimum requirements that states should fulfil in order to safeguard this right. The right to health demands more than receiving medical attention when one is sick. It includes the right to health care services and reproductive health care. The Charter fails to guarantee emergency medical treatment, which is not uncommon in many African states.⁹⁴

The Charter is also not elaborate in its provision that guarantees the protection of the right to education. It simply states that ‘every individual shall have the right to education’ without stipulating the parameters of this right. As stated in the previous chapter, this right embodies a number of essential components. For example, it consists of the right to primary education, secondary education, higher (tertiary) education, and the right to choice of schools, among others.⁹⁵ One cannot understand whether the Charter also guarantees individuals the right to establish and maintain independent educational institutions that would further their religious, cultural or other pertinent interests.⁹⁶ The right to establish and maintain independent educational institutions, like its counterpart, the right to education, is important because it allows one to decide the kind of education they think is appropriate either to themselves or their children.⁹⁷

The Charter also does not contain certain economic, social and cultural rights, including the right to food, social security and adequate standards of living. These are basic rights which any state is expected to guarantee its citizens. Many African states have been violating these rights with impunity. State funds, which would rather have been used to

⁹³ Art 16(1) provides, ‘Every individual shall have the right to enjoy the best attainable state of physical and mental health.’

⁹⁴ Umozurike U, ‘The significance of the African Charter on Human and Peoples’ Rights’, note 25 above, p. 48.

⁹⁵ Nmehielle O, *The African human rights system*, note 1 above, p. 130.

⁹⁶ Ibid.

⁹⁷ Ibid.

safeguard these rights, have always been mismanaged or diverted to private accounts of the 'powers-that-be,' leaving many innocent citizens wallowing in abject poverty. It is therefore very unfortunate that these basic rights were not given any attention by the drafters of the Charter. The inadequacies of most social, economic and cultural rights in the Charter have been discussed at length in the previous chapter and it is needless to rehearse the arguments in the present chapter.

From the foregoing, it is inevitable to conclude that economic, social and cultural rights have not been fully addressed under the Charter and as such the relevant substantive provisions need to be reformed. This calls for both progressive interpretation and, in certain cases, the promulgation of protocols to address certain rights more comprehensively. For example, protocols should be adopted to protect the rights of vulnerable groups such as the aged, disabled and minority communities, thus expounding on Article 18(4) of the Charter. The inadequacies of the provisions relating to women and children's rights under Article 18(3) have been redressed through the adoption of the Protocol on Women in Africa and the African Charter on the Rights and Welfare of the Child, respectively. Thus there was no need, at least in this thesis, to concentrate on the inadequacies of the Charter with regard to these two groups of persons. Arguably, the two legal instruments that expound Article 18(3) sufficiently reinforce the Charter in as far as women and children's rights are concerned.

It is recommended that economic, social and cultural rights should be taken as seriously as civil and political rights in both the agenda of the AU and the activities of the African human rights system. People should be educated on the existence of these rights and their enforcement procedures. It is sad to note that, while economic, social and cultural rights are very essential, they are generally not known to, or ignored by, the lay person. This trend needs to be reversed.

Apart from the economic, social and cultural rights debate, the question of duties in the Charter also needs to be revisited. As shown in the previous chapter, the Charter imposes duties on both the state and individual. However, some of the duties are not clearly

worded, making them not capable of being enforced. More should be done to clarify the status of the duties in the Charter. Particularly, their moral and legal dimensions should be defined.⁹⁸ The duties in the Charter cannot easily be given meaning in a legal context. For example, there is uncertainty on how the duty to preserve the harmonious development of the family in Article 29(1) could be enforced by a domestic court of law or the regional enforcement mechanisms such as the African Commission and the court.⁹⁹

The scope and content of peoples' rights under the Charter also needs to be revisited. If peoples' rights are to be utilised to address some of the human rights challenges affecting the continent, it would be imperative for the commission to put extra effort in their interpretation and application and in the promotion of their understanding.¹⁰⁰ For purposes of legal certainty, it would also be crucial for the commission to elaborate sufficiently clear criteria for determining the nature of the groups which qualify as 'people' within the meaning and context of the Charter.¹⁰¹

A number of groups across the African continent have been, and continue to be, subjected to gross human rights violations. In particular, some have been dispossessed of lands they consider their traditional homes and with which they have a special attachment.¹⁰² These groups have also been, and continue to be, subjected to discrimination and marginalisation as a result of their allegedly inferior and outdated cultural practices.¹⁰³ It is worthy to note that the commission has begun to see the importance of protecting the

⁹⁸ See Mutua M, 'The African human rights system: A critical evaluation', note 1 above, p. 12.

⁹⁹ Heyns C, 'African regional human rights system: In need of reform?', note 8 above, p. 160.

¹⁰⁰ Dersso S, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights' (2006) 6 *African Human Rights Law Journal*, p. 380.

¹⁰¹ Ibid.

¹⁰² Bojosi K & Wachira G, 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal*, p. 406.

¹⁰³ Ibid.

rights of these vulnerable indigenous communities. For example, it recently adopted a report that recognises certain groups as indigenous peoples.¹⁰⁴

The commission should also be commended for some landmark pronouncements on economic, social, cultural and peoples' rights, in spite of the inadequacy of the Charter's provisions. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*¹⁰⁵ (hereafter the 'SERAC' or 'Ongoni' case), discussed in the previous chapter, it underscored the role of the state in providing socio-economic rights to its people. This communication is important because, for the first time the commission was able to deal in a groundbreaking way with alleged violations of economic, social and cultural rights.

Although not provided for in the Charter, the commission recognised the right to housing or shelter by broadly interpreting Articles 14 (property), 16 (health) and 18 (family rights). The commission observed that the right to shelter implies an obligation to respect, in the sense that it obliges the government of Nigeria not to destroy the houses of its citizens and not to obstruct efforts by individuals or communities to rebuild their lost homes.¹⁰⁶ The right to shelter also implies an obligation to protect because it obliges the government to protect its citizens from interference with their right to live in peace.¹⁰⁷ The commission also affirmed that the right to housing includes a right to be protected against forced evictions. It concluded that 'the conduct of the Nigerian government clearly demonstrates a violation of this right [to housing] enjoyed by the Ongonis as a collective right'.¹⁰⁸

¹⁰⁴ Ibid. See African Commission's Working Group on Indigenous Populations/Communities, Activity Report 2005 (April 2006); see also IWGIA Report, 39th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 11 to 25 May 2006.

¹⁰⁵ See communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

¹⁰⁶ Ibid, paras 60-62

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, para 63.

Using the same approach, the commission found a violation of the right to food, which is not expressly guaranteed by the Charter. Towards this end, it interpreted Articles 4 (right to life), 16 (right to health) and 22 (the right of all peoples to their economic, social and cultural development) as encompassing the right to food. Although it did not define the content of this right, the commission listed some minimum obligations resulting from this right. These include the duty not to destroy or contaminate food resources; not to allow private parties to destroy or contaminate food resources; and not to prevent peoples' efforts to feed themselves. The commission therefore concluded that Nigeria violated all three of these obligations.¹⁰⁹

The position taken in the *Ongoni* case shows that the commission is able and willing to adopt a creative and dynamic approach to interpreting the Charter. This therefore demonstrates that cases of alleged violations of economic, social and cultural rights and collective rights can be fully justiceable. It also means that the commission can 'read-in' those rights that have not been expressly stated in the Charter. The commission upholds this opinion by stating that 'it will apply any of the diverse rights contained in the African Charter... and there is no right in the African Charter that cannot be made effective'.¹¹⁰ This viewpoint is contrary to the popular opinion that this category of rights is unjusticeable, thus distinguishing the *Ongoni* case as a precedent for international and domestic courts on socio-economic and cultural rights.¹¹¹

4.3 The institutional mechanisms of the African human rights system

4.3.1 The African Commission on Human and Peoples' Rights

The reform of the African Commission on Human and Peoples' Rights necessitates a multi-dimensional and incremental process, based on a careful and rigorous assessment of its actual performance and real potential. It is in tandem with this realisation that this

¹⁰⁹ Para 64-66.

¹¹⁰ Ibid, para 68.

¹¹¹ See Odinkalu, C and Christensen, C 'The African Commission on Human and Peoples' Rights: The development of its non-state communications procedures' (1998) 20 *Human Rights Quarterly*, p. 278.

part of the study examines a number of aspects of the African Commission which may be included in such a reform process. These aspects include, but are not limited to, the commission's composition, organisation, mandates and functions.

To begin with, a number of concerns have been raised regarding the commission's composition and organisation. These include the mode of election, independence and impartiality of its members; gender representation; and equitable geographic and legal cultural representation.¹¹² It has been noted, and correctly so, that the commission is effectively under the control of the Assembly of the Heads of State and Government (AHSO), thus bringing to question its ability to function independently and impartially.¹¹³ A number of provisions in the Charter attest to this fact. For example, it provides for the establishment of the commission 'within the OAU'¹¹⁴; its commissioners are political appointees¹¹⁵ and its power to make decisions, including the publication of measures taken lies with the AHSO.¹¹⁶

This situation is aggravated by the fact that the commission cannot make binding decisions against state parties but only recommendations to the AHSO.¹¹⁷ This is in stark

¹¹² See, for example, Nmeihelle O, *The African human rights system*, note 1 above, p. 172; Rembe S, *The system of protection of human rights under the African Charter on Human and Peoples' Rights: Problems and prospects* (1991), p. 25; Ankumah E, *The African Commission on Human and Peoples' Rights*, note 1 above, pp. 18-19.

¹¹³ Nmeihelle O, *The African human rights system*, note 1 above, p. 172.

¹¹⁴ Art 30 of the Charter states as follows: 'An African Commission on Human and Peoples' Rights, hereinafter called 'the commission', shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.'

¹¹⁵ African Charter, Art 33.

¹¹⁶ See the Rules of Procedure of the African Commission on Human and Peoples' Rights adopted on October 6, 1995.

¹¹⁷ Art 58 of the Charter provides: '1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases. 2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a

contrast with, for instance, the European Convention on Human Rights and Fundamental Freedoms, which has provision for mechanisms with jurisdiction to make binding decisions against contracting states.¹¹⁸ Moreover, the involvement of the AHSG in the election of the commissioners has raised some doubt about the effectiveness of the commission, as it appears to be subordinate to the AHSG.¹¹⁹ These fears are confirmed by the fact that since its establishment, the commission has been served by Attorneys-General, Ambassadors, Ministers, Judges, Advocates and university lecturers, who are normally appointed as a result of their ‘good standing’ with their governments, and not necessarily on the basis of their competence and human rights credentials.¹²⁰ Consequently, their election has seriously undermined the independence and credibility of the commission.¹²¹

The independence of the commissioners is the cornerstone of the mechanism’s credibility. The Charter emphasises that the commissioners ‘shall serve in their personal capacity.’¹²² This means that they ought to serve independently without any iota of influence from their home governments, despite the fact that they were nominated by them.¹²³ The appointment of commissioners who are also Ministers or Ambassadors in their home governments has been condemned because they can hardly function

factual report, accompanied by its findings and recommendations. 3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.’

¹¹⁸ See Art 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹¹⁹ Rembe S, *The system of protection of human rights under the African Charter on Human and Peoples’ Rights: Problems and prospects*, note 112 above, p. 25.

¹²⁰ See Murray R, ‘The African Charter on Human and Peoples’ Rights 1987-2000: An overview of its progress and problems’, note 1 above, p. 7; Wachira G, ‘A critical examination of the African Charter on Human and Peoples’ Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population’, in Viljoen F, (ed), *The African Human Rights System: Towards the Co-existence of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights* (2006), p. 19.

¹²¹ Ibid.

¹²² African Charter, Art 31(2).

¹²³ Nmehielle O, *The African human rights system*, note 1 above, p. 173.

independently or even effectively.¹²⁴ Their efficiency is largely impaired by the workload that comes with the performance of multiple tasks. Some of these political appointees also lack expertise, commitment and interest in human rights. Their attendance of the commission's sessions is therefore largely due to formality and performance of duties. No wonder, it is not uncommon to find as many as between four and five commissioners being absent as a result of engagements, not related to the commission's work.¹²⁵ Consequently, the commission's endeavours to improve the enforcement of human rights in the region has grossly been impaired.

In an apparent attempt to reverse this trend, the AU has come up with guidelines on the election of commissioners with a view to redress the issues of independence and impartiality.¹²⁶ The guidelines require states to only nominate and elect persons with requisite knowledge, expertise and commitment to human rights and whose regular assignments do not, or appear to, compromise their independence.¹²⁷ It is interesting to note that in the recent nomination and election of the commissioners as well as judges of the African Court, these guidelines were adhered to and states only elected candidates whose positions and careers did not seem to conflict with their independence and impartiality.¹²⁸ In line with the subordination argument, the AHSG has been accused of asserting its influence and position to interfere with the commission's work. This is in light of, for example, the Assembly's decision to suspend the publication of the African

¹²⁴ Ankumah E, *The African Commission on Human and Peoples' Rights*, note 1 above, p. 18-19.

¹²⁵ See Nmehielle O, *The African human rights system*, p. 173; Ankumah E, *The African Commission on Human and Peoples' Rights*, note 1 above, p. 16.

¹²⁶ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', note 120 above, p. 21.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* See also Assembly/AU/Dec.84 (V) on the election of members of the African Commission in Sirte, Libya (4-5 July 2005); on the election of judges of the African Court see (Assembly/AU/Dec.100 (VI)) in Khartoum, Sudan (23-24 January 2006).

Commission's 17th Activity Report and deletion of certain aspects of the 19th Activity Report before its publication.¹²⁹

At its sixth Summit in Khartoum, Sudan, in January 2006, the Assembly decided 'to adopt and authorise, in accordance with Article 59 of the Charter, the publication of the 19th Activity Report of the African Commission and its Annexes, except for those containing the Resolutions on Eritrea, Ethiopia, Sudan, Uganda and Zimbabwe.'¹³⁰ The decision to suspend the publication of the Report was made after Zimbabwe protested that the report did not incorporate its response to the findings of the commission on a fact finding mission which was part of the Annual Activity Report's Annexes. This is despite the fact that the commission had solicited the said response to no avail.¹³¹

The subordination of the commission to the control of the AHSG has made it impossible for it to effectively remedy human rights violations because states, which are normally the main perpetrators of violations, seem to have the last word in the commission's work.¹³² It is therefore important for the commission to clarify its status, and dialogue with the AHSG to ensure that the interference in its work by both individual states and the Assembly is addressed.

The geographical composition of the commission has also remained unsatisfactory until recently. It is unfortunate that the Charter does not provide for geographical and gender balance in the composition of the commission. Thus, over the years, most commissioners have come from West Africa.¹³³ At its Twentieth Session, for instance, six commissioners were from West Africa, two each from North and Central Africa, and one from East and Southern Africa. East and Southern Africa have particularly been under-

¹²⁹ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', note 120 above, p. 21.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ In 1996, the Commission had seven members from West Africa and none from Southern or East Africa.

represented. Equitable geographical representation at the commission has often been made an issue, and rightly so. The reason for this is the connection between the geographical divides and legal cultures of Africa, and the need to have these legal cultures represented.¹³⁴

Apart from geographic representation, the issue of gender balance in the commission has also been of concern. From its inception, it appeared that the role of women in the commission was taken for granted.¹³⁵ This trend has changed in the recent years and a more representative commission is now in place. Its membership now reflects a diversity of gender and the geographical regions of Africa. As at April 2007, the commissioners were elected as follows: two from Eastern Africa¹³⁶; three from Western Africa¹³⁷; one from North Africa¹³⁸; and four from Southern Africa.¹³⁹ The only region that is not represented is Central Africa. It should be noted that the number of female commissioners has also increased. The commission now has five female commissioners, which is almost half of the total number. The current chairperson is also a woman (Madame Salamata Sawadogo). This is a marked improvement that needs to be encouraged because the increasing participation of women in the commission will encourage positive developments in promotional and protective activities in the areas of human rights that affect women.

Another area in which the commission is in need of reform relates to its promotional mandate. Although initiative has been taken to promote human rights in the region, the same has not been satisfactory, partly because the commission is hampered by a number of internal and external challenges. To begin with, it is inevitable to note, although

¹³⁴ Nmehielle O, *The African human rights system*, note 1 above, p. 172.

¹³⁵ *Ibid*, p. 173.

¹³⁶ Mr. Yaser Sid Ahmad El-Hassan (Sudanese) and Mr. Bahame Tom Mukirya Nyanduga (Tanzanian).

¹³⁷ Madame Salamata Sawadogo (Burkinabe), Madame Reine Alapini-Gansou (Benin) and Mr. Musa Ngary Bitaye (Gambian).

¹³⁸ Ambassador Kamel Rezag-Bara (Algerian).

¹³⁹ Dr. Angela Melo (Mozambican), Ms. Sanji Mmasenono Monageng (Botswana), Mr. Mumba Malila (Zambian) and Advocate (Ms) Faith Pansy Tlakula (South African).

publicity is essential to the realisation of the commission's promotional mandate, the same has not been done effectively. Odinkalu notes that one of the reasons why the commission has not had much impact is because many Africans are not even aware of its existence or, if they are, they do not appreciate its mandate and capacity.¹⁴⁰

There is the need to publicise the commission and the Charter through, for example, publications, promotional missions, hosting more sessions in all states and through the mass media. Additionally, national human rights institutions, civil society and educational institutions have a great role to play in creating awareness and sensitising the general public of the regional human rights mechanisms.¹⁴¹ Publicity, if taken seriously, would play an important role in enhancing the effective promotion of human rights. Individuals, NGOs and Inter-Governmental Organisations need reliable information to put pressure on governments.¹⁴² The lack of publicity in the work of the commission has contributed to the low esteem human rights have enjoyed on the continent. Moreover, poor publicity has led to the situation where national legislations, including constitutions of states parties, are at variance with the provisions of the Charter, hence complicating its enforcement.¹⁴³

Apart from the issue of publicity, the commission has also somehow failed in its relationship with NGOs, though admittedly, they have greatly influenced its activities.¹⁴⁴ For example, it was through the efforts of NGOs that the commission was able to appoint

¹⁴⁰ Odinkalu C, 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights', in Evans M & Murray R, *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002), p. 234.

¹⁴¹ Ibid.

¹⁴² Killander M, 'Confidentiality versus publicity: Interpreting Article 59 of the African Charter on Human and Peoples' Rights', (2006) 6 *African Human Rights law Journal*, p. 572.

¹⁴³ Odinkalu C, 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights', note 140 above, p. 234.

¹⁴⁴ Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 1 above, p. 13.

Special Rapporteurs on Prisons and Other Conditions of Detention¹⁴⁵, on Summary, Arbitrary and Extrajudicial Executions¹⁴⁶, on Refugees and Displaced Persons in Africa, on Human Rights Defenders and on Women's Rights.¹⁴⁷ As if to appreciate and acknowledge their involvement in its work, the commission has so far granted observer status to more than 300 NGOs, to enable them to participate during its sessions.¹⁴⁸

Whereas the participation of NGOs should be encouraged, the commission has seemingly developed the tendency of abdicating some of its responsibilities for its actions, or inaction to these organisations.¹⁴⁹ For instance, one commissioner, who merely was being assisted by an NGO, reportedly attributed his failure to deliver to the lack of funding from the NGO.¹⁵⁰ This is rather unfortunate because the commission ought to execute its mandate, with the available resources, without necessarily having to rely on NGOs.

In spite of assistance from NGOs, some of the Special Rapporteurs cannot boast of much success in their assigned areas. This has resulted to their usefulness being questioned.

¹⁴⁵ See generally, Report of the Special Rapporteur on Prisons and Conditions of Detention to the 21st Session of the African Commission on Human and Peoples' Rights, Tenth Annual Activity Report, Annex VII.

¹⁴⁶ At the commission's 14th session, held in Addis Ababa in 1993, *Amnesty International* proposed that the commission appoint a Special Rapporteur on Extrajudicial Executions in Africa. See statement of Amnesty International to the 15th session of the African Commission on Human and Peoples' Rights, April 1995. See also Report on Extra-Judicial, Summary or Arbitrary Executions (by Hatem Ben Salem, Special Rapporteur) Tenth Annual Activity Report Annex VI.

¹⁴⁷ See Draft programme of activities of the Special Rapporteur on women's rights in Africa for the period 1999-2001, DOC/OS/53(XXIV); Report of the Special Rapporteur on women's rights, DOC/OS/57(XXIV).

¹⁴⁸ See the Twenty-Second Activity Report of the African Commission on Human and Peoples' Rights, June 2007, EX.CL/364(XI). See also Resolution on granting observer status to national human rights institutions in Africa, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (1998.1999), AHG/215 (XXXV), Annex IV.

¹⁴⁹ Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 1 above, p. 13.

¹⁵⁰ *Ibid.*

Upon her appointment, the first Special Rapporteur on Women's Rights, for example, failed to undertake any of the studies on the situation of women's rights in Africa that were initially planned.¹⁵¹ The same is noted of the Special Rapporteur on Extrajudicial Executions. Harrington notes the following shortcomings about this particular Rapporteur:

Firstly, the Special Rapporteur had no expertise in the subject, no concrete notion of how to proceed, and no written mandate to guide him... The second problem was that there were no material means-financial or administrative-made available to the Special Rapporteur, even for writing and sending faxes and making phone calls. The Secretariat of the African Commission proved manifestly incapable of playing the role of administrative arm for the Special Rapporteur's activities...Thirdly, the Special Rapporteur was professionally ill-placed to pursue investigations of, or negotiations with, African governments. At the time of his appointment he was a mayor. In 1997 he was appointed the Tunisian ambassador to Senegal....Although superficially these positions might have seemed as presenting him with abundant opportunities to know and influence African governments, in practice the nature of his duty to represent his own state made it extremely difficult if not impossible for him to appear at other times in the guise of an independent Rapporteur.¹⁵²

As evidenced by the above narration, it is not so much the inadequacy of the African Charter that hampers the African Commission's effectiveness, but lack of resources and, most critical of all, lack of will power and requisite expertise on the part of some commissioners. The attempt by the commission to designate Special Rapporteurs to circumvent the constraints of the institution can only be successful where the individual chosen has the willingness to devote energy to the task. Unfortunately, the commission's

¹⁵¹ For the planned studies see, Draft programme of activities of the Special Rapporteur on women's rights in Africa for the period 1999-2001, DOC/OS/53(XXIV); Report of the Special Rapporteur on women's rights, DOC/OS/57(XXIV). See also Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 1 above, p. 13.

¹⁵² Harrington J, 'Special Rapporteurs of the African Commission on Human and Peoples' Rights', in Evans M & Murray R, *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002), p. 256.

choice of Special Rapporteurs from within its ranks has only highlighted the disparate nature of some commissioners' commitment to the institution and human rights in general.¹⁵³

Additionally, the commission's promotional activities have paid lip service to economic, social and cultural rights by being predominantly focused on civil and political rights.¹⁵⁴ Concerns have been raised by representatives of civil society organisations, in several of the commission's sessions, that there is the need for a focus on socio-economic rights too.¹⁵⁵ As recently as 2004, the African Commission, in collaboration with the International Centre for Legal Protection of Human Rights (Interights), the Cairo Institute for Human Rights Studies and the Centre for Human Rights at the University of Pretoria, co-hosted a seminar on 'Economic, Social and Cultural Rights in Africa.'¹⁵⁶ The seminar highlighted the violation of economic, social and cultural rights in the continent, emphasising their neglect and relegation to a secondary status. More needs to be done by the commission to give weight to the promotion of this category of rights on the continent.

At another level, it is evident that the promotional mandate of the commission is very extensive. However, the commission carries out its promotional activities only during the inter-session period. Even so, the commissioners have restricted themselves to visiting universities and other institutions of higher learning in the countries assigned to them, giving lectures on the African Charter, African human rights issues and the work of the commission.¹⁵⁷ While limiting itself to such activities, the commission is definitely seized

¹⁵³ Ibid.

¹⁵⁴ Khoza S, 'Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria', (2004) 4 *African Human Rights Law Journal*, P. 334.

¹⁵⁵ Ibid. See, for example, the Report of the 17th session of the African Commission on Human and Peoples' Rights, Lomé, Togo, 13–22 March 1995, published by the African Society of International and Comparative Law, p. 8.

¹⁵⁶ Held in Pretoria from 13 to 17 September 2004. See generally Khoza S, 'Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria', note 154 above, p. 334.

¹⁵⁷ Nmehielle O, *The African human rights system*, note 1 above, p. 179.

with the knowledge that masses of Africans are ignorant of its existence. Hence, it needs to do more than just give lectures in institutions of higher learning. It could, for example, organise public awareness meetings in towns and villages, targeting people from diverse backgrounds. This, however, requires the collaboration and cooperation of African states. Additionally, sufficient resource allocation needs to be considered towards this end.

As stated in the previous chapter, the size of the continent and the inadequacy of material and human resources present challenges to effective regional promotion of human rights. With one commissioner working part time and responsible for promoting the Charter in three to five countries, chances of effective promotion are slim.¹⁵⁸ It is therefore necessary for the commission to operate through a network of national, international and private organisations based in those areas. Because human rights promotion requires publicity in the mass media, which in many African countries are still controlled by governments, the commission must seek the support of all stakeholders if its promotional mandate is to be a success.¹⁵⁹

Another promotional activity of the commission that warrants reform is the state reporting mechanism. The effectiveness of this mechanism is undermined by several factors, the first one being its inadequate legal framework.¹⁶⁰ As Kofi observed, the reporting obligation under Article 62 of the Charter is rather terse compared to that of other human rights instruments, such as the ICCPR.¹⁶¹ Whereas the ICCPR requires states to report on 'the measures' they have adopted, the African Charter requires state parties to 'report on the legislative and other measures...'¹⁶² This suggests that the African system places a greater emphasis on legislative measures.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ See in this regard Kofi Q, 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism', (2002) 2 *African Human rights Law Journal*, p. 273.

¹⁶¹ Ibid.

¹⁶² See ICCPR, Art 40.

Further, the African Commission lacks the explicit authority to make ‘general comments.’ On the other hand, the ICCPR gives the Human Rights Committee (now Human Rights Council) the authority to issue ‘general comments’.¹⁶³ It was out of this realisation that the participants at the 1991 ‘Conference on the African Commission’ recommended that the commission should ‘interpret Articles 45(1)(b) and 60 of the Charter as providing the commission with the mandate to perform the functional equivalent of the Human Rights Committee’s general comments.’¹⁶⁴

The African Commission’s initial guidelines on state reporting, which were unnecessarily complex, also contributed to the improper functioning of the reporting mechanism. In the formative years of state reporting, the commission did not have clearly laid down procedures. Thereafter, at its 4th ordinary session in October 1991, it adopted the *General Guidelines for National Periodic Reports*.¹⁶⁵ The initial guidelines were found not to be very useful because they were too detailed and complex, making it difficult for member states to follow.¹⁶⁶ The commission, realising the problems associated with the guidelines, amended them. The subsequent amendments found states already demotivated and not willing to comply with their reporting obligations because no seriousness was attached to the mechanism from the beginning.¹⁶⁷

Other reasons for non-compliance by states with their reporting obligations under the Charter include the general lack of political will and the lack of a co-ordinated effort

¹⁶³ Kofi Q, ‘The African Charter on Human and Peoples’ Rights: Towards a more effective reporting mechanism’, note 160 above, p. 273. See also ICCPR, Art 40(4).

¹⁶⁴ Ibid.

¹⁶⁵ See *Guidelines on national periodic reports*, Second Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex XII), reprinted in Naldi G, *Documents of the Organisation of African Unity* (1992), p. 155.

¹⁶⁶ See Nmehiell O, *African human rights system*, note 1 above, p. 189; Ankumah E, *The African Commission on Human Rights*, note 1 above, p. 284; Viljoen F, ‘State reporting under the African Charter on Human and Peoples’ Rights: A boost from the south’ (1999) 44 *Journal of African Law*, p. 112.

¹⁶⁷ Mugwanya G, ‘Examination of the state reports by the Africa Commission: A critical appraisal’, note 3 above, p. 278.

between state departments.¹⁶⁸ The non-coercive nature of the reporting procedure is also a potential reason for lack of commitment to the reporting process. States that submit their reports do so as a mere formality or a public relations exercise.¹⁶⁹ Those that choose not to submit their reports are neither reproved nor punished. Simply put, many states do not seem to appreciate the importance of putting together and submitting their reports as and when due.¹⁷⁰ Partly because of the failure by states to submit reports as they should, the African Commission has not fully succeeded in enhancing the protection and promotion of human rights in the region.

The first report under the African Charter was submitted by Libya in January 1990.¹⁷¹ As at 9th March 1992, only eight state parties had submitted their initial reports.¹⁷² As at 30th March 2000, 24 states had never submitted a report and only 12 had no overdue reports.¹⁷³ As at June 2007, 15 states had not submitted any report, 14 states had submitted all their reports, while 14 states had submitted one report but owed more.¹⁷⁴ Moreover, most reports lack serious self-evaluation.¹⁷⁵ Nigeria's initial report, for example, was very brief and uninformative.¹⁷⁶ Some initial reports, however, such as those of The Gambia, Mozambique and Algeria, were of a satisfactory standard.¹⁷⁷

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ See Heyns C & Viljoen F, 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly*, p. 508.

¹⁷¹ Third Annual Activity Report of the African Commission on Human and Peoples' Rights, para 23.

¹⁷² Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, para 11.

¹⁷³ Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex III.

¹⁷⁴ See the Twenty-Second Annual Activity Report of the African Commission on Human and Peoples' Rights, p. 11.

¹⁷⁵ Mugwanya G, 'Examination of the state reports by the Africa Commission: A critical appraisal, note 3 above, p. 278.

¹⁷⁶ Ibid. The whole report was six pages long.

¹⁷⁷ Ibid.

To overcome the problem of irregular submission and non-submission of reports, the commission has, since November 1995, been willing to receive reports which combine several years.¹⁷⁸ However, this approach does not also seem to be working. Perhaps the approach of the UN Committee on Economic, Social and Cultural Rights and that of the Committee on the Elimination of all forms of Racial Discrimination could be adopted to salvage the situation. The two UN Committees have developed procedures that enable the examination of a country's human rights situation even when no report has been submitted.¹⁷⁹

Heyns' recommendation, that an inter-departmental body responsible for state reporting should be formed in each country, ought to be considered.¹⁸⁰ Additionally, a reporting support unit should be formed under the African human rights system, to assist governments with setting up such structures, and to train those who will staff it. Further, national human rights institutions should become involved in follow-up, both in respect of communications and reports.¹⁸¹

Another inhibiting factor to effective state reporting is the lack of seriousness during the report examination proceedings. There is some indication that the report examination proceedings are taken lightly by both the commission and reporting states.¹⁸² For example, during the 18th session when the report of Tunisia was being examined, some shortcomings regarding the procedures were noted.¹⁸³ To start with, the Rapporteur and the commissioners had not been provided with copies of the report and other relevant documents and background material. Further, no English translation of the report was

¹⁷⁸ See *Note Verbale* ACHPR/PR/A046, 30 November 1995.

¹⁷⁹ See UN Doc HRI/MC/1995/2 7; UN Doc HRI/MC/1996/2, pp. 10-11. See also the arguments advanced in Kofi Q, 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism', note 160 above, p. 275.

¹⁸⁰ Heyns C, 'African regional human rights system: In need of reforms?', note 8 above, p. 173.

¹⁸¹ *Ibid.*

¹⁸² See Malstrom S & Oberleitner G, '18th ordinary and 2nd extra-ordinary session of the African Commission on Human and Peoples' Rights', (1996) 14 *Netherlands Quarterly of Human Rights*, p. 93.

¹⁸³ *Ibid.*

provided, thus effectively locking out the English speaking commissioners from participating in the proceedings.

The commissioners were forced to restrict themselves to listening to the presentation of the Tunisian delegate and to exchanging opinions than posing concrete questions of substance and criticising the government's information or offering assistance and guidance for changes of the Tunisian legislation and administrative practice.¹⁸⁴ At the 21st ordinary session of the commission, the situation had not changed significantly. The reports of Sudan and Zimbabwe were available only in English, thus eliminating the non-English-speaking commissioners from the examination proceedings.¹⁸⁵

At the 28th ordinary session of the commission held in Benin in 2000, the reports of Namibia and Ghana were not examined because their representatives did not show up.¹⁸⁶ Earlier, at its 25th ordinary session in 1999¹⁸⁷, the African Commission was compelled to adopt a resolution concerning the Republic of Seychelles' refusal to present its initial report.¹⁸⁸ The resolution noted that the commission had since its 17th session invited Seychelles to present its initial report. However, the government had refused to abide by the request, under the pretext of unavailability of resources to implement such an obligation.¹⁸⁹

Considering this to be a breach of Article 62 of the African Charter, the commission invited the Assembly of Heads of State and Government 'to express their disapproval of such a persistent refusal that amounts to a deliberate violation of the Charter by the

¹⁸⁴ Ibid.

¹⁸⁵ See Malstrom S, '21st ordinary session of the African Commission on Human and Peoples' Rights' (1997) 15 *Netherlands Quarterly of Human Rights*, p 382.

¹⁸⁶ Murray R, 'The African Commission on Human and Peoples' Rights', (2001) 19 *Netherlands Quarterly of Human Rights*, p. 94.

¹⁸⁷ Held at Bujumbura, Burundi, 26 April to 5 May 1999.

¹⁸⁸ Murray R, 'The African Commission on Human and Peoples' Rights', note 186 above, p. 94.

¹⁸⁹ Kofi Q, 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism', note 160 above, p. 277.

Republic of Seychelles.’¹⁹⁰ It further requested the Assembly ‘to invite Seychelles to abide by the Charter and to consider the appropriate measures to be taken against the Republic of Seychelles.’¹⁹¹ In spite of the commission’s efforts, Seychelles’ report could still not be examined afterwards because no delegate was there to present it.¹⁹²

Even when representatives are sent by states, it sometimes happens that they are unable to provide the required information in response to questions from the commission. A good example to be cited in this regard is that of Ghana’s *Chargé d’Affaires* who presented the country’s initial report in 1993.¹⁹³ The representative’s incompetence warranted the commission to urge the government of Ghana to submit in writing additional information and response to questions which could not be answered by the representative during the examination of the report.¹⁹⁴

If the reporting mechanism is to be effective, it is necessary for the commission to start taking the exercise more seriously.¹⁹⁵ The commission also needs to adopt a more critical examination and assessment attitude in the form of concluding observations.¹⁹⁶ Indeed, this approach was attempted at the commission’s 29th session in 2001.¹⁹⁷ The commission adopted concluding observations, pointing out positive aspects, areas of concern, and recommendations to states parties, in respect of the reports presented by Algeria, Congo,

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² See 26th ordinary session of the African Commission on Human and Peoples’ Rights, 1-15 November 1999, Kigali, Rwanda.

¹⁹³ See Final Communiqué of the 14th ordinary session of the African Commission on Human and Peoples’ Rights- ACHPR/FIN/COM(XIV).

¹⁹⁴ Ibid.

¹⁹⁵ See Malstrom S, ‘21st ordinary session of the African Commission on Human and Peoples’ Rights’, note 185 above, p 382.

¹⁹⁶ See Viljoen F, ‘Examination of state reports at the 27th session of the African Commission on Human and Peoples’ Rights: A critical analysis and proposals for reform’, (2001) 16 *South African Journal on Human Rights*, p. 576.

¹⁹⁷ Ibid.

Ghana and Namibia.¹⁹⁸ Unfortunately, the commission has not been consistent in its approach of giving concluding observations.¹⁹⁹ Viljoen correctly noted that without concluding observations the reporting process ‘has little meaning because no critical evaluation can be conducted without the commission stating its position on the facts presented before it.’²⁰⁰

It is said that the report examination process usually ends with profuse thanks to the representatives, without any advice to the state parties on how to improve their human rights situations.²⁰¹ This defeats the logic and essence of having the process in the first place. It is equally unfortunate that the commission lacks sufficient time to examine reports in detail because it has too much to do within a fixed period in the course of its sessions. The time allocated for the examination proceedings should be extended since state reports inform the commission on the extent to which the Charter’s provisions have been given effect at the state level.²⁰²

Another inhibiting factor to the effectiveness of the reporting mechanism is related to budgetary constraints and secretarial problems. Some of the problems mentioned above, such as the lack of adequate time to consider reports and their non-submission in the approved languages, are linked to budgetary constraints and the resulting lack of secretarial support.²⁰³ These problems have given rise to other challenges such as limited periods of working sessions, inability to make documents available for circulation to those who need them, default in transcription and translation of reports; and the

¹⁹⁸ Ibid.

¹⁹⁹ The Procedure of making concluding observations is in fact provided for in rules 85(3) & 86(1) of the Rules of Procedure.

²⁰⁰ See Viljoen F, ‘State reporting under the African Charter on Human and Peoples’ Rights: A boost from the South’, (2000) 44 *Journal of African Law*, p. 110.

²⁰¹ Mugwanya G, ‘Examination of the state reports by the Africa Commission: A critical appraisal, note 3 above, p. 278.

²⁰² Ibid.

²⁰³ Ibid. See also Wachira G, ‘A critical examination of the African Charter on Human and Peoples’ Rights’, note 120 above, p. 26; Nmehielle O, *The African human rights system*, note 1 above, p. 195.

unavailability of easy access to modern communication technology such as e-mail and the internet. Financial allocations from the OAU/AU have often declined rather than increased.²⁰⁴ This, of course, can be attributed to the existent difficulty of the Union to recover the total amount of budget contributions from member states.

Under Article 41 of the African Charter, the commission of the African Union is responsible for the costs of the African Commission's operations, including the provision of staff, financial and other resources, necessary for the effective discharge of its mandate.²⁰⁵ During the 2006 financial year, the commission was allocated One million one hundred and forty-two thousand four hundred and thirty six United States Dollars.²⁰⁶ In the 2007 financial year, there was a five per cent increase to the 2006 budget. This brought the budget to about \$ 1,199,557.8.²⁰⁷ Out of this amount, only \$ 47,000 was allocated for the commission's programmes, including promotion and protection missions.

As per the commission, this amount is enough to cover only four promotion missions in a year, whereas the commissioners are expected to undertake at least two missions each in any year.²⁰⁸ There is no allocation for research, training/capacity building, special mechanisms activities, projects, seminars and conferences, commemoration of human rights events, such as the Africa Human Rights Day, etc. This amount does not cover even a third of the cost of the promotion missions for commissioners and special mechanisms earmarked for a year.²⁰⁹ This explains the magnitude of the financial strain the commission is currently facing.

²⁰⁴ Kofi Q, 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism', note 160 above, p. 263.

²⁰⁵ Art 41 states in part that '...the Organization of African Unity shall bear the costs of the staff and services. . . .'

²⁰⁶ See the Twenty-Second Activity Report of the African Commission on Human and Peoples' Rights, p. 17, para 100.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid, para 101.

Consequently, the commission continues to resort to extra-budgetary sources to supplement AU funding. It has therefore been relying on material and financial support from its partners, such as the Danish Human Rights Institute²¹⁰, Rights and Democracy²¹¹, the Danish International Development Agency (DANIDA)²¹², Open Society Initiative for West African (OSIWA)²¹³, and the Republic of South Africa²¹⁴, among others. The extra-budgetary resources, notwithstanding, the financial situation at the Secretariat of the commission is still disturbing. For example, by the end of 2007, the commission had only 23 members of staff to undertake its enormous tasks.²¹⁵ The staff provided to the commission by the AU is clearly inadequate to effectively support its very broad mandate.

It cannot be gainsaid that the effectiveness of the Secretariat is critical for the success of the African Commission. The commission considers at least fifty communications at each ordinary session and a lot of research is needed to finalise a communication.²¹⁶ Given the workload of, for example, the Special Rapporteurs, each of them should have at least one full-time legal officer to coordinate their activities. At the moment however, only two of them have been provided with legal officers on short term basis.²¹⁷ Legal officers should

²¹⁰ Para 104. The Secretariat of the African Commission continues to be supported by the Danish Institute for Human Rights by financing the post of an Expert on Strategic Planning.

²¹¹ Para 105. The Canadian NGO— Rights and Democracy— has supported the commission with personnel and has put at its disposal three Canadian *cooperants* since January 2006.

²¹² Para 106. DANIDA continues to support the activities of the Working Group on Indigenous Populations/Communities through the International Working Group on Indigenous Affairs (IWGIA). This support was expected to continue until June 2007. The European Union, through the International Labour Organization (ILO) is also supporting the activities of the WGIP.

²¹³ Para 107. The Open Society for West Africa has provided the commission with computers and printers and made available money to improve the website of the commission.

²¹⁴ Para 108. The Republic of South Africa has provided funding for activities of the commission and also seconded one of its nationals to assist the commission's Special Rapporteur on the Rights of Women in Africa.

²¹⁵ *Ibid.*, p. 19.

²¹⁶ *Ibid.*

²¹⁷ Twenty-Second Activity Report of the African Commission on Human and Peoples' Rights, p. 19.

also be appointed to advise commissioners on state reports. To promote human and peoples' rights and ensure their protection in Africa—a vast continent of 53 independent states—the current staff strength is clearly inadequate.

The above are the key factors inhibiting the effectiveness of the state reporting mechanism. There may be others that are either connected with or incidental to these. It should therefore suffice to state that the above discussed factors are only instructive but not exhaustive. It is not possible, in a study of this magnitude, to analyse in detail all the challenges to state reporting. Apart from the specific suggestions and recommendations discussed above, there are a number of other ways the state reporting mechanism can be reinvigorated and made more effective. One such strategy is to increase the role of NGOs and national human rights Institutions in state reporting. For example, the commission can request these organisations to furnish 'shadow' or alternative reports to those of the states. The 'shadow' or alternative reports provide the requisite information that will enable the African Commission to engage in constructive dialogue with state representatives when the reports are considered.²¹⁸ Experience at the UN level has shown that reports are better prepared where the state encouraged inputs from NGOs and also when there is widespread dissemination of the report, making it possible for the public to give comments thereon.²¹⁹

The practice of furnishing 'shadow' reports is also entrenched in the European system. Article 23 of the European Social Charter imposes on governments an obligation to send their periodic reports to national organisations of employers and trade unions. These organisations have the right to comment on the report, and the government has a duty to forward the comments to the monitoring bodies.²²⁰ The African Commission could adopt

²¹⁸ Mugwanya G, 'Examination of the State Reports by the Africa Commission: A critical appraisal, note 3 above, p. 280.

²¹⁹ Ibid. See also para 5 of General Comment 1 of the Committee on Economic, Social and Cultural Rights, contained in Document E/1988/22.

²²⁰ Kofi Q, 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism', note 160 above, p. 271.

similar approaches as under the European Social Charter and UN system in its dealings with the NGOs. NGOs can also play the very important role of ensuring that the commission's recommendations are in fact respected by states.²²¹ The increased involvement of these organisations is also essential because the commission is logistically limited to monitor compliance with its recommendations.

The national human rights institutions and NGOs that have been granted observer status with the commission may be relied on to put the necessary pressure on their governments to supply their reports.²²² Moreover, NGOs should not only participate in the processes of preparing 'shadow' reports but should also be encouraged to be present during the examination of state reports. The fact that states would be aware that NGOs are present and ready to furnish the commission with information may check dishonesty in state reporting, besides putting pressure on states to remedy violations to avoid embarrassment before the commission.²²³ If the NGOs and national human rights institutions perform their functions as required, a more effective monitoring system could be guaranteed.

Another strategy to reinvigorate the state reporting mechanism is to involve African Union (AU) organs in its implementation. The success of the mechanism depends, to a significant extent, on the possibility of exposing and sanctioning non-compliant states. The exposure of non-compliant states may go a long way to improve state reporting because African governments are never comfortable with adverse publicity, especially with respect to their poor human rights records.²²⁴ There is sufficient legal basis on which the African Commission can rely in order to bring on board some AU organs in its state reporting activities.

²²¹ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights', note 120 above, p. 29.

²²² Ibid.

²²³ Mugwanya G, 'Examination of the state reports by the Africa Commission: A critical appraisal, note 3 above, P. 280.

²²⁴ See in this regard the argument advanced in Kofi Q, 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism', note 160 above, p. 282.

Article 45(1)(c) of the African Charter, for example, calls on the African Commission, when performing its functions, to ‘co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.’ This is a general provision that could be interpreted liberally to allow the commission to work with any organ of the AU in its state reporting activities.²²⁵ The commission could, for instance, collaborate with relevant AU organs to induce some degree of political pressure on a recalcitrant state, as a way of strengthening the state reporting mechanism. The fear of expulsion from the AU is perhaps one of the sanctions that could eventually compel African states to honour their obligations under the African Charter. A pro-human rights interpretation of Article 23(2) of the Constitutive Act of the African Union could be used to achieve this result.²²⁶ This Article provides that:

... [A]ny member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.

This provision may be used by the AU to come up with, for example, policies and resolutions on state reporting that states ought to comply with. This way, the AU will be fully involved in ensuring that this process becomes a success. As it stands today, the state reporting mechanism requires more seriousness on the part of both the commission and the states parties to the Charter.

Other than its promotional mandate, the effectiveness of the protective mandate of the commission, which is exercised mainly through the communication (complaints) procedure, has been and is still being, undermined by several factors. First, for a long time, there was uncertainty as to whether the commission had the authority to consider individual complaints, and also about the exact mandate of the commission when considering such complaints.²²⁷ Article 58 provides for a special procedure to be

²²⁵ Ibid.

²²⁶ Ibid, p. 287.

²²⁷ Heyns C, ‘The African regional human rights system: In need of reform?’, note 8 above, p. 163.

followed by the commission in the case of ‘a series of serious or massive’ human rights violations. However, it was not entirely clear from the text whether individual communications could be considered by the commission if these communications did not reveal such ‘serious or massive violations.’²²⁸ The commission has taken upon itself, on the basis of Article 55²²⁹ of the Charter, to consider individual communications, even if they do not reveal serious or massive violations.²³⁰

Moreover, the requirement under Article 58 that the commission should draw the attention of the Assembly of Heads of State and Government to *prima facie* situations of serious or massive violations, and then await further instructions from the Assembly, proved to be a dead letter, since the latter has apparently never responded to such requests.²³¹ This has, however, not deterred the commission from finding ‘a series of serious or massive violations’ in a number of cases, without necessarily bringing such cases to the attention of the AHSG.²³²

In some cases, the commission has failed or ignored to deal with states against which several communications alleging serious and massive violations were pending. For example, in separate cases brought against Chad²³³, Malawi²³⁴, Zaire²³⁵ and Rwanda²³⁶,

²²⁸ Ibid.

²²⁹ Art 55 states as follows: ‘1. Before each Session, the Secretary of the commission shall make a list of the communications other than those of states parties to the present Charter and transmit them to the members of the commission, who shall indicate which communications should be considered by the commission. 2. A communication shall be considered by the commission if a simple majority of its members so decide.’

²³⁰ Heyns C, ‘The African regional human rights system: In need of reform?’, note 8 above, p. 163. See also communications 147/95, 149/96, *Sir Dawda K Jawara v. The Gambia*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, para 42.

²³¹ Ibid. See also Murray R, *The African Commission on Human and Peoples’ Rights and international law* note 1 above, p. 20.

²³² Murray R, ‘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*, p. 109.

²³³ Communication 74/92, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*.

the commission found that there were serious and massive violations, but it did not take action beyond these findings.²³⁷ In the case of Rwanda, on receipt of complaints alleging serious and massive violations of the right to life in October 1990, the commission contacted Rwanda for permission to conduct on-site investigation.²³⁸ Although Rwanda immediately granted permission for the same, the commission was unable to carry out the investigation probably due to financial and other administrative reasons.²³⁹

It is also evident that the Charter is not clear on what kind of findings the commission is able to make after the consideration of individual communications and what the possible remedies are.²⁴⁰ Nonetheless, the commission has developed a practice of its own in this regard, which has been discussed at length in the previous chapter. What needs to be done, however, is to entrench the commission's procedure in the Charter or in the commission's Rules of Procedure.²⁴¹ It is advisable for the Charter to be revised to provide a clear legal basis for making of findings and recommendations by the commission.

On remedies, the commission has not applied a consistent approach in some cases.²⁴² For instance, while it ordered the annulment of the offending decrees in *Civil Liberties Organisation v. Nigeria*²⁴³, it failed to do the same in other cases with similar facts.²⁴⁴

²³⁴ Communications 64/92, 68/92, 78/92, *Krishna Achuthan, on behalf of Aleka Banda, Amnesty International, on behalf of Orton and Vera Chirwa v. Malaw.*

²³⁵ Communications 25/89, 47/90, 100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Jehovah's Witnesses of Zaire, Union Interfricaine des Droits de L'Homme v. Zaire.*

²³⁶ Communications 27/89, 46/90, 49/91, 99/93, *Organisation Mondiale Contre La Torture and Association Internationale des Juristes Democrates v. Rwanda.*

²³⁷ Murray R, 'Serious or massive violations under the African Charter on Human and Peoples' Rights: A comparison with the Inter-American and European mechanisms', note 232 above, p. 109.

²³⁸ Communication 46/90, *International Commission of Jurists v. Rwanda.*

²³⁹ Ankumah E, *The African Commission*, note 1 above, p. 113.

²⁴⁰ Heyns C, 'The African regional human rights system: In need of reform?', note 8 above, p. 164.

²⁴¹ *Ibid*, p. 163.

²⁴² See Mugwanya G, *The African human rights system*, note 3 above, pp. 373-374.

²⁴³ Communication 101/93, *Civil Liberties Organisation v. Nigeria.*

This has brought to question its ability to chastise recalcitrant states. It is therefore proposed that the commission should be consistent when awarding remedies for cases with similar facts. Additionally, the pronouncement of such remedies should be clear and unambiguous. Some of the remedies the commission previously awarded were not clear.²⁴⁵ For instance in the *Banda and Chirwa Cases*, while it found serious violations and that the Malawian government was liable for violations committed by the previous regime, it did not clearly recommend the appropriate remedy. The commission merely stated that the government was ‘responsible for the reparation of these abuses.’²⁴⁶

In three other cases in which it found massive violations, the commission blindly accepted the government’s arguments that it had an amnesty law under which various crimes were covered and that the subsequent fair trial of one of the complainants absolved the government from liability.²⁴⁷ The commission should have analysed the government’s alleged fairness of the complainant’s trial and accord remedies arising from the state’s actions before exonerating it.²⁴⁸ As a result of its failure to do so, one is left to wonder whether ‘a subsequent fair trial’ is a form of remedy acknowledged by the commission. If so, it is not clear whether the victim would be entitled to some form of compensation for past injustices or for miscarriage of justice that occurred prior to the fair trial.

Additionally, the quality of the commission’s decisions is quite unsatisfactory.²⁴⁹ Generally, they are not detailed and seldom expound on the Charter’s provisions.²⁵⁰ It is

²⁴⁴ See, for example, Communication 102/93, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V); Communication 129/94, *Constitutional Rights Project (in respect of Lekwot and six others) v. Nigeria*.

²⁴⁵ See this argument also in Mugwanya G, *The African human rights system*, note 3 above, p. 374.

²⁴⁶ Communication 87/93, *Constitutional Rights Project v. Nigeria*, para 48.

²⁴⁷ Communications 83/92, 88/93, 91/93, *Jean Yaovi Degli v. Togo*.

²⁴⁸ Mugwanya G, *The African human rights system*, note 3 above, p. 374.

²⁴⁹ Nmehielle O, *The African human rights system*, note 1 above, p. 249.

therefore recommended that the commission should make its decisions more elaborate. Other than expressly citing the relevant provisions of the Charter, the decisions should be supported by judicial precedents, as well as jurisprudence from national and other international mechanisms. Such elaborate and well formulated decisions are essential in deepening the normative understanding of the rights in the Charter.²⁵¹

Further, recent efforts by the commission to publish its decisions must be supported and enhanced. In addition, the commission should welcome and encourage efforts by individuals and organisations to publish its work.²⁵² The commission's findings on communications were confidential prior to the release of the Seventh Annual Activity Report in 1994. In this Activity Report, the commission for the first time included an Annex with information on the individual communications submitted to it.

Another factor inhibiting the effectiveness of the commission's protective mandate is the inordinate delay between the institution of a complaint and making of a final decision thereon. Until the 16th Session of the commission, for instance, it often took between two to six years for the commission to render its decision on admissibility.²⁵³ For example, *Diakité v. Gabon*²⁵⁴ was filed with the commission in April 1992. The commission, however, declared this case inadmissible more than eight years later, a length of delay that is both unsatisfactory and worrisome. In *Association pour la defence des droits de l'homme et des libertés v. Djibouti*²⁵⁵, where the commission delayed the case for unduly long, the matter was later resolved amicably.²⁵⁶

²⁵⁰ See the observations in Mutua M, 'The African human rights court: A two-legged stool?', (1999) 21 *Human Rights Quarterly*, p. 348.

²⁵¹ Mugwanya G, *Human rights in Africa*, note 3 above, p. 368.

²⁵² Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000', note 1 above, p. 10.

²⁵³ Nmehielle O, *The African human rights system*, note 1 above, p. 248.

²⁵⁴ Communication 73/92, *Mohamed L Diakité v. Gabon*, Seventh Annual Activity Report.

²⁵⁵ Communication 133/94, *Association pour la Defence des Droits de l'Homme et des Libertés v. Djibouti*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights.

²⁵⁶ *Ibid*, paras 13-17.

The inadequate staffing and management of the commission's Secretariat, particularly during the initial years of the commission's existence and the failure of states to respond promptly to the commission's inquiries are said to have contributed to these delays.²⁵⁷ The commission's recent approach of presuming the truth of allegations contained in communications and its proceeding to hear cases, notwithstanding a state's silence, is commendable for speeding up the dispensation of justice. Now, on average, the commission is said to be rendering its admissibility decisions between six months and one and a half years after the filing of a communication.²⁵⁸ There is still the need to increase the sessions of the commission as well as the staffing of the Secretariat to avoid any further delays in the dispensation of justice.

Another factor that undermines the protective mandate of the commission, which is also related to inordinate delay, is the lack of organisation at sessions.²⁵⁹ Murray noted that although the commission holds two sessions per year, lasting fifteen days each, the efficient use of time during the session is lacking.²⁶⁰ It has further been noted that in some instances, the commitment of individual commissioners to the discharge of their responsibilities has been pathetic and the commission's internal checks on such conduct have not been sufficient.²⁶¹ Although the commission has an obligation to police itself²⁶², in most cases it has failed to do so.

Mugwanya observes that the commission has always been reluctant to take action in cases where commissioners' perpetual absence constituted negligence or the lack of commitment.²⁶³ One example he cited in this regard is when the commission failed to

²⁵⁷ Nmehielle O, *The African human rights system*, note 1 above, p. 248.

²⁵⁸ See Communication 106/93, *Amuh Joseph Vitine v. Cameroon*. See generally Odinkalu C & Christensen C, 'The African Commission on Human and Peoples' Rights: The development of its non-state Communication Procedure', note 111 above, pp. 275-76.

²⁵⁹ Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000' note 1 above, p. 8.

²⁶⁰ *Ibid.*

²⁶¹ Mugwanya G, *Human rights in Africa*, note 3 above, p. 377.

²⁶² Art 39(2) of the African Charter.

²⁶³ Mugwanya G, *Human rights in Africa*, note 3 above, p. 378.

bring to the attention of the Secretary-General the fact that commissioner Beye had not attended five consecutive Ordinary sessions and two Extraordinary sessions in 1989 and 1995.²⁶⁴ It was further noted that, in several instances, the commission begins its session with the requisite quorum but the quorum degenerates in the course of the session when some commissioners leave prematurely.²⁶⁵

The commission also lacks detailed written record of the debates and decisions taken at the sessions.²⁶⁶ Murray succinctly captures this position when she stated as follows:

A final communiqué is produced at the end of sessions, but this is only a few pages long and often does not detail the discussions on specific points. As a result, there are many occasions where it is either not possible to remember what issues were raised, whether any decision was reached at a previous session or, if so, what it was. There is thus considerable repetition of previous discussions, which wastes valuable time. While submissions made by participants at the session are now collected, copied and disseminated to participants, sometimes by the end of that day, this has for long not been the case.²⁶⁷

She therefore rightly suggests that the commission could improve its own efficiency by requiring its Secretariat to make a detailed report of the session and disseminate it amongst the commissioners, NGOs, states and other participants.²⁶⁸

Like its promotional activities, the protective activities of the commission also lack ample publicity. The commission has developed a practice of publishing its decisions on communications in detail in its Activity Reports. Unfortunately, these reports are not disseminated widely enough. Consequently not many international bodies and national

²⁶⁴ Ibid.

²⁶⁵ See Ankumah E, *The African Commission on Human and Peoples' Rights*, note 1 above, p. 48.

²⁶⁶ Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000...', note 1 above, p. 8.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

judicial systems are aware of the commission's decisions.²⁶⁹ Indeed, it is not sufficient for the commission to post its decisions on its website, more so as annexes in its Annual Activity Reports, without giving them ample publicity among, for example, the states parties and other AU organs.

Another inhibiting factor to the effectiveness of the commission's protective mandate is the lack of proper follow-up procedures.²⁷⁰ Although the commission recommends some forms of remedies, their enforcement is lacking. The African Charter is devoid of mechanisms that could compel states parties to abide by the recommendations; neither has the commission laid down procedures to supervise their enforcement. This effectively confines the enforcement of the commission's recommendations to the goodwill of the states concerned.²⁷¹ At present the commission's follow up is made through diplomatic *note verbales*, during field missions and during its ordinary sessions when state delegates are present.²⁷² This approach, however, has failed to yield satisfactory results.

The commission has evolved the practice of requiring states to include, in their subsequent country reports, the measures they have taken to comply with the remedies stated in its recommendations.²⁷³ It has been argued, and rightly so, that this is not an effective follow-up mechanism because not every state party to the Charter submits its country reports.²⁷⁴ The effectiveness of this practice is yet to be realised. It is

²⁶⁹ Ibid.

²⁷⁰ Mugwanya G, *Human rights in Africa*, note 3 above, p. 376.

²⁷¹ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', note 120 above, p. 23.

²⁷² Ibid.

²⁷³ Communication 211/98, *Legal Resources Foundation v. Zambia*, concluding para. See also communication 241/2001, *Purohit and Moore v. The Gambia*, concluding paragraph.

²⁷⁴ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', note 120 above, p. 23.

recommended that a Special Rapporteur on follow-up should be appointed.²⁷⁵ In the same manner, the commission should endeavour to award and monitor state compliance with interim measures to prevent irreparable harm to victims of human rights violations.

Few interim or provisional orders have so far been issued by the commission.²⁷⁶ Even then, they have not been elaborate enough.²⁷⁷ For instance, in *Degli v. Togo*²⁷⁸, the commission generally called upon the state ‘to ensure the security of the individual and avoid any irreparable prejudice being inflicted on the victim of the alleged violations.’ In the *Ken Saro Wiwa case*²⁷⁹, the complaint revealed serious acts of torture against Ken Saro Wiwa. Although the commission acknowledged the need for interim measures to prevent the occurrence of irreparable harm, the interim measures ordered were also not specific.²⁸⁰

The commission is also affected by the persistent lack of support and cooperation from states, especially when it comes to the enforcement of its recommendations. The eleven commissioners cannot do much without states carrying out their obligations under the Charter.²⁸¹ Political leaders are sometimes tempted to take a stand on human rights situation based on what they consider to be their own national interest.²⁸² For example, there have been unfortunate instances of democratic governments supporting dictatorial

²⁷⁵ Ibid.

²⁷⁶ Mugwanya G, *Human rights in Africa*, note 3 above, p. 377.

²⁷⁷ For a discussion on the interim measures in the commission’s practice, see Nmehielle O, *The African human rights system*, note 1 above, pp. 232-236.

²⁷⁸ Communication 83/92, *Degli v. Togo*.

²⁷⁹ Communication 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V).

²⁸⁰ See the previous chapter of this thesis which discusses interim measures at length and also the facts of the *Ken Saro Wiwa case*.

²⁸¹ Mugwanya G, *Human rights in Africa*, note 3 above, p. 377.

²⁸² See generally Mangu A, ‘The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo’ (2002), *LLD Thesis University of South Africa*, chapter 3.

regimes in Africa. Beneath the ostensible reasons are profit motives and political or ideological advantages they wish to exploit.²⁸³

States parties have failed to comply with their obligations under the Charter and some have deliberately ignored recommendations made by the commission.²⁸⁴ In 2004, for example, the African Commission granted provisional measures to the Endorois community in Kenya.²⁸⁵ It urged the state to take immediate steps to ensure that no further mining concessions were issued or land transferred prior to the decision of the commission on the substance of the matter. The provisional measures notwithstanding, mining went on in the region. By the 39th Ordinary Session the communication was still being considered on its merits but the state was yet to heed to the provisional measures.²⁸⁶ Another example is the landmark *Ogoni* decision.²⁸⁷ The recommendations made in the decision including that environmental and social impact assessments be conducted and the victims be adequately compensated, are yet to be implemented.

At its 24th Ordinary Session, the African Commission adopted a resolution noting the lack of compliance by states parties with its recommendations on communications. It called upon those states which had not implemented the recommendations to do so without delay, within 90 days from notification.²⁸⁸ The commission stated that it would

²⁸³ Ibid.

²⁸⁴ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', note 120 above, p. 23.

²⁸⁵ Communication 276/2003; See also http://www.minorityrights.org/news_detail.asp?ID=342 (accessed on 22 December 2007). (*CEMIRIDE (On behalf of the Endorois Community v. Kenya)*).

²⁸⁶ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', note 120 above, p. 24.

²⁸⁷ Communication 155/96, *Social and Economic Rights Action Centre (SERAC) & Another v. Nigeria*, Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

²⁸⁸ Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', note 120 above, p. 24.

submit a report on human rights situation and the extent of compliance of each state with its recommendations to each session of the Executive Council of the AU.²⁸⁹ The resolution notwithstanding, most, if not all, concerned states are yet to implement the commission's recommendations. It appears that it is impossible to execute recommendations of the commission in the respondent state unless the latter agrees to do so voluntarily.

The fact that the African human rights system lacks efficient mechanisms to enforce the commission's recommendations has resulted to the continued neglect of its decisions by states. It is hoped that the AU and its new structures and institutions will provide a framework to ensure decisions reached by the African Commission and court, when it commences its proceedings, are implemented. It has correctly been argued that the successful enforcement of human rights in Africa will depend, in large part, on the development of economic integration among states on the continent.²⁹⁰

The AU structure offers the highest level of economic integration that African states could aspire for. Viewed together with the provision for sanctions under Article 23(2) of the Constitutive Act, trade and other economic activities come within the purview of the 'other measures of ... economic nature to be determined by the Assembly' as tools for sanctioning recalcitrant states. If this tool is used effectively, states will be compelled to honour their human rights obligations under the system. It is also recommended that the

²⁸⁹ See 'Draft Resolution on the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights', in Murray, R and Evans, M (ed), *Documents of the African Commission on Human and Peoples Rights on Compliance of State Parties to adopted recommendations of the African Commission: A legal approach* (2001), p. 758.

²⁹⁰ Heyns C & Viljoen F 'An overview of international protection of human rights in Africa' (1999) 15 *South African Journal of Human Rights*, p. 433. These authors argue that as a general rule, the international enforcement of human rights depends for its success on the existence of, among other factors, a web of trade relations between the respective states because only where these exist can their potential severance in cases where human rights violations come to light constitute a real threat to coerce the states to adhere to human rights principles.

African Union should exercise its right to intervene in a member state in respect of grave circumstances of human rights violations as envisaged in the Constitutive Act.²⁹¹

The recently established Peace and Security Council of the African Union may also be useful in assisting the commission to enforce some of its recommendations, especially where the continuing violations are serious or massive. Additionally, the Charter should be revised to enhance the commission's powers to ensure that its decisions are complied with and its remedies are enforced. Where a state fails to do so, or where an amicable settlement is not forthcoming, the state should be punished accordingly.

The effectiveness of the African commission can also be improved through strengthening its Secretariat. This would entail a number of things, for instance, increasing the number of its professional staff.²⁹² In particular, legal experts and competent press personnel are needed to expedite and publicise the work of the commission. Moreover, the quality of personnel should be emphasised. Recruitment of the staff should include, among others, African legal experts and scholars.

Even though the Charter does not assign any specific function to the Secretariat, it is customary for secretariats of this nature to perform administrative and other management functions in line with their respective mandates.²⁹³ This is especially because commissions of this nature are usually composed of part-time commissioners, who may probably not be able to oversee the day to day running of the Secretariat or perform other

²⁹¹ Constitutive Act Art 4 (h).

²⁹² See the Twenty-Second Activity Report of the Commission, pp.20-21. As at June 2007, the Commission had 23 personnel whereas the required number is 36. See also the Executive Council Decision EX.CL/322 (X) on the 21st Activity Report of the African Commission on Human and Peoples' Rights adopted at its Tenth Ordinary Session held from 25 – 26 January 2007 in Addis Ababa, Ethiopia. The decision 'CALL[s] ON the Commission of the African Union in collaboration with the ACHPR to propose a new Structure for the latter to the next Ordinary Session of the Executive Council taking into consideration the broad mandate of the ACHPR.'

²⁹³ Nmehielle O, *The African human rights system*, note 1 above, p. 183.

administrative functions.²⁹⁴ As a result of the Charter's silence in this regard, the rules of procedure of the commission prescribe some roles to the secretariat.²⁹⁵ It follows, therefore, that the resource implications in carrying out the functions assigned to the Secretariat are enormous. However, as explained above, this has been one of the areas where the African system has been found wanting.²⁹⁶

To strengthen its secretariat, the commission could also initiate programmes that would attract people from across the continent to visit it and contribute to its work. This may include a fully-funded legal researchers' programme for post-graduate students from African universities, pursuing degrees that are relevant to the commission's work. African universities and institutions of higher learning should also be encouraged to send researchers, students and distinguished scholars to the commission on a regular basis.²⁹⁷ The more people get to understand the system, the better. This is because, an insight into the system will reveal the potential areas of reforms thereto.

The efficiency of the commission could also be enhanced if sub-commissions, entrusted with promotional activities are established. The sub-commissions, based on the main geographical divides of the continent, will represent the Western, Eastern, Northern, Central and Southern regions of the continent. Apart from conducting promotional activities, the sub-commissions could receive communications, from their regions, on behalf of the commission and process them in accordance with the requirements of the Charter and the Rules of Procedure.²⁹⁸ The admissible communications would then be forwarded to the commission's headquarters to be determined in accordance with the laid down procedures.

²⁹⁴ Ibid.

²⁹⁵ Ibid. See also Rules of Procedure of the African Commission, rule 23.

²⁹⁶ Nmehielle O, *The African human rights system*, note 1 above, p. 185.

²⁹⁷ See a similar recommendation in Heyns C, 'African regional human rights system...', note 8 above, p. 172.

²⁹⁸ Eno W, 'The African Commission on Human and Peoples' Rights as an instrument for the protection of human rights in Africa' (1998) *LLM Thesis, University of South Africa*, p. 156.

As far as accessing the court is concerned, the sub-commissions would assist in the admissibility process, in accordance with the court's Protocol and the Rules of Procedure. They could also examine the reports from states within their sub-regions. The rationale for the creation of sub-commissions is to bring the activities of the African human rights system closer to the people. As argued earlier, the African continent is vast, consisting of states with ideological, social, economic and political differences. Thus, sub-commissions will create a sense of identity and cohesiveness amongst the few states within a sub-region. This reasoning can be supported by at least two arguments.

First, given the diversity of the continent, it is possible for sub-regional arrangements to be more readily accepted than global, or even regional, arrangements. Arguably, a state would confidently submit to international supervision if the machinery is set up by a group of like-minded states. Moreover, a state is expected to be more willing to yield to a sub-commission comprising of its friends and neighbours, than to a regional commission in which it plays a relatively insignificant role. The emergence of Regional Economic Commissions (RECs) attests to this fact. It is evident that states are more responsive to these commissions than to the continental bodies.²⁹⁹

Secondly, it is obviously more convenient for a case to be heard within the sub-region than elsewhere. This is largely because, complainants will not have to travel long distances and more witnesses could be summoned than it may be the case with a regional arrangement. Also, it is more likely for states within a sub-region to agree on sanctions against another member than at a continental level. Further, the establishment of sub-commissions will to some extent generate competition amongst the various sub-commissions as each will strive to ensure that it does not lag behind in matters of human rights, or that it is not publicly criticised as a sub-region with the worst human rights record.³⁰⁰ Commissioners are also more likely to take interest in human rights violations in their sub-regions than on the continental level.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

Definitely, the pragmatism of establishing sub-commissions may be contested on grounds of their financial implication. It may be argued that since the commission is faced with financial constraints, it is not conducive at this time to implement the idea of sub-commissions, especially if their budgets would strain the meagre resources of the human rights system. To overcome the financial implications of establishing sub-commissions, it is proposed that each sub-region should take care of the expenses of its sub-commission. The commissioners who come from the sub-region will then be in-charge of the activities thereof and report to the commission. Thus, their emoluments will continue to be drawn from the AU coffers.

The creation of sub-commissions would encourage division of labour and efficiency of the commission. It would also ensure that the commissioners are put to more productive use that it is currently the case. The involvement and participation of NGOs from within a sub-region would also be enhanced. Further, the commission will also be more accessible to people who will not have to travel to The Gambia to have their rights vindicated, unless it becomes very necessary for them to do so. Finally, the commission's interaction with sub-regional mechanisms such as ECOWAS, COMESA and SADC, and the tribunals established under them, will be invigorated through the proposed sub-commissions.³⁰¹ This will have a positive impact on the jurisprudence of the African human rights system.

4.3.2 The African Court on Human and Peoples' Rights

At the time of compiling this part of the study, the African Court had not yet commenced its proceedings. Its Rules of Procedure are still being drafted, its Registry has not yet been set up and it is not known when it will consider its first case. In 2006, the court submitted its first Activity Report to the AU Summit, noting that it had held three meetings since the appointment of its Judges in 2006.³⁰² The Report cited a number of

³⁰¹ Ibid, p. 157

³⁰² Activity Report of the Court for 2006, Assembly/AU/8(VIII). The meetings held dealt with drafting the court's Rules of Procedure, discussing its budget and the seat of the court.

challenges already faced by the court in its initial months of operation. These include heavy dependence on the AU Commission, lack of awareness among those in the AU Commission of the importance and status of the court and lack of headquarters. After deliberating on the Activity Report, the Assembly, among other things, instructed the AU Commission to liaise with Tanzania in order to facilitate the establishment of the headquarters of the court in Arusha.³⁰³

As argued in the previous chapter, the process of establishing the court has generally been very slow. This is evidenced by the fact that, it took longer than five years to secure the fifteen ratifications required for the entry into force of the court's Protocol. This is not very encouraging, given the fact that its creation took more than thirty years from the time it was first mooted.³⁰⁴ With the atrocities in Darfur (Sudan), Democratic Republic of Congo, Chad, Zimbabwe, and other violations taking place across the continent, it is obvious that the court is essential and its delayed operationalisation should not be condoned. The AU could not continue to fold its hands, while many Africans continue to be victims of human rights violations.

It is inevitable to note that the prolonged operationalisation of the court is one of the challenges facing regional enforcement of human rights under the African system. In the first place, the idea of a regional human rights court in Africa has been resisted for a number of reasons. The main argument has been that there are adequate mechanisms for the protection of human rights at the national level.³⁰⁵ This argument is premised on the assumption that there is no need for a regional court because national bills of rights reflect all the important provisions of human rights treaties and may be enforced through

³⁰³ Ibid.

³⁰⁴ The quest for a regional human rights court began in the 1961 Lagos Conference that was organised by the International Commission of Jurists. For a detailed discussion on the historical origin of the court, see chapter one of this thesis.

³⁰⁵ O'Shea A, 'A Critical reflection on the proposed African Court on Human and Peoples' Rights', (2001) 2 *African Human Rights Law Journal*, p. 287.

constitutional courts. A regional human rights court, according to this argument, will therefore encourage unnecessary duplication of the mandates of these courts.³⁰⁶

This argument should be rejected given the ineptitude of national courts of most African states. Not every African state can boast of effective judicial protection of human rights. Additionally, as O'Shea correctly argues, a national constitution is not only an instrument for the protection of human rights, but is also a reflection of the general needs and interests of a particular state.³⁰⁷ It follows, therefore, that whenever there is a conflict between the general interests and human rights provisions of a constitution, the court may be called upon to balance the two. This balancing and its attendant limitation of human rights may offend internationally accepted standards for the protection of human rights and should therefore be subjected to international judicial scrutiny.³⁰⁸

Another challenge to the potential effectiveness of the court may be linked to resource allocation. African states are ravaged by poverty and in most cases they are left with no option but to prioritise their resource allocation. Already, there are a number of new institutions that require support from states in terms of resources. Additionally, a majority of the African states rely on donor aid to manage their huge economic burdens. Given such circumstances, having a regional court, that would more likely than not have further adverse economic implications, is not an idea most states are prepared to embrace at the moment.

Further, certain provisions on the jurisdiction of the court also present certain challenges which may have negative implications to its effectiveness. Article 3(1) provides that: 'the jurisdiction of the court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.' Article 7 further states: 'the court shall apply the provisions of the Charter and any other relevant human rights

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

instruments ratified by the states concerned.’ These provisions could create a whole range of uncertainties.

It has been argued, they give the court a wider adjudicatory jurisdiction than the other regional human rights systems.³⁰⁹ Whereas the European³¹⁰ and Inter-American³¹¹ human rights courts’ subject matter jurisdiction is limited to the conventions under which they were established, the above provisions could well be interpreted to mean that the African court has the jurisdiction to consider cases brought before it under any human rights treaty ratified by the states concerned. These include UN and other African human rights treaties. Some commentators have indeed taken this approach.³¹²

Consequently, Article 3(1) should be amended to provide that the court exercises jurisdiction over the African Charter and other relevant instruments promulgated under the AU.³¹³ In the event an amendment is not preferred, the African Court should make it clear at the earliest opportunity that it does not exercise jurisdiction over the entire corpus of human rights treaties ratified by African states. Additionally, Article 7 of the Protocol grants the court much less latitude than the commission is granted under the African Charter. This is bound to lead to a difference in the way the rights in the Charter are interpreted by the commission and the court.³¹⁴

³⁰⁹ Naldi G & Magliveras K, ‘Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples’ Rights’ (1998) 16 *Netherlands Quarterly of Human Rights*, p. 435.

³¹⁰ European Convention, Arts 32–34.

³¹¹ American Convention, Arts 62(1).

³¹² See generally the arguments in Quasigah E, ‘The African Court of Human Rights: Prospects in comparison with the European Court of Human Rights and the Inter-American Court of Human Rights’, in African Society of International and Comparative Law, *Proceedings of the Tenth Annual Conference, held in Addis Ababa 3–5 August 1998* (1998), pp. 61–62.

³¹³ See a similar argument in Heyns C, ‘African regional human rights system...’, note 8 above, p. 168, where the author argued that Article 3(1) should be amended to provide that the Court exercises jurisdiction over ‘the African Charter and all Protocols to the Charter’.

³¹⁴ *Ibid*, p. 169.

Another area of equal importance to the court's efficiency is its power to issue binding judgements. The ability of the system to bring about change depends on how binding the judgements of the African Court will be.³¹⁵ Article 30 of the Protocol provides that state parties 'undertake to comply with the judgment in any case to which they are parties within the time stipulated by the African Court and to guarantee its execution.' Apart from this provision, the Protocol does not seem to provide for any sanction against a state that deliberately refuses to comply with the court's judgments. Consequently, the effectiveness of the court seems to be largely at the mercy and willingness of states to comply with its decisions.³¹⁶

States parties therefore ought to be compelled to comply with, and enforce the judgements of the court. At least one of two approaches could be used to achieve this intention. First, Article 30 of the Protocol could be amended with an express provision spelling out the consequences of a state's failure to comply with, or enforce the court's judgements. Alternatively, the court's Rules of Procedure could provide for the enforcement of the court's judgements at the national level because supra-national enforcement of decisions is normally practically difficult.³¹⁷ This difficulty is mainly caused by the reluctance of states to enforce decisions against each another. Perhaps, this is instigated by the general fear that if a state chastises another, the same would most probably be done to it sooner or later.³¹⁸

Suffice it to state that the success, or otherwise, of the African Court will to a large extent depend on the willingness of states to embrace the core values of the African human rights system. As Mutua notes, this is a two-dimensional obligation: first, it necessitates

³¹⁵ Hopkins K, 'The effect of an African Court on the domestic legal orders of African states', (2002) 2 *African Human Rights Law Journal*, p. 238.

³¹⁶ Ibid.

³¹⁷ Sibongile N, 'Implications of the establishment of the African Court on Human and Peoples' Rights on domestic legal systems in Africa' in Frans Viljoen (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006), p. 44.

³¹⁸ Ibid.

that states incorporate the provisions of the African Charter into their own municipal laws and ensure compliance with it. Secondly, it necessitates that states accept and obey the judgments of the court notwithstanding ideological conflicts that may exist between their own jurisprudence and that of the court.³¹⁹ The court will only be useful if it will manage to correct the shortcomings of the African system and provide victims of human rights violations with an effective and accessible forum to vindicate their rights.³²⁰ It is needless to state that the court will not meet the expectations of Africans if it is not provided with material and other forms of support that it may require for its effective performance.³²¹

4.3.3 Institutional overlaps and duplication and their challenges to the effective enforcement of human rights in the region

In the main, this part of the study adds our voices to the ongoing debate on mainstreaming of the human rights system within the AU in order to strengthen it. It has been argued that the failure to mainstream the system within the former OAU partly explains the weaknesses that have been experienced in the implementation and enforcement of the regional human rights instruments.³²² Similarly, failure to anchor the system in the newly created AU is more likely to reproduce the marginalisation experienced under the OAU. As already stated earlier, the African human rights system has not remained static since its inception. Rather, it has been advancing both normatively and institutionally.

For instance, while the African Commission used to be its sole enforcement mechanism, the African Court has lately been established to complement it and there is also the possibility of the African Court of Justice being instrumental in human rights protection in the region. Additionally, the AU has undertaken a number of initiatives geared towards

³¹⁹ Ibid.

³²⁰ Mutua M, 'The African human rights court: A two-legged stool?', note 250 above, p.357.

³²¹ Mutua M, 'The African human rights court: A critical evaluation, note 1 above, p. 39.

³²² Gutto S, 'The reform and renewal of the African regional human and peoples' rights system', (2001) 2 *African Human Rights Law Journal*, p. 176.

human rights promotion and protection in the region. These include the creation of the NEPAD and APRM, as well as other organs created under the Constitutive Act of the AU. As a result of these developments, the regional human rights system seems to suffer from normative and institutional overlaps, tending towards duplication and proliferation.³²³

A number of examples could be cited to vindicate this argument. Most notable is the duplication of certain functions between the African Commission and the Committee of Experts on the Rights and Welfare of the Child (herein after ‘the Committee’).³²⁴ The Committee, established under Article 32 of the African Charter on the Rights and Welfare of the Child (herein after ‘Children’s Charter’), has promotional and protective mandates that are more or less similar to those of the African Commission. For example, the protective mandate includes examining periodic reports by states³²⁵ and receiving and determining complaints by individuals and groups, as well as interstate complaints.³²⁶ This is regardless the fact that the rights and freedoms of children, although elaborated and expanded in the Children’s Charter, can easily be interpreted and enforced through the African Commission, as well as the African Court.³²⁷

At another level, duplication is apparent between the African Court of Justice (ACJ) and the African human rights court. As stated earlier, the jurisdiction of the regional human rights court ‘shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human

³²³ Kithure K, ‘Overlaps in the African human rights system’ in Viljoen F, (ed), *The African Human Rights System: Towards the Co-existence of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights* (2006), p. 125.

³²⁴ Gutto S, ‘The reform and renewal of the African regional human and peoples’ rights system’, note 322 above, p. 178.

³²⁵ African Charter on the Rights and Welfare of the Child (ACRWC), Art 43.

³²⁶ Ibid, Art 44.

³²⁷ Gutto S, ‘The reform and renewal of the African regional human and peoples’ rights system’, note 322 above, p. 178.

rights instrument ratified by the states concerned.’³²⁸ Undoubtedly, therefore, the enforcement of human rights is its core business. The ACJ, on the other hand, has a broader jurisdiction extending to all AU treaties and conventions and other issues concerning international law, including bilateral issues between AU member states.³²⁹ Moreover, the Assembly of the Union may confer jurisdiction on the court over any other dispute.³³⁰

Hence, there is a broad symmetry in both courts in relation to their composition and jurisdiction.³³¹ Like the African Court, the ACJ has the competence to interpret and apply the CAAU.³³² Thus, their jurisdictions overlap in the sense that, while the ACJ could adjudicate on human rights matters that fall within the competence of the human rights court, the latter could be requested to give advisory opinions or hear cases based on the human rights provisions of the CAAU. There is therefore the possibility of the two courts rendering conflicting judgements on human rights issues if allowed to operate independently from each other.³³³

There is also potential duplication and jurisdictional conflicts likely to be experienced by the African human rights court and the commission. Both the commission³³⁴ and the court³³⁵ are mandated to interpret the Charter and receive communications. However, there is no clarity as to when it would be appropriate to submit a complaint to the court

³²⁸ Art 3 of the Protocol Establishing the African Court on Human and Peoples’ Rights.

³²⁹ See the Protocol Establishing the Court of Justice.

³³⁰ Ibid, Art 9.

³³¹ Both courts consist of eleven Judges, no more than one from each of the states parties and with the president serving full-time. See Baimu E & Viljoen F, ‘Courts for Africa: Considering the co-existence of the African Court on Human an Peoples’ Rights and the African Court of Justice’ (2004) 22/2 *Netherlands Quarterly of Human Rights*, p. 250.

³³² Art 19(1)(a) & (d) of the ACJ Protocol.

³³³ Baimu E, & Viljoen F, ‘Courts for Africa: Considering the co-existence of the African Court on Human an Peoples’ Rights and the African Court of Justice’, note 331 above, p. 250.

³³⁴ African Charter on Human and Peoples’ Rights, Art 45(3).

³³⁵ Art 3 of the Protocol.

rather than to the commission, or vice versa. It is equally important to note that the AU is not precluded from establishing more institutions than those currently in place. The CAAU mandates the Assembly of Heads of State and Government to establish more institutions if this would be desirable for the achievement of the Union's objectives.³³⁶

One would therefore concur with Magliveras and Naldi that 'the number of organs of the Union appears to be very large and in the long run it could not only result in the cumbersome operation of the Union but also present a financial burden.'³³⁷ Additionally, as Kithure observed, the proliferation of institutions and norms at the regional level is likely to present problems to African states regarding how to allocate resources and personnel to deal with the attendant obligations.³³⁸ Even if funds were available, this should not serve as permission to create many institutions with their attendant operational and staffing needs.

With rationalised, synchronised and consolidated institutions, any increased funding will make more effective contribution in achieving demonstrable results in the promotion and protection of human rights and enhancing justice and the rule of law on the continent.³³⁹ In under-resourced Africa, the proliferation of institutions should be a source of concern, since understaffing and under-funding plague the existing human rights institutions and mechanisms on the continent.³⁴⁰ As stated earlier, the African Commission is currently under severe shortage of human and financial resources, which restricts its effective functioning.

The foregoing therefore stresses the need to mainstream and rationalise the existing regional human rights institutions in a way that they can complement but not duplicate

³³⁶ Arts 5(2) and 9(2) of the Constitutive Act of the African Union.

³³⁷ Magliveras K & Naldi G, 'The African Union: A new dawn for Africa?' in (2002) 51 *International and Comparative Law Quarterly*, p. 419.

³³⁸ Kithure K, 'Overlaps in the African human rights system', note 323 above, p. 144.

³³⁹ *Ibid.*

³⁴⁰ Baimu E, 'Human rights in NEPAD and its implications for the African human rights system', (2002) 2 *African Human Rights Law Journal*, p. 313.

each other. In the context of the present study, ‘mainstreaming’ should be understood to mean the process that would involve the consolidation of the existing human rights mechanisms within the AU framework in order to enhance their relationship with each other.³⁴¹ The AU, as the parent organ of the African human rights system would therefore hold the central place in ensuring the co-ordination and synergy of the existing human rights mechanisms in the region.

Rationalisation, on the other hand, would involve defining the relationship and synergies of the existing human rights enforcement institutions in order to minimise or overcome overlaps and duplication within the African human rights system. Hence, while mainstreaming would be initiated to improve the ‘vertical relationship’ (between the AU and the regional human rights institutions), rationalisation should be seen as a way to improve the ‘horizontal relationship’ (between the human rights enforcement institutions). What follows, therefore, are proposals of some ways in which rationalisation could be achieved. Due to the subject matter of the present study, our discussion shall be confined to the rationalisation of the African human rights court, the African Commission and the African Court of Justice.

4.3.3.1 Rationalising the African human rights court and the commission

It should be emphasised that the mere establishment of a regional court should not be construed as the end to the many challenges encompassing the enforcement of human rights under the African system. Much still needs to be done, especially with regard to its relationship with its counterparts, such as the African Commission, to ensure its efficiency. Further, it should be reiterated that the court was not established to replace, but rather to complement and reinforce the commission.

³⁴¹ See also this position in Gutto S, ‘The reform and renewal of the African regional human and peoples’ rights system’, note 322 above, pp. 181-184.

On the above premise, one would expect the court's Protocol to set out, in no uncertain terms, the relationship between the commission and the court, yet it does not. Instead, as O'Shea correctly noted, the relationship between the two organs is only dealt with in the most general terms.³⁴² For example, while Article 2 provides that the court shall 'complement the protective mandate' of the commission, Article 8 requires the intended Rules of Procedure of the court to indicate when cases should be brought before it, 'bearing in mind the complementarity between the commission and the court.'³⁴³

The Protocol also initiates a relationship between the court and the commission with regard to admissibility proceedings. Article 6(1) intimates that 'the court, when deciding on the admissibility of a case instituted under Article 5(3) of this Protocol, may request the opinion of the commission which shall give it as soon as possible.' Also, Article 6(2) of the Protocol provides that the court shall take the provisions of Article 56 of the African Charter into account when considering the admissibility of all cases. Clearly, all these provisions are not very instructive on the intended relationship between the two institutions. Two approaches are therefore mooted to rationalise these institutions. The first approach contemplates a situation where the protective and promotional functions are vested in the court and the commission, respectively.³⁴⁴ The second one prefers that both institutions are vested with clearly defined protective functions. Additionally, the commission would continue with its promotional functions.³⁴⁵

³⁴² O'Shea A, 'A Critical reflection on the proposed African Court on Human and Peoples' Rights', note 305 above, p. 293.

³⁴³ Art 8 reads: 'The Rules of Procedure of the court shall lay down the detailed conditions under which the court shall consider cases brought before it, bearing in mind the complementarity between the commission and the court.'

³⁴⁴ See Mutua M, 'The African human rights court: A two legged stool?', note 250 above, p. 360.

³⁴⁵ Kaguongo W, 'The questions of *locus standi* and admissibility before the African Court on Human and Peoples' Rights', in Viljoen F, (ed), *The African Human Rights System: Towards the Co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006), p. 84.

The first approach is motivated by a number of factors. First, it is important to have a clear division of labour between the commission and the court. This arrangement will therefore enable them to be more effective in their areas of specialisation and will also enhance cooperation and mutual reinforcement between the two institutions.³⁴⁶ Secondly, it is both time and cost effective. It is questionable whether the allocation of resources to have two separate organs with a judicial mandate is rational, given that the commission is already severely hampered by inadequate resources.³⁴⁷ Instead of the institutions duplicating each others functions, it is expedient that each be vested with distinct roles.

Thirdly, if both the commission and the court are involved in the interpretation of the Charter, but do so separately, then it is possible that the African human rights system may have two separate voices saying two different things.³⁴⁸ In such circumstances, it would be appropriate to allow only the court to conduct judicial functions. Other than that, the court comprises judges who, unlike commissioners, may exude competence in their work. Further, all measures should be taken to ensure that the court operates independently from the commission which has been accused of suffering from severe image problems.³⁴⁹

While the first approach makes sense given the reasons fronted to justify it, it has been argued that the protocol establishing the court contemplates a sharing of the protective mandate between the commission and the court.³⁵⁰ Indeed, Article 2 confirms this position. It states that ‘the court shall, bearing in mind the provisions of this Protocol,

³⁴⁶ See Amnesty International, *Credibility in question: Proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples’ Rights*, AI Index: IOR 63/02/1998.

³⁴⁷ Benedek W, ‘The judiciary and human rights in Africa: The Banjul seminar and the training Workshop for a Core of Human Rights Advocates of November 1989’, (1990) 11 *Human Rights Law Journal*, p. 250.

³⁴⁸ Kaguongo W, ‘The questions of *Locus Standi* and admissibility before the African Court on Human and Peoples’ Rights’, note 345 above, p. 84.

³⁴⁹ See generally, Mutua M, ‘The African human rights court: A two-legged stool?’, note 250 above, pp. 361.

³⁵⁰ Harrington J, ‘The African Court on Human and Peoples’ Rights’, in Evans M & Murray R, *The African Charter on Human and Peoples’ Rights: The system in practice* (2002), p. 332.

complement the protective mandate of the African Commission on Human and Peoples' Rights...' (italics added). It is in line with this position that the second approach, which prefers that the commission performs both protective and promotional functions, is recommended. This is essentially because stripping the commission of its protective mandate and reducing it to a 'human rights promotion body' would not be in line with Article 2 of the Protocol.³⁵¹

Indeed, the commission and court may complement each other in a number of ways. For instance, as Harrington suggested, the two institutions could divide the consideration of communications, with the commission deciding the admissibility as the court determines the merits.³⁵² After all, Article 6(1) of the Protocol gives the court the right to ask for the opinion of the commission on questions of admissibility. Thus, the commission could desist from holding hearings and instead work as a screening body which determines the admissibility of cases for the court.³⁵³ Since the court does not have promotional mandate, the commission could continue with these activities.

Alternatively, the court could leave collection and collation of facts to the commission and restrict itself to the determination of cases chiefly on the basis of the commission's written records. Hearings before the court could thus be restricted to oral arguments by counsel, rather than the examination of witnesses. On the other hand, hearings before the commission could be restricted to the examination of witnesses and evidentiary documents.³⁵⁴ However, a fundamental prerequisite for the adoption of this practice would be for the commission to be divided into sub-commissions as previously proposed in this chapter. This will then resolve the issue on whether the commission and the court should be located in the same place.

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

In the long run, this approach will guarantee the evolution of consistent African human rights jurisprudence as well as improve on the superficial method of dealing with communications traditionally associated with the commission. Suffice it to state that there could be more ways of perfecting the relationship between the commission and the court. However, the most important factor to be considered when selecting the most suitable approach is whether duplicity and overlaps are avoided. The preferred approach should also be cost effective and time saving.

4.3.3.2 Rationalising the African human rights court and the African Court of Justice

This part discusses the possible ways the African human rights court and the ACJ could be rationalised to increase their efficiency and perfect their relationship. Its gist is the argument that Africa does not need more than one regional court; the region should settle for a single (integrated) regional court. It is possible that the agitation for two regional courts in Africa is motivated more by the ongoing events in Europe than by the need to improve on supra-national adjudication. For example, as Udombana observed, like Europe, Africa is intensifying economic and political integration through structural evolution.³⁵⁵

Indeed, a critical evaluation would reveal that institutions such as the AU have been patterned along the lines of their counterparts in Europe, for instance, the European Union (EU). Similarly, Europe has two regional courts—a human rights court and a court of justice, which arrangement seems to have impressed those fronting for the same in Africa. Africa's approach, therefore, seems to hinge on the assumption that if the idea of two courts has succeeded in Europe; it can also succeed in Africa.³⁵⁶ This assumption is nonetheless faulty.

³⁵⁵ Udombana N, 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication?', (2003) 23/3 *Brook Journal of International law*, p. 852.

³⁵⁶ *Ibid*, p. 853.

In the main, the historical experiences of the two continents are fundamentally different. What motivates Africa's current integration endeavours differs from the European motivation. For example, the architects of the European movement sought, by emphasising common traditions and interests, to have the European nations work together rather than just living together or working against one another.³⁵⁷ In contrast, Africa's current movement has more to do with the challenges resulting from globalisation than the euphoria of unity. The socio-economic origin of the AU therefore emanated from the desire of African leaders to meet the present challenges of globalisation and regional integration.³⁵⁸

Thus, it would be pretentious for Africa to expect European model and approaches, which have blindly been transplanted into the region, to flourish.³⁵⁹ It therefore follows, from our discussion on the challenges facing the African human rights system, that at the moment, the region does not need more than one court. In fact, the proliferation of courts and recourse mechanisms in the region may pose further challenges. For example, this study has already elaborated how there is the danger of conflicting interpretations of treaties by the two institutions. The problem could be compounded by the fact that neither court is envisaged to be superior to the other nor can overrule decisions of the other. The resultant confusion would impede, rather than facilitate, the development of human rights jurisprudence in Africa.³⁶⁰ The other challenge is the lack of resources to operate two regional courts. Vast resources are needed to effectively operate the two institutions.³⁶¹ Udombana succinctly captured this phenomenon when he stated as follows:

³⁵⁷ Ibid. See also Kohler C, 'The Court of Justice of the European Communities and the European Court of Human rights' in Igor I, *Supranational and constitutional courts in Europe: Functions and sources* (1992), p. 18.

³⁵⁸ Ibid, p. 849.

³⁵⁹ Ibid.

³⁶⁰ Ibid; Udombana N, 'Can the leopard change its spots? The African Union treaty and human rights', (2002) 17 *American University International Law Review*, p. 1177.

³⁶¹ Udombana N, 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication?', note 355 above, p. 860.

To start with, each of the proposed courts will require a building to house the court rooms, judges' chambers, and the offices for secretariats, including the Registrars. These offices must be equipped with furniture and other necessary supplies. Accommodation for the judges and their support staff will also have to be provided.... Another major resource the courts will require is a library and documentation centre. The library must be stocked with rich legal materials dealing with both African and comparative law. It must also maintain a comprehensive collection of the laws of member states. In addition, there should be facilities for users, such as legal research and photocopy services and separate similar facilities for the judges of the courts. Furthermore, like any modern library, they must be equipped with computers and internet access. Competent librarians will need to be employed. They will also have to be trained in each of the principal legal systems and the courts' languages and regularly exposed to modern information systems.³⁶²

Udombana's analysis identifies just some, not all, of what the two courts will require to function properly. It is not surprising that the AU, perhaps seeing the imminent difficulty of operating two regional courts, resolved to integrate them.³⁶³ However, the failure to reach a consensus on the modalities of the integration made the AU Assembly to permit the operationalisation of the African human rights court.

The operationalisation of the human rights court notwithstanding, the idea of an integrated regional court may be favoured for a number of reasons. First, an integrated court would avoid splitting of resources towards maintaining two courts. Secondly, an integrated court will result in simplicity and is an antidote to the ongoing proliferation of regional institutions.³⁶⁴ Thirdly, an integrated court would give the region an opportunity

³⁶² Ibid, p. 860.

³⁶³ See Decisions of the AU Assembly of Heads of State and Government, Third Summit held in Addis Ababa, Ethiopia, 6-8 July 2004; document Assembly/AU/Dec.45 (III) available www.africa-union.org, last accessed on 16 June 2008.

³⁶⁴ On the likely impact of proliferation of human rights and other institutions in Africa see Baimu, E 'Human rights mechanisms and structures under NEPAD and the African Union: Emerging trends towards proliferation and duplication' *Occasional No 15*, Centre for Human Rights (2002); See also Naldi, G and Magliveras, K 'The African Union: A new dawn for Africa?', (2002) 51 *International and Comparative Law Quarterly*, p. 421.

to underscore the interface between human rights and economic matters.³⁶⁵ Fourthly, an integrated regional court will offer opportunities for developing a unified, integrated, cohesive, and, hopefully, indigenous jurisprudence for Africa.³⁶⁶ Finally, integration of the two courts will synchronise the judicial system in Africa. Both courts operating under one umbrella will have a similar regional focus and will operate under the auspices of a common organisation— the AU. Moreover, they will operate under standards and regulations that are at least compatible if not similar to one another.³⁶⁷

However, integration of the two courts, now that the African human rights court is operational, is going to be much more problematic because they are at different stages of development. According to Kithure:

The question to be grappled with remains: Should the integration of the courts be realised, what will happen to the judges of the African Human Rights Court who may not secure slots in the integrated court? Under such circumstances it is likely that vested interests might make submerging of the African Human Rights Court into the Court of Justice very difficult even though it could be the most pragmatic thing to do. There are bound to be deep-seated vested interests (of judges and others) that may lead to a vehement opposition against any kind of interference with an already functioning human rights court.³⁶⁸

Apart from the different stages of development being a major obstacle to the integration process, the required qualifications and expertise of the judges of the two courts are also different and may be issues of concern.³⁶⁹ For instance, while to be elected to the human rights court an individual is required to have, among other things, recognised practical, judicial or academic competence and experience in the field of human and peoples'

³⁶⁵ Kithure K, 'Overlaps in the African human rights system', note 323 above, p. 138.

³⁶⁶ Udombana N, 'Toward the African Court on Human and Peoples' Rights: Better late than never', (2000) *3 Yale Human Rights and Development Law Journal*, p.102.

³⁶⁷ Kithure K, 'Overlaps in the African human rights system', note 323 above, p. 139.

³⁶⁸ *Ibid*, p. 135.

³⁶⁹ *Ibid*.

rights,³⁷⁰ for the ACJ, the qualifications should be in international law.³⁷¹ Competence and experience in human rights are therefore not a prerequisite for one to be appointed to the ACJ.³⁷²

The issues relating to the differences in jurisdiction and expertise of the judges of the two courts, however, could be resolved. To start with, the Court of Justice, given the nature of its jurisdiction, can resolve human rights disputes. Its core business is the ‘interpretation and application’ of the AU Constitutive Act.³⁷³ It is needless to reemphasise that pursuant to this Act, the objectives³⁷⁴ and the fundamental principles³⁷⁵ of the AU are concerned with various aspects of human rights promotion and protection. Further, it should be noted that since human rights have a nexus with international law, experts in international law will ordinarily have some knowledge of human rights.³⁷⁶ This will then resolve the issue of competence and experience of the judges with regard to resolving human rights cases. Alternatively, in the election of the judges of the merged court, member states could be advised to nominate some candidates with expertise on human rights who, if elected, would deal with cases on this subject.³⁷⁷

When integrating the two courts, the AU may settle for one of two options. The first would be to abandon the respective protocols of the two courts and instead adopt another one to establish an integrated court. Such a protocol may, however, embrace important provisions from both the Protocol establishing the human rights Court and the protocol on the Court of Justice. This arrangement would then necessitate the creation of a ‘Special Chamber’ to specifically deal with the enforcement of the regional human rights

³⁷⁰ Art 11(1) of the Court Protocol.

³⁷¹ Art 4 of the Protocol establishing the Court of Justice.

³⁷² Kithure K, ‘Overlaps in the African human rights system’, note 323 above, p. 136.

³⁷³ See Art 19 of the Constitutive Act of the African Union.

³⁷⁴ See Art 3 paras (g) and (h) of the AU Act.

³⁷⁵ Art 4 paras (h), (m), (n) and (o), AU Act.

³⁷⁶ Kithure K, ‘Overlaps in the African human rights system’, note 323 above, p. 137.

³⁷⁷ *Ibid*, p. 138.

norms.³⁷⁸ Of course, this option has its own disadvantages, the main one being that it would be time-consuming.³⁷⁹ Moreover, its pragmatism is also questionable simply because the Protocol establishing the human rights court is already in force and the human rights court is already setting up its required structures.

This first option was attempted, although not in the manner proposed above. A group of seven experts discussed the issues surrounding the merger and produced a Draft Protocol prior to the AU's Assembly summit of 2005.³⁸⁰ The Draft Protocol envisaged that the African Court would become a 'specialised human and peoples' rights division' of the merged court.³⁸¹ The new merged court would then be composed of fifteen Judges of which at least seven should have 'competence in human and peoples' rights.'³⁸² However, the Permanent Representatives' Committee at its meeting in January 2005 were unhappy with the Draft and agreed that the merger of the two courts should not unduly delay the establishment of the African Court.

The second option would be to maintain the jurisdiction of both courts but amend their Protocols to facilitate their integration and rationalisation.³⁸³ This option would ensure that the initial purposes of establishing the two courts are not compromised whatsoever and that their respective objectives are fulfilled jointly and severally. In this regard, the 'integration' of the two institutions would be based more on 'essence' rather than 'form'. In other words, it is the purposes and objectives of these institutions that would be integrated and nothing else. The courts will then exercise the jurisdiction of both the human rights court or that of the ACJ, depending on the type of dispute before them.

³⁷⁸ Udombana N, 'An African Human Rights Court and an African Union Court...', note 355 above, p. 865.

³⁷⁹ Kithure K, 'Overlaps in the African human rights system', note 323 above, p. 141.

³⁸⁰ Draft Protocol on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union. EX.CL/162 (VI) Annex I.

³⁸¹ *Ibid*, Art. 2(3).

³⁸² *Ibid*, Art. 4.

³⁸³ Kithure K, 'Overlaps in the African human rights system', note 323 above, p. 141.

Matters could also be referred from one court to another whenever the need arises, in order to utilise the competence of both courts to the fullest extent.

While so doing, the African Commission could still play its role, either wholly as a human rights promotional institution, or would scrutinise communications on behalf of the human rights court. From this arrangement, it would be prudent for the commission to defer its protective mandate to the court so as to avoid duplicity and overlaps. With the prevalence of genocide, war crimes and crimes against humanity on the continent, it is appropriate for the intended merged court to consider prosecuting these crimes.³⁸⁴ Suffice it to state that, it is only after the two regional courts and the commission have been streamlined that it would be possible to properly mainstream them within the AU. The current situation is pathetic because the relationships between these institutions are not clearly defined.

4.4 Conclusion

It is obviously not possible to discuss all the challenges to effective regional enforcement of human rights in Africa in a study of this limited magnitude. As stated in the previous chapter, the African human rights system is not static. Rather, it has been evolving from the time of its inception. In such circumstances, it is inevitable to encounter new and unexpected challenges. Besides the normative and institutional challenges discussed above, effective regional enforcement of human rights in Africa is also challenged by a number of other factors, including, but are not limited to: poverty, diseases, internal and international conflicts, terrorism, civil disobedience, foreign interference, poor governance, historical antecedents, cultural and ideological influences, among others. All these combine with the normative and institutional challenges discussed above, thus leading to a complex web of factors inhibiting the effective regional enforcement of human rights on the continent.

³⁸⁴ Ibid, p. 143.

Much as one would want to delve into the details of all the actual or potential challenges, it has only been possible to highlight some of them and leave the rest for further research and investigation. Hence, this chapter cannot claim to have been exhaustive; rather it is a mere pointer to the nature and magnitude of the challenges that have been underscored in the bulk of the literature on the African human rights system. What has been attempted, therefore, is a discussion of the more prominent challenges and the possible ways to reinvigorate or reform the system. Most of the challenges and possible reforms were highlighted in the various literatures on diverse aspects of the African human rights system, which formed the basis of the present study. The literature was reviewed comprehensively in chapter one. We cannot, therefore, claim that the present discussion is exhaustive in as far as the system is still evolving and as much as more is still being researched and published on various aspects of the African human rights system.

Generally, this chapter has attempted to emphasise that the developments registered over the last few decades are a clear indication and a positive sign that the African human rights system is gradually moving towards success. The complete success of the system, however, calls for a close relationship between the AU, AU's institutions with human rights responsibility and the African human rights system. As Baimu suggested, these institutions should complement rather than compete with one another; the relationship between them should be one of collaboration, as distinguished from that of control.³⁸⁵ In the meantime, ways and means will have to be explored on how all the regional institutions with human rights responsibility in Africa can jointly pursue the common goal of a peaceful, stable and developed Africa, in tandem with human rights protection and promotion.³⁸⁶

Further, for the African human rights system to be effective, the criteria to be followed when setting up new structures or mechanisms need to be defined. In this regard, some inquiry should be conducted to ascertain important issues such as: the added value of a

³⁸⁵ See Baimu E, 'Human rights in NEPAD and its implications for the African human rights system', (2002) 2 *African Human Rights Law Journal*, p. 318.

³⁸⁶ Kithure K, 'Overlaps in the African human rights system', note 323 above, p. 141.

proposed structure or mechanism; its legal, financial and administrative implications; and how the proposed structure would interface with the existing structures and mechanisms. No institution should be established prior to such an inquiry.³⁸⁷

It is also important to conduct an ‘impact assessment’ before mechanisms are established. The efficiency of the African human rights system is not on the number of institutions established, but rather on their relevance and impact. In line with the proposed ‘impact assessment’ is the need to conduct an ‘audit’ on the existing mechanisms. Whereas an ‘impact assessment’ should be conducted prior to the establishment of new mechanisms, an ‘audit’ should be done on the already existing ones to gauge their efficacy. It is proposed that the AU should create a special unit that would be involved in both impact assessment and auditing.

While it is appreciated that Annual Activity reports may be useful in gauging the performance of the existing mechanisms, it is important to have an independent body to do so. External evaluation is usually more critical and thorough than an internal one. Thus, a unit vested with monitoring and evaluation functions should be formed, specifically to monitor and evaluate the existing regional human rights mechanisms. The unit would then be in a position to advise on issues such as, the need, or otherwise, to create a new human rights institution, financial matters, mainstreaming and rationalisation of the human rights mechanisms, ways to improve the efficiency of the system, etc.

Ultimately, it may be argued that the future of human rights enforcement in Africa is more in the hands of Africans than it is in the hands of other stakeholders. Although the global community can and should play a role in addressing some of the challenges facing the system, it is up to the people of Africa to chart their own destiny. Hence, to alleviate the challenges, the concerted effort of all role-players, but more particularly member states of the AU, is required. Suffice it to state therefore that the on-going debate on the

³⁸⁷ Baimu E, ‘Human rights in NEPAD and its implications for the African human rights system’, note 385 above, p. 318.

possible ways to invigorate the African human rights system is in itself a milestone contribution towards the efficiency of the system. Certainly, the debate should be encouraged, particularly among African scholars and human rights activists because it is basically a paramount step towards an effective African human rights system.

CHAPTER FIVE

GENERAL CONCLUSION

This study was motivated by the need to investigate the challenges facing regional enforcement of human rights in Africa and to recommend suitable reforms for the African human rights system to make it more effective. A number of issues were discussed, including the historical antecedents, normative, institutional and other aspects of the system, with a view to highlighting the challenges. In the main, the study has shown that Africa is in need of effective human rights mechanisms. Having passed through the eras of slave trade and colonialism and now struggling with post-colonial uncertainties, the continent needs to direct all its resources to the attainment of reasonable standards of human rights, particularly at the regional level.

While it is true that the African human rights system has achieved remarkable progress since its inception, much still remains to be done. The journey towards an effective regional human rights system is far from being completed; the road leading thereto is rather narrow and long, yet the prospects and possibilities of attaining this goal are quite high. In other words, amid the conflicts, uncertainties and confusion associated with the system, there is hope for a brighter and a better future. The alarming scepticism on the future of the regional human rights system may therefore be dismissed as unmeritorious, farce and sham.

As shown in the preceding chapters, the African human rights system has generated unending academic debates, both negative and positive, on its past, present and future. The merits of these debates were extensively discussed throughout this study. For instance, efforts were made to trace the roots of the human rights concept as understood by Africans. It emerged that the concept is neither foreign nor an imposition.¹ Rather, it is

¹ See generally chapter two of the thesis where reference and arguments of the following scholars were analysed in this regard: Busia K, 'The status of human rights in pre-colonial Africa: Implications for contemporary practices', in McCarthy-Arnolds E, et al, *Africa, human rights, and the global system: The*

an outgrowth of the African society, with certain peculiarities and specificities. Sadly, human rights have been violated with impunity over the past centuries, as they still are today. The violations, however gross, have in the past not been unequivocally condemned.² Worst of all, even the former OAU, which was expected to set the trend for human rights promotion and protection on the continent, maintained a passive posture amidst the massive violations that occurred during its subsistence. Commenting on the passiveness of the OAU to human rights violations on the continent, Mangu correctly notes as follows:

The weak status of human and peoples' rights in the OAU Charter had serious implications for their promotion and protection in Africa. The practice of most OAU member states was inimical to the promotion and protection of human rights on the continent. Years of authoritarianism, single party or military rule, rebellions, and armed conflicts transformed Africa into a continent of 'human wrongs' instead of 'human rights'.³

Luckily, the replacement of the OAU with the AU, the emergence of the NEPAD and its APRM, and the establishment of the African Court on Human and Peoples' Rights,

political economy of human rights in a changing world, p. 49; Mangu A, 'The Road to Constitutionalism and Democracy in Post-Colonial Africa: The Case of the Democratic Republic of Congo' (2002), *LLD Thesis University of South Africa*, p. 235-257; Appiagyei-Atua K, 'A rights-centred critique of African philosophy in the context of development', (2005) 5 *African Human Rights Law Journal*, pp. 335-357; Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', (1992) *Journal of Human Rights Law and Practice*, pp. 22-38; Hountondji P, 'The master's voice: The problem of human rights in Africa', in Ricoeur P (ed), *Philosophical foundations of human rights* (1986), p. 319; Anthony E, 'Beyond the paper Tiger: The challenges of a human rights court in Africa', (1997) 32 *Texas International Law Journal*, pp. 519-521; Mutua M, 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law*, p. 339.

² See the argument in Mangu A, 'The Changing human rights landscape in Africa: Organisation of African Unity, African union, New Partnership for Africa's Development and the African Court', (2005) 23/3 *Netherlands Quarterly of Human Rights*, p. 388.

³ *Ibid.*

among other developments, have in a way contributed to changing the human rights landscape in Africa.⁴ With the current progressive status of the regional human rights system, it should be impermissible for gross violations to be committed anywhere on the continent without serious repercussions. Clearly, the continent has been on a journey towards an effective regional human rights system. In the course of the journey, many challenges have been met; some have been surmounted, while others are yet to be overcome.

It is against this background that the present study recommends strategies of strengthening the African human rights system with the hope that the system would eventually salvage the continent from the present state of persistent human rights violations. The study is an added voice to the ongoing reforms debate. It is not a conclusion in itself, but both an addition to, and a summation of, whatever has already been discussed on this subject that is crucial to the future success of the continent. Its findings, recommendations and conclusions are therefore partial because the debate on the reform of the system is not about to end; neither is the system static. It is rather in the process of transformation. Throughout the study, many findings, recommendations and conclusions were made pertaining to various issues. This chapter therefore serves as a summary of those findings, conclusions and recommendations in line with the research questions, aims and hypotheses that defined the parameters of the study. The chapter also recommends some questions for further research and investigation.

5.1 Summary of findings, recommendations and conclusions

This study was premised on the fact that the human rights situation in Africa is exceptionally precarious because many states and their agencies are not committed to their obligations as stipulated in the various international and regional human rights norms.⁵ Generally, the study illuminated the problems as well as the prospects and

⁴ Ibid.

⁵ See Mugwanya G, *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003), p. xv.

opportunities for regional enforcement of international human rights law in Africa. In the main, the study found that, although the regional system is encumbered with numerous challenges, it has also made some positive contributions in the sphere of international human rights law in its relatively short period of existence.⁶ If relevant reforms are made, the prospects are good for the African human rights system to become more effective.⁷

While the above observations summarise the main findings of this study, it is important to note that every chapter embodies some specific findings and conclusions that are relevant to the overarching objectives and subject matter of this research. In summary, chapter one laid the foundation for the entire study. It introduced the subject matter and research problem, and set out the aims and scope of the study. It also discussed the research methodology, conducted a review of the literature on the subject matter of the study and formulated a number of research questions and hypotheses.

Chapter two discussed the historical and philosophical background to human rights in Africa. It examined the history, development and evolution of the concept on the continent from antiquity to the contemporary period by traversing through three epochs—pre-colonial, colonial and post-colonial. The chapter reinforced the arguments and counter-arguments on the place of human rights in Africa. Consequently, it provided answers to a number of questions relating to, among other things: the definition of human rights; whether human rights are merely Western or they have a bearing in the African context; the philosophical and conceptual origins of human rights law in Africa; and how

⁶ Ibid.

⁷ See generally Steiner H & Alston P, *International human rights in context: Law, politics and morals* (1996), p. 689; Mutua M, 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' note 1 above, p. 339; Oloka-Onyango J, 'Beyond the rhetoric: Reinvigorating the struggle for social and economic rights in Africa', (1995) 26 *California Western International Law Journal*, p. 1; Amoah P, 'The African Charter on Human and Peoples' Rights: An effective weapon for human rights?', (1992) 4 *African Journal of International and Comparative Law*, p. 226; Welch C, 'The African Commission on Human and Peoples' Rights: A five-year report and assessment', (1992) 14 *Human Rights Quarterly*, p. 43.

the concept evolved in Africa to attain its present regional status, as well as the origin and the development of the African human rights system.

Chapter three reviewed the normative and institutional mechanisms of the African human rights system. Its focus was on the main human rights treaty in the region, namely the African Charter on Human and Peoples' Rights, and on its enforcement institutions, the African Commission and Court on Human and Peoples' Rights. The chapter analysed, *inter alia*, the extent to which the mechanisms of the African system are effective. It found that states have failed to live up to the promise of human rights protection in spite of the proliferation of human rights treaties and institutions on the continent. Many shortcomings were identified with regard to the African Charter's provisions, the African Commission's practice and the Protocol establishing the human rights court. Chapter four highlighted the challenges and strategies to invigorate the African human rights system. The system has rightly been criticised as being ineffective thus raising more questions than answers on its potential to improve the continent's poor human rights record.⁸

Contrary to the fears of many writers, however, the uniqueness of some of the normative and institutional mechanisms of the African human rights system in no way detracts from its viability as an effective system. For instance, the African Charter, which is the main normative instrument of the system, is a relatively balanced instrument, despite its profusion of concepts.⁹ While this is true, it is also difficult to deny that 'the density and originality of this document very often goes hand in hand with an equally remarkable technical poverty.'¹⁰ As already shown in the preceding chapters, the so-called 'technical poverty' of the Charter is displayed by, among other things, the imprecise formulation of some of the rights, the indiscriminate use of claw-back clauses, the lack of definition of concepts such as 'people' and the conspicuous absence of a derogation clause. Despite

⁸ Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', (2001) 1 *African Human Rights Law Journal*, p. 1.

⁹ Onguergouz F, 'The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa' (2003), p. 784.

¹⁰ *Ibid.*

these weaknesses, it should be appreciated that the Charter was birthed in very difficult circumstances and as such it represents the best that could possibly be achieved at that time. According to ‘the father of the Charter’, Keba M’baye:

The Charter constitutes the actual result which could be attained at the time of its adoption, bearing in mind the great disparity characterising the political and economic situation of Africa. Powerful internal currents simmered away beneath the surface and the Charter bears the stigma of these Animist, Islamic, traditional and Christian currents, to name only some of them. The Charter gathered all these seeds to its breast and created a product which is a result of their cross-fertilisation.¹¹

It is needless to re-state, in crafting the present instrument, the drafters of the Charter had to surmount difficulties and complexities, including the dilemma of reconciling the universality and cultural relativism doctrines. Now that the document has been adopted, it is incumbent upon all stake-holders and role-players to implement it to the fullest possible extent. The Charter can certainly be improved upon as it undeniably possesses the crucial tenets of a legal instrument that is capable of protecting human rights.¹² This, however, requires innovation, especially with regard to the interpretation and implementation of its inadequate or ‘flawed’ provisions. By interpreting some of the Charter’s provisions as broadly as it could, the African Commission has already begun this trend. This is expected because, as already stated elsewhere above, Articles 60 and 61 encourage the commission to interpret the Charter in the light of general international law.

Although marked by a slow start characterised by some form of ‘judicial conservatism’, the commission has now gathered the momentum to evolve a robust body of ‘case-law’ on the basis of the provisions of the Charter. This is indeed commendable given the loose nature of the Charter’s provisions and the social, economic, political, cultural and legal

¹¹ M’Baye K, *Les droits de l’homme en Afrique* (1992), p. 267.

¹² Onguergouz F, ‘The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa’, note 9 above, p. 797.

diversities on the continent. As indicated in the previous chapters, the commission is lately determined to interpret the provisions of the Charter more liberally in order to specify and give effect to the basic rights contained therein. While this is happening, states parties to the Charter need also to be actively involved in the quest for a workable Charter and a viable regional human rights system, generally. This could be through the promulgation of additional protocols or amending the Charter in line with its Articles 66 and 68.

Indeed, the adoption of the Protocol establishing the African Court on Human and Peoples' Rights is a living proof that the Charter was not intended to be a static instrument.¹³ The establishment of the court is itself 'a useful addition to the mechanism for monitoring the rights guaranteed by the African Charter; it is all the more useful because the court has been given relatively broad powers.'¹⁴ Hopefully, the two regional human rights enforcement institutions on the continent— the commission and court— will be given the necessary support, including the material means, to effectively perform their tasks. At the moment, these institutions are challenged by, among other things, the general lack of political will power from states parties and inadequacy of material means that are necessary to ensure their efficiency.

In a nutshell, many of the findings of this study strongly indicate that the journey towards an effective regional human rights system is still far from being concluded. The strengthening of the system can only be the product of a collective effort, requiring the synergy of many actors. There is therefore the need for Africans and their governments, in concert with human rights organisations within and outside the continent to work together to create conditions for development, equity, democracy and freedom on the continent.¹⁵ When these are attained, motivations for human rights violations, instability and rebellion would be drastically reduced and the enforcement of human rights law

¹³ Ibid, p. 791.

¹⁴ Ibid, p. 792.

¹⁵ Alemika E, 'Protection and realisation of human rights in Africa', in Kalu A & Osinbajo Y, *Perspectives on human rights* (1992), p 168.

would more likely become a reality. As the study confirmed, the regional platform is likely to become the most appropriate arena for human rights enforcement.¹⁶ However, the African human rights system has suffered great opposition and challenges, rendering it the least performer of the existing regional human rights systems. These challenges, which were comprehensively discussed in the course of the study, take various forms and stem from different quarters.¹⁷

The study would therefore agree with Odinkalu's view that the effective protection of human rights in post-colonial Africa necessitated a re-orientation of states away from the institutional infrastructure and attitudinal orientation inherited from the colonial period.¹⁸ Unfortunately, this process was never undertaken let alone achieved. In fact, most of the laws, institutions and attitudes that underwrote the violations of human rights during colonialism did not just survive independence, they prospered thereafter.¹⁹ Oloka-Onyango notes that:

Nearly half a century after most countries on the continent attained independence, so many of them continue to utilise colonial laws governing political association, public health, education and free expression. The consequence is that their very claim to have

¹⁶ See in this regard, Benedek W & Heinz (eds.), *Regional systems of human rights protection in Africa, America and Europe: Third Afro-Americo-European Conference, Strasbourg, June 1992* (1992); Nowak M, *Introduction to the international human rights regime* (2003), p. 26; Wachira G, 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively meet the needs of the African population', in Viljoen F, (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006), p. 16.

¹⁷ Murray R, 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems', note 8 above, p. 1; Heyns C, 'The African regional human rights system: In need of reform?', (2001) 2 *African Human Rights Law Journal*, p. 158.

¹⁸ Odinkalu C, 'Back to the future: The imperative of prioritising for the protection of human rights in Africa', (2003) *Journal of African Law*, p. 2.

¹⁹ *Ibid.*

made a difference in the human rights reality of the people they govern is effectively negated.²⁰

It is not surprising that early insecurities about the precariousness of their newly won independence led Africa's post-colonial leadership to evolve a rather extreme assertion of sovereignty and domestic jurisdiction that kept human rights outside the political and diplomatic priorities of the continent until the very end of the 20th century.²¹ Hence, Article III (2) of the OAU Charter proclaimed 'non-interference in the internal affairs of states' as one of the basic principles of the OAU. Another principle required 'respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.'²² Thus, as elucidated in chapter two of this thesis, the focus today on human rights in Africa is against the background of a long history of pre-colonial, colonial and post-colonial influences. This partly explains why, more than twenty years after the entry into force of the African Charter, the reality is far from the ideal foreseen by those African jurists who drafted it.²³ The drafters hoped that the Charter would bring to a halt the impunity in most states. However, this ideal is yet to be realised, for it is difficult to imagine how a state that is not committed to the promotion and protection of human rights at the national level would be devoted to do the same at the international level.

On a more positive note, however, this study confirmed that the African human rights system is capable of being reformed, notwithstanding the many challenges and setbacks facing it. Suitable reforms to the African system will go a long way to improve the

²⁰ Oloka-onyango J, 'Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizons?' (2000) *Human Development Report 2000 Background Paper*, p. 4, available at <http://www.undp.org/hdro/Oloka-Onyango2000.html>.

²¹ Odinkalu C, 'Back to the future: The imperative of prioritising for the protection of human rights in Africa', note 18 above, p. 2.

²² Art III (3), Charter of the OAU, 479 UNTS 39.

²³ See Gutto S, 'The compliance to regional and international agreements and standards by African governments with particular reference to the rule of law and human and peoples' rights', note 1 above, p. 94.

enforcement of human rights law in the region. Such reforms may be normative, institutional, procedural, jurisdictional, political, and financial, among others. In this regard, one of the study's main findings was to the effect that, for the system to operate effectively, institutional mainstreaming and rationalisation are necessary. Currently, there are a number of institutions and initiatives (or programmes) on the continent with the mandate to promote and protect human rights. As a result, the institutions either overlap or duplicate each others' efforts. While it is encouraging to note that the African system is registering a positive impact, the study insists that proliferation of these enforcement mechanisms should not be encouraged. This is because, the existing and emerging institutions tend to overlap and duplicate the functions which could otherwise be performed by fewer and better resourced institutions.²⁴

One of the most pertinent conclusions of the study is to the effect that the future of human rights enforcement in Africa is more in our hands (Africans) than it is in the hands of other stakeholders. Although the international community can, and should be invited to play some role in addressing some of the challenges facing the system, it is up to us to champion the destiny of our continent. The study has also shown that the achievements that have been made over the last few decades are a clear indication that the African human rights system is capable of success. Once again, it is inevitable to note that the regional human rights system has made remarkable progress in the promotion and protection of human and peoples' rights since its inception. Unfortunately, the steps taken have been small and somewhat slower in practice than they are in theory. The system is rather littered with a large number of human rights conventions, declarations and statements that remain dead letters.²⁵ This trend needs to be reversed if the regional mechanisms are to produce any meaningful results.

²⁴ See generally, Kithure K, 'Overlaps in the African human rights system', in Viljoen F, (ed), *The African human rights system: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*, note 16 above, pp. 144 -145.

²⁵ Ibid, p. 144.

5.2 Questions and recommendations for further research and investigation

The study has been an attempt to answer a number of questions that were raised in chapter one. In spite of such attempts, however, a number of other questions could still be raised in line with the subject matter and objectives of this study. This, therefore, calls for further research and scientific investigation in this area of study. The first question that requires further investigation concerns the status of human rights enforcement in Africa in the twenty-first century. This area is broader than has been addressed in this study. Many things have transpired since we began to compile this piece of work. Since the transformation of the African human rights system is a process, it is imperative that research should be conducted as often as is practicably possible to gauge its performance. Further research on the progress and status of regional enforcement of human rights in Africa should be keen to address issues such as: whether there are any new regional human rights enforcement mechanisms; to what extent the mechanisms are effective; and whether the existing normative and institutional mechanisms for regional enforcement of human rights are registering any positive improvement.

Another question that needs to be investigated further relates to ways of improving the efficiency of the African Court and Commission on Human and Peoples' Rights. Many proposals and recommendations have been made on the possible reforms to these institutions. However, it cannot be said that what is entailed in this study and elsewhere is final and perfect. Sustained scholarly debate and research is required. Whilst a reasonably large body of literature exists on the court and commission, there is still room to research further especially on the issue of reforming these institutions. Questions such as how the proliferation of institutions with human rights responsibility should be handled call for extensive research beyond what has been done here.

The role and potential of other regional human rights systems in influencing the effectiveness of the African human rights system also requires further research. The African system is the youngest of the three systems and the least developed. The African

Commission has also begun the trend of drawing inspiration from the European and Inter-American systems and will most likely continue to do so. While this should be encouraged, it is crucial to establish the pros and cons of such an approach. Similarly, the role and place of the civil society in ensuring the effectiveness of the system should also be underscored. As already stated elsewhere in this study, the African Commission has developed an important relationship with NGOs which needs to be encouraged and strengthened. The role of these organisations in facilitating the effectiveness of the regional human rights system therefore needs to be defined through a thorough research.

With regard to human rights education, it has already been said that Article 25 of the Charter provides the normative basis for the development and implementation of effective human rights education programmes in the region. Further research is therefore needed to look into how the commission could establish a meaningful regional system for human rights education through, for example, its partnership and co-operation with NGOs. Research is also required to assess and analyse the implementation by states of their human rights education obligation under Article 25 of the Charter. Further research would be essential in ensuring the collaboration between governments, NGOs, individuals and the African Commission in pursuing joint human rights education programmes.

The role of individual African states in ensuring the effectiveness of the regional human rights system also needs to be researched at length. Further research is needed on how the state may be streamlined and managed to promote and sustain the values propagated by the African human rights system. It may take an extensive study to find out, for example, why African leaders and governments have not lived up to the promise of human rights protection in spite of the proliferation of human rights legislations, policies and institutions on the continent. It may also necessitate a comprehensive study to underscore the relationship between democratic and other forms of good governance and the promotion and protection of human rights in Africa. Additionally, the role played by the global community in the context of globalisation of laws and politics should be on the spotlight as it is central to the realisation of effective regional human rights protection.

The challenges to effective enforcement of human rights at the regional level in Africa that were articulated in the present study were also not exhaustive. It is obviously impossible to discuss all the challenges in a study of this magnitude owing to its limited scope. Much as we wanted to delve into the details of each actual or potential challenge, it was only possible to highlight some of them and leave the rest for further research and investigation. Hence, the study cannot claim to have been exhaustive; rather it is a mere pointer to the nature and magnitude of the challenges and an added voice to the reforms debate.

From the foregoing, it is noteworthy that the study on the challenges to effective regional enforcement of human rights in Africa is far from being complete. As already shown, Africa is a continent besieged with many challenges; some being self-imposed, others as a result of external influences. This notwithstanding, there has been positive progress in regional enforcement of human rights in Africa. Indeed, things do change! It is against this backdrop that the present study has established that the future of human rights in Africa is, after all, not bleak as it may have been purported to be. What remains is the concerted effort of all the role-players, with the African states and peoples being in the lead, towards an effective regional human rights system. If it is to be, it is up to us!

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