

**HUMAN RIGHTS PROTECTION  
INSTITUTIONS; A COMPARATIVE ANALYSIS  
OF THE COMPLAINTS PROCEDURES IN  
AFRICA, EUROPE AND INTER-AMERICA**

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# Abstract

This research will provide general information in relation to the regional human rights protection institution. The research will look into the three Human Rights System, which are the African, The European and the Inter-American.

The research will give insight into the African human rights protection institution, stressing on the specificity of the African model due to the tradition, norms and cultures of the African people. The research will then try to answer the question what to do to strengthen the efficiency of the African model.

The research will go into depth into the complaints procedures under the three systems and will try to see how best to improve the African system of complaints procedure in order to react more effectively to the human rights situation in the African continent/region. All through the research a comparative methodology will be adopted.

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## INTRODUCTIONS

The Concept of human rights has come to hold the notion that “all men are created equal”<sup>1</sup> and this has developed within the international community to being the basic principle of Human Rights.<sup>2</sup> Arat has defined human rights as “the rights of people have recognised in all communities, albeit under different names (often as obligations and duties), and considered as essential to maintain social life and order”.<sup>3</sup> After the activities that occurred during the Second World War and which were of grave human rights violation the United Nations adopted the Universal Declaration of Human Rights<sup>4</sup> on 10<sup>th</sup> December 1948.<sup>5</sup> Protection of Human Rights under the various international human rights instruments was greatly influenced by the need for protection against any other violence after the Second World War.<sup>6</sup> The victorious powers and the other nations that were against any other violence adopted the Universal Declaration of Human Rights<sup>7</sup> and which was later followed by the

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<sup>1</sup> United States Declaration of Independence at Paragraph 2 (U.S 1776)

<sup>2</sup> Timothy Garvey, “God V. Gays? The Rights of Sexual Minorities in International Law as Seen Through the Doomed Existence of the Brazilian Resolution” *Denver Journal of International Law and Policy*, Vol. 30, p 659-685 at 659

<sup>3</sup> Zehar F. Arat, “Human Rights and Democracy: Expanding or Contracting?”, *Polity*, Vol. 32, No. 1 (Autumn, 1999), pp. 119-114, at p. 121

<sup>4</sup> Which was adopted on December 10, 1948 by the General Assembly of the United Nations and proclaimed as the Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr/>

<sup>5</sup> Timothy Garvey, “God V. Gays? The Rights of Sexual Minorities in International Law as Seen Through the Doomed Existence of the Brazilian Resolution” *Denver Journal of International Law and Policy*, Vol. 30, p 659-685 at 659

<sup>6</sup> Murray Rachel, “The African Commission on Human and Peoples’ Rights and International Law” (Hart Publishers; Oxford, 2000) at p. 9

<sup>7</sup> available at <http://www.un.org/en/documents/udhr/>

International Covenant on Civil and Political Rights (ICCPR)<sup>8</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>9</sup> (ICESR).<sup>10</sup>

In the most general term human rights are understood as rights which belong to all person by virtue of being humans and they are not given to us but belong to human, “whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status”<sup>11</sup>. It therefore means that human rights are for all persons and should not be denied to anyone on any grounds, as “we are all equal”.<sup>12</sup> “These rights are all interrelated, interdependent and indivisible.”<sup>13</sup>

The idea or the concept of human rights has come to gain a usage that denotes that rights are universal to all human beings.<sup>14</sup> The universality of concept of human rights was first codified or put in a document in the United Nations Charter<sup>15</sup> and later the Universal Declaration on Human Rights.<sup>16</sup>

While the first early steps for protection of human rights were taken through coming up with the United Nations Charter and the Universal Declaration for Human Rights, this had no binding effect and the United Nation General Assembly later come up with the International

<sup>8</sup> Adopted on 16<sup>th</sup> December 1966 and entered into force on 23<sup>rd</sup> March 1976

<sup>9</sup> Adopted on 16<sup>th</sup> December 1966 and entered into force on 3<sup>rd</sup> January 1976

<sup>10</sup> Murray Rachel, “The African Commission on Human and Peoples’ Rights and International Law” (Hart Publishers; Oxford, 2000) at p. 9

<sup>11</sup> United Nations Human Rights, Office of the High Commissioner for Human rights, available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

<sup>12</sup> United Nations Human Rights, Office of the High Commissioner for Human rights, available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

<sup>13</sup> United Nations Human Rights, Office of the High Commissioner for Human rights, available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

<sup>14</sup> Zehra F. Arat, “Human Rights and Democracy: Expanding or Contracting?” Polity, Vol. 32, No. 1 (Autumn, 1999), pp. 119-144, at p. 121

<sup>15</sup> The Charter of the United Nations was signed on 26 June 1945, available at <http://www.un.org/en/documents/charter/>

<sup>16</sup> Which was adopted on December 10, 1948 by the General Assembly of the United Nations

Covenant on Civil and Political Rights<sup>17</sup> and the International Covenant on Economic, Social and Cultural rights<sup>18</sup>. The former provides for Civil and political rights while the later provides for economic, social and cultural rights. These two covenants together with their optional protocols and the Universal Declaration of Human Rights provide what is the international bill of rights.<sup>19</sup>

While there was some effort at the International level to protect and promote human rights, there were also efforts at the regional level to establish mechanisms for promotion and protection of human rights.<sup>20</sup> In Europe the European Convention on Human Rights (ECHR)<sup>21</sup> had been adopted by the European Countries. Whereas the Organization of American States on their hand had the American Declaration on the Human Rights and duties of Man.<sup>22</sup>

The African Continent/Region followed the other two regions much later with the establishment of a regional mechanism for the protection and promotion of human rights at the regional level.<sup>23</sup> The Organization of the African Unity adopted the African Charter on Human and Peoples' Rights.<sup>24</sup>

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<sup>17</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, in accordance with Article 49

<sup>18</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, in accordance with article 27

<sup>19</sup> available at <http://www2.ohchr.org/english/law/>

<sup>20</sup> Murray Rachel, "The African Commission on Human and Peoples' Rights and International Law" (Hart Publishers; Oxford, 2000) at p. 9

<sup>21</sup> Signed on 4<sup>th</sup> November 1950 and entered into force on 3<sup>rd</sup> September 1953

<sup>22</sup> Signed on 2<sup>nd</sup> May 1948, which transpired to a legally binding instrument, the American Convention on Human Rights (ACHR) signed on 22<sup>nd</sup> November 1969 and entered into force on 18<sup>th</sup> July 1978

<sup>23</sup> Murray Rachel, "The African Commission on Human and Peoples' Rights and International Law" (Hart Publishers; Oxford, 2000) at p. 9

<sup>24</sup> Adopted in 1981 and came into force in 1986

Having of the regional systems for the protection of human rights brought some questions and more particularly to the United Nations on the understanding of this regional bodies on the issue of “universality”.<sup>25</sup> There was also the question of the regions to be able to understand “their own human rights systems”.<sup>26</sup> However currently the international community has come to believe and not have doubt in the regional systems.<sup>27</sup>

The regional mechanism brought with them different methods and ways in which to protect and promote the human rights of individuals within their jurisdiction and this included the inter-state communications, individual complaints and state reporting systems<sup>28</sup>.

The concept of the universality of human rights provides that rights belong to everyone naturally and are therefore uniform to all everywhere.<sup>29</sup> People and countries from similar area or regions tend to have common aspects and have “shared interest in the protection of human interests”<sup>30</sup> further they shape the attitudes of their neighbours which the international community may not be in a position to do.<sup>31</sup>

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<sup>25</sup> Christof Heyns, David Padilla and Leo Zwaak, “A Schematic Comparison of Regional Human Rights Systems: An Update” *International Journal on Human rights*, Number 4 (2006), p 163-171, at 163

<sup>26</sup> Christof Heyns, David Padilla and Leo Zwaak, “A Schematic Comparison of Regional Human Rights Systems: An Update” *International Journal on Human rights*, Number 4 (2006), p 163-171, at 16

<sup>27</sup> Christof Heyns, David Padilla and Leo Zwaak, “A Schematic Comparison of Regional Human Rights Systems: An Update” *International Journal on Human rights*, Number 4 (2006), p 163-171, at 163

<sup>28</sup> Murray Rachel, “The African Commission on Human and Peoples’ Rights and International Law” (Hart Publishers; Oxford, 2000) at p. 9

<sup>29</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 155

<sup>30</sup> Christof Heyns, David Padilla and Leo Zwaak, “A Schematic Comparison of Regional Human Rights Systems: An Update” *International Journal on Human rights*, Number 4 (2006), p 163-171, at 163

<sup>31</sup> Christof Heyns, David Padilla and Leo Zwaak, “A Schematic Comparison of Regional Human Rights Systems: An Update” *International Journal on Human rights*, Number 4 (2006), p 163-171, at 163



Norms and specific specificities are more easily adopted and created within the regional systems of protection of human rights.<sup>32</sup> The specificities and norms that emanates from the regional provides for the a mechanisms of enforcement that can be more widely and easily accepted than one which will be enforced by a international body.<sup>33</sup> Further the regional bodies are more flexible, adoptive and some ways of enforcement might go well in other regions while it might not be the case in other regions as it is the case in international systems where it applies the same mechanism irrespective of the region.<sup>34</sup> However the norms developed within the regional systems bodies may to some extent go against the principle of universality.<sup>35</sup>

The regions systems of protection of human rights are established instruments/treaties and which provide for rights therein.<sup>36</sup> The instruments further go ahead to provide for systems to check or monitor that the rights are respected.<sup>37</sup> Under the European Convention of Human Rights<sup>38</sup> provides for the European Court of Human Rights<sup>39</sup>, initially the European system had the Commission and the Court but the commission was abolished by Protocol 11 of

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<sup>32</sup> Christof Heyns, David Padilla and Leo Zwaak, "A Schematic Comparison of Regional Human Rights Systems: An Update" *International Journal on Human rights*, Number 4 (2006), p 163-171, at p 163

<sup>33</sup> Christof Heyns, David Padilla and Leo Zwaak, "A Schematic Comparison of Regional Human Rights Systems: An Update" *International Journal on Human rights*, Number 4 (2006), p 163-171, at p 164

<sup>34</sup> Christof Heyns, David Padilla and Leo Zwaak, "A Schematic Comparison of Regional Human Rights Systems: An Update" *International Journal on Human rights*, Number 4 (2006), p 163-171, at p 164

<sup>35</sup> Christof Heyns, David Padilla and Leo Zwaak, "A Schematic Comparison of Regional Human Rights Systems: An Update" *International Journal on Human rights*, Number 4 (2006), p 163-171, at p163-164

<sup>36</sup> Christof Heyns, David Padilla and Leo Zwaak, "A Schematic Comparison of Regional Human Rights Systems: An Update" *International Journal on Human rights*, Number 4 (2006), p 163-171, at p 164

<sup>37</sup> Christof Heyns, David Padilla and Leo Zwaak, "A Schematic Comparison of Regional Human Rights Systems: An Update" *International Journal on Human rights*, Number 4 (2006), p 163-171, at p 164

<sup>38</sup> Signed on 4<sup>th</sup> November 1950 and entered into force on 3<sup>rd</sup> September 1953

<sup>39</sup> Article 19 of the European Convention of Human Rights

which 1<sup>st</sup> November 1998.<sup>40</sup> The American Convention on Human Rights<sup>41</sup> has both the Commission and the Court.<sup>42</sup> The African Charter on Human and Peoples' Rights initially provided for the Commission<sup>43</sup> only, later the 1998 Protocol<sup>44</sup> provided for a Court.

This research will aim to stress the specificity of the African model of the protection of human rights based on the traditions, culture and history. The research would then try to answer the question of how to strengthen its efficiency using a pattern of comparison.

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<sup>40</sup> C. Ovey and R. White, "Jacobs & White. The European Convention on Human Rights" Oxford University Press; Oxford (2006), at p 10

<sup>41</sup> signed on 22<sup>nd</sup> November 1969 and entered into force on 18<sup>th</sup> July 1978

<sup>42</sup> Article 33 of the American Convention on Human Rights

<sup>43</sup> Article 30 of the African Charter on Human and Peoples' Rights

<sup>44</sup> Adopted in Ouagadougou, Burkina Faso on 9<sup>th</sup> June 1998

# CHAPTER ONE

## *1.1 African Concept of Human Rights*

### **Specificity of African System**

The African communities unlike other cultures and norms do not isolate the individual from the rest of the community.<sup>45</sup> This aspect of the African communities is a challenge and continues to be a challenge more so with the establishment of the regional African mechanism of the protection of human rights that should be based on the African norms.<sup>46</sup>

As earlier noted the one of the basic principle of human rights is that of universality, where rights are human rights are based on the common nature of all individual. Taking this assumption within the African context brings about issues on what is different when it comes to the concept of human rights within the African norms.<sup>47</sup>

Under the western or the European context of human rights is that there is the

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<sup>45</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 155

<sup>46</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 155

<sup>47</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 155

individualisation of human rights unlike the African there is the community nature.<sup>48</sup> The human worth in regard to the European is taken at the individual level while in the African we take the community first before the individual.<sup>49</sup> The concept of human rights is one that also existed within the African communities and Africans had within their “famil[ies], clan, an ethnic solidarity, in short the web of kinship, provide the frameworks within which individuals exercised their economic, political, social liberties and duties.”<sup>50</sup> Therefore the African had a way of protecting abuse and violation of the human rights way before the European coming to Africa.<sup>51</sup>

The individual in the African context is viewed in regards to the “communitarian value of the individual”.<sup>52</sup> This is further seen by the “individual’s participation in the life of the community”.<sup>53</sup> This idea brings about the fact that the individual belongs more to the community and not the other way round and his “responsibilities and rights are acknowledged, but they are dominated by the community idea”.<sup>54</sup>

That being the case this does not therefore mean that “even if Africans are far more group than individualistically oriented, the conclusion that human rights are therefore irrelevant to

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<sup>48</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 156

<sup>49</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 156

<sup>50</sup> C.E. Welch, “Human Rights as a Problem in Contemporary African” in Human Rights and Development in Africa, New York, 1984, 11-31, p. 11

<sup>51</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 156

<sup>52</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 156

<sup>53</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 156-157

<sup>54</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p. 157, see also C.Nyamiti, “The Incarnation Viewed from the African Understanding of Person”, in CHIEA, African Christian Studies, Vol. 6 no. 1 (March 1990) 3-27, p. 9

African societies does not follow”.<sup>55</sup> According to Howard “the prim[ary] purpose of human rights everywhere is to protect the citizens against the state, as against the state, as the individual’s interest are always at risk of being undermined by political authority”.<sup>56</sup>

“The African Concept of human rights is viewed to be based on the concept of human dignity”<sup>57</sup>. This concept can be very hard to define, “however it can be understood as the inner nature and worth of a human person”.<sup>58</sup> When it comes to enforce claims of human rights this will not only involve “individual claims” but also “physical and psychic security of group memberships”<sup>59</sup> According to Brems that this has led to the “urge for human rights, born from the experience of their denial, which in the west [European] is focused on the individual dignity, [while] in Africa automatically has a strong collective aspect”.<sup>60</sup>

Having this in mind it is worth to note and consider that there has been change in attitudes and that “some of the elements of social obligation practised in the last century are no longer apparent, but the values, wisdoms, which inspired them are often maintained with deep respect”.<sup>61</sup> Therefore is imperative that a model that is responsive to the African communitarianism aspect be adopted and we should not follow the form of the global or

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<sup>55</sup> R.E. Howard, “Group versus Individual Identity in the African Debate on Human Rights,” pp. 159-183, p. 160

<sup>56</sup> R.E. Howard, Communitarianism and Liberalism in the Debate on Human Rights in Africa,” in the Journal of Contemporary African Studies, 4 (1992) 1-21, p. 2

<sup>57</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 159

<sup>58</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 159

<sup>59</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 159

<sup>60</sup> A. Brems, Human Rights: Universality and Diversity, (unpublished Doctor in De Rechten, Faculteit Rechtsgeleerdheid, K.U. Leuven) Leuven, 1999

<sup>61</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 159

international learning of human rights, but learn from it in order to develop one that fits our own aspects and norms.<sup>62</sup>

## ***1.2 The African Charter of Human and Peoples' Rights***

The Organization of the African Unity adopted the African Charter on Human and Peoples' Rights on 27<sup>th</sup> June 1981 and it was enforced on 21<sup>st</sup> October 1986. The Charter was a way of providing for a mechanism for the protection of human and peoples' rights with the context of the African region which was missing while the other regions (Europe and Inter-America) had their own mechanism for protection of human rights.<sup>63</sup>

The Charter is based on certain principles and “the foundational principle is the balance between tradition and modernity: not only between African tradition and the modernity of international law, but also between African modernity and the tradition of international law”<sup>64</sup>. “The Charter further aims at bringing together the African values with the international norms, proclaims collective rights and individual duties, guarantees the rights of the people to self-determination and to full sovereignty over their natural resources and calls for the duty of the individual towards their family, community and state”.<sup>65</sup> The African Charter on Human Rights is seen as a “unique treaty” in comparison with the other human

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<sup>62</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 159

<sup>63</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 160

<sup>64</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 161, see also L.S. Senghor, “Address delivered by H.E. Mr. Leopold Sedar Senghor, President of the Republic of Senegal” in P. Kunig, W. Benedek & C.R. Mahalu, Regional Protection of Human Rights by International Law: Emerging African Systems, Baden-Baden, 1985, p. 122-123

<sup>65</sup> Richard N. Rwiza, “Ethics of Human Rights: African Perspective”, Catholic University of Eastern Africa Press; Nairobi (2010), at p 160

rights treaties that are in existence since it provides for the “‘African’ concept of human rights”.<sup>66</sup> The idea was all about coming up with a system that reflects the “African philosophy and responsive to African needs”.<sup>67</sup> The different aspect in the African Charter can be shown “by the inclusion of civil and political rights, economic, social and cultural rights and peoples’ rights in one document treating them as indivisible”.<sup>68</sup>

### ***1.3 Complaints Procedures***

I will now consider the complaints procedures, that is the individual communications, state to state complaints and the state reporting system provided under the African Charter as an effective measure for the protection of human rights and this will be discussed with the comparison of the other regional human rights institutions.

The ability for an individual or a corporation or a state or any other party to be able to complain about the violation of human rights in an international or regional human rights enforcement body brings to reality the meaning of human rights contained in the various human rights treaties or instruments. The complaints procedures that are recognized by the

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<sup>66</sup> O. Gye-wado, “Comparative Analysis of the Institutional Framework for the Enforcement of Human Rights in Africa and Western Europe” 2(2) AJICL (1990), 187-200 at p. 191

<sup>67</sup> R. Gittleman, “The African Charter on Human and Peoples’ Rights: A Legal Analysis” 22 Virginia Journal of International Law (1981-2) 667-714, at 668

<sup>68</sup> Murray Rachel, “The African Commission on Human and Peoples’ Rights and International Law” (Hart Publishers; Oxford, 2000) at p. 11

majority of the human treaties are individual communications, state to state complaints and state reporting system.<sup>69</sup>

### 1.31 Reporting System

According to Quashigah, the international community expects states to give the progress of human rights protection in their territory and this should be done by the states through reporting system.<sup>70</sup> Other writers also support the importance of state reporting and the obligation that is placed on the state. Coliver and Miller sees this obligation not only towards the citizens of the state but also towards the international community as well and it is a way of showing that the state is taking all actions and its responsibility to secure protection and promotion of human rights.<sup>71</sup> The reporting system is way of showing what steps the state is taking and brings about transparency in the sense that the state can be challenge by other state or even non-governmental organizations operating in the state. The obligation of the state is not only required nationally but also internationally and this should also be an ongoing process to keep the international community assured that the state respects human rights of its

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<sup>69</sup> Dr. Rachel Murray, "The African Commission on Human and Peoples' Rights and International Law" (Hart Publishers; Oxford, 2000) at p. 9; Communication procedure are provided under the Optional Protocol to the International Covenant on Civil and Political Rights and its Article 41; European Convention on Human Rights, Articles 33 and 34; African Charter on Human Rights, Articles 44 and 45. A state reporting mechanism is available under Article 40 of the International Covenant on Civil and Political Rights

<sup>70</sup> Dr. Kofi Quashigah, "African Charter on Human Rights and Peoples' Rights: Towards a More Effective Reporting Mechanism" Centre for Human Rights University of Pretoria (April 2002), available at [http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ13.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ13.html)

<sup>71</sup> Coliver & Miller, "International Reporting Procedures", in Hannum (ed.), Guide to International Human Rights Practice (Transnational Publishers, Inc.; Ardsley, New York, 1999), p. 178



citizens.<sup>72</sup> Without the report system it would not be possible for the international and regional human rights system to observe the member states on the issue of human rights.<sup>73</sup>

According to Leckie while commenting on the United Nation Convention on economic, Social and Cultural Rights he said that “state reports remain the most important means of monitoring compliance with this instrument at the international level”.<sup>74</sup> Further an analysis and discussions by other states of the international community on the actual of situation of human rights in a country is beneficial for bringing out best practices, learning from others and development of the human rights in the entire universe.<sup>75</sup> This analysis is supported by a former member of the African Commission on Human and Peoples’ Rights, Badawi El-Sheikh, where he emphasized that “the reporting procedure is the backbone of the mission of the Commission. Through it, the Commission would be able to monitor the implementation of the Charter and engage states parties in a process of dynamic implementation”.<sup>76</sup>

Therefore it is evident that the reporting procedure is one of paramount importance and very vital as a tool and means of creating a culture of observance and respect for human rights. Further is of great importance that this obligation by states to be followed strictly and there be an effective means to ensure compliance. This is an issue that needs to be addressed under the

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<sup>72</sup> Ige Tokunbo, “The Role of Jurists in the Determination of State Responsibility For the Realization of Economic, Social and Cultural Rights”, in ICJ Report of a Regional Seminar on Economic, Social and Cultural Rights, (1999), p.153.

<sup>73</sup> Dr. Kofi Quashigah, “African Charter on Human Rights and Peoples’ Rights: Towards a More Effective Reporting Mechanism” Centre for Human Rights University of Pretoria (April 2002), available at [http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ13.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ13.html)

<sup>74</sup> Leckie Scott, The appearance of the Netherlands Before the UN Committee on Economic, Social and Cultural Rights, in 7 NQLR Vol. 3 (1989), p. 308

<sup>75</sup> Making Reporting procedure Under the International Covenant on Civil and Political rights More Effective (A Report by the Norwegian Institute of Human rights) (Oslo; Norwegian Institute of Human rights, 1991), p. 7

<sup>76</sup> Badawi El-Sheikh, “The African Commission on Human and Peoples’ Rights: Prospects and Problems”, in 7 NQHR Vol. 3 1989, p. 272 at 281

African Charter on Human and Peoples' Rights as the current state of affairs is not enough for the protection of human rights as well as for proper implementation of the Charter by the member states and for monitoring by the international community. Also there is no mechanism to provide for state compliance with the current state reporting procedure, thereby creating a negative attitude of most member states to the reporting procedure. Quashigah says that there is need for "additional, implied or inherent duties on the part of the [African] states in the performance of their reporting obligations."<sup>77</sup> He further goes ahead to say the reporting obligation by should never be seen as a "formal submission" of the report by the state, as it is portrayed by the African Charter,<sup>78</sup> but carries with it certain objectives which the state should aim at.<sup>79</sup>

Most of the international and regional human rights bodies come up with reporting guidelines that make the duties of the member states easier and clearer on what is required of them.<sup>80</sup> However also it has been criticized that sometimes these guidelines may contribute to the quality of the reports not good and therefore member states producing reports that are not helpful.<sup>81</sup>

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<sup>77</sup>Dr. Kofi Quashigah, "African Charter on Human Rights and Peoples' Rights: Towards a More Effective Reporting Mechanism" Centre for Human Rights University of Pretoria (April 2002), available at [http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ13.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ13.html)

<sup>78</sup> Article 62 of the African Charter on Human and Peoples' Rights

<sup>79</sup>Dr. Kofi Quashigah, "African Charter on Human Rights and Peoples' Rights: Towards a More Effective Reporting Mechanism" Centre for Human Rights University of Pretoria (April 2002), available at [http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ13.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ13.html)

<sup>80</sup> George William Mugwanya, "Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System" (Transnational Publishers, Inc, 2003) at p 152-153

<sup>81</sup> Dr. Rachel Murray, "The African Commission on Human and Peoples' Rights and International Law" (Hart Publishers; Oxford, 2000) at p. 16

According to Quashigah for the reporting procedure also to be effective and well utilized there is need for the presence of political will by the reporting state and this should be there throughout.<sup>82</sup> He further suggest for a “more radical system of sanctions and monitoring system”<sup>83</sup>

### 1.32 Individual Complaints

Individual complaints procedure is another way by which parties can makes complaints of violation of human rights, under this procedure it is an individual person who makes the complaint against the state. This procedure is provided for by a number of international and regional human rights protection instruments as way of monitoring mechanism and redress procedure.<sup>84</sup> Individual complaints procedure has come to be seen as a workable procedure compared to the others that are available. Mugwanya where states have failed to make complaints of against other members states in a treaty, convention or charter and further due to states failure to produce state reports or late reporting by state, then individual complaints have tended to be more workable in the protection of human rights.<sup>85</sup> This procedure theoretically may seem to be a real workable procedure and a proper one for the protection of human rights. However much of its success and for which it is to provide practical results will depend on the implementing provisions.

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<sup>82</sup> Dr. Kofi Quashigah, “African Charter on Human Rights and Peoples’ Rights: Towards a More Effective Reporting Mechanism” Centre for Human Rights University of Pretoria (April 2002), available at [http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ13.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ13.html)

<sup>83</sup> Dr. Kofi Quashigah, “African Charter on Human Rights and Peoples’ Rights: Towards a More Effective Reporting Mechanism” Centre for Human Rights University of Pretoria (April 2002)

<sup>84</sup> Dinah Shelton, “Regional Protection of Human Rights” (Oxford University Press, 2008)

<sup>85</sup> George William Mugwanya, “Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System” (Transnational Publishers, Inc, 2003) at p. 161-162

Accordingly Mugwanya provides an example of the ECOSOC<sup>86</sup> and the UNHRC<sup>87</sup> not being bodies that are independent due to their composition and therefore interference in their decision that they consider during individual complaints is more likely than not.<sup>88</sup> He further points out the issue of confidentiality of the process makes it difficult for the parties to know what is happening to their complaints.<sup>89</sup>

There are also other issues that hamper the use of the individual complaints, one issue is the reservation that state has put or in other cases the state has not become party to a protocol that allows individual complaints to be brought against it.<sup>90</sup> Poverty and ignorance more so among the African countries is another factor that also contributes to individual from not making individual complaints.<sup>91</sup>

There is a requirement that for to be able to utilize the individual complaints procedure one has to be a victim, however there is room for one to act on behalf of another provided there is authorization and also legal persons are allowed to complain as victims.<sup>92</sup> Further in most human rights instruments for the protection of human rights it is a requirement that one has to exhaust all domestic remedies before he can make an individual complain, however not all

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<sup>86</sup> United Nation Economic and Social Council

<sup>87</sup> United Nation Human Rights Commission

<sup>88</sup> George William Mugwanya, "Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System" (Transnational Publishers, Inc, 2003) at 162

<sup>89</sup> George William Mugwanya, "Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System" (Transnational Publishers, Inc, 2003) at 162

<sup>90</sup> George William Mugwanya, "Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System" (Transnational Publishers, Inc, 2003) at p. 164

<sup>91</sup> George William Mugwanya, "Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System" (Transnational Publishers, Inc, 2003) at p. 165

<sup>92</sup> Martin Scheinin, "International Mechanism and Procedures for Implementation," in "An Introduction to the International Protection of Human Rights", (ed.) Raija Hanski and Markku Suksi, (Institute for Human Rights; Abo Akademi University, Finland) 1997 p. 437

remedies are considered as capable of exhaustion and also where a remedy is not available then one can need not exhaust those remedies in such instances.<sup>93</sup>

The function of the human rights institutions to consider individual complaints is a perfect example of an alternative to the state reports and the interstate complaints which have been underutilized in the African Human Rights Institutions. Mutua considers individual complaints as an area that has not been utilized and also one which has a lot of potential as the African Charter on Human and Peoples' Rights is so open in its application of the individual complaints.<sup>94</sup>

### 1.33 State to State Complaints

The state to state complaints or communication from states is another form of the complaint procedures by which state may bring cases "in form of petitions or complaints"<sup>95</sup>. The communication from state has not been the bulk of the communication procedures probably due to the fact that states tend to have the idea of not interfering with the affairs of other states and sovereignty of other states. The procedure for state to state communication is where "if a state party to the charter has good reasons to believe that another state party to th[e] the charter has violated the provisions of the charter, it may draw, by written

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<sup>93</sup> Martin Scheinin, "International Mechanism and Procedures for Implementation," in "An Introduction to the International Protection of Human Rights", (ed.) Raija Hanski and Markku Suksi, (Institute for Human Rights; Abo Akademi University, Finland) 1997 at p. 438

<sup>94</sup> Makau Mutua, "The African Human Rights Court: A Two-Legged stool" Human Rights Quarterly, Vol. 21, No. 2 (May, 1999), pp. 342-363 at 346

<sup>95</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 198

communication, the attention of that state to the matter”.<sup>96</sup> The mechanism of the state to state communication under the Charter is not optional and all member state to the charter do not need any additional consent to be affected by the state to state communication.<sup>97</sup> The communication done to the state is also communicated to the Secretary-General of the OAU and the Chairperson of the Commission.<sup>98</sup>

“Within three months of receiving of the communication, the state to which the communication is addressed shall give the enquiring state, written explanation or statement elucidating the matter”.<sup>99</sup>

Article 48 of the Charter provides for the mechanism of solving the any dispute that might arise in relation to Article 47 by not involving the Commission in as much it is viable. However it does not give any what are the enforceable remedy for lack of compliance or adherence with Article 47 by an state.

Article 49 of the Charter gives option where a state party can opt not to communicate with the other state that is in violation of the charter and make the complaint straight to the commission; however, it does not give the time limit as it is the case in Article 47.<sup>100</sup> However, the commission has developed a precedent of using the three months in Article 47 as the time limit.<sup>101</sup>

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<sup>96</sup> Article 47 of the African Charter of Human and Peoples’ Rights

<sup>97</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 198

<sup>98</sup> Article 47 of the African Charter of Human and Peoples’ Rights

<sup>99</sup> Article 47 of the African Charter of Human and Peoples’ Rights

<sup>100</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 199

<sup>101</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 199

Any state party to the Charter that thinks another state party has violated the Charter and wishes to communicate it must comply to the guidelines<sup>102</sup> that are for making complaints against other state parties.<sup>103</sup> The commission has to ascertain that all the domestic remedies have been exhausted in order to consider the state-to-state complaint;<sup>104</sup> this is a requirement that is not may provide a hurdle as it is not possible for another state to pursue the domestic remedies that involve another state.

The procedures for the inter-state complaints seem to suggest that these procedures were made in such a manner to provide for peaceful resolution of disputes.<sup>105</sup> However, this kind of mechanism has become a problem to the protection and promotion of human rights.<sup>106</sup> And it is my recommendation that such procedure should be abolished and a more punitive method should be approached to tackle the issue of human rights abuse that are raised by other member state to the Charter.

Further the provisions under Article 47 and 48 for the peaceful resolution by the state parties before resorting to the provisions of the external resolution under Article 49, have no demarcation and these has resulted to referring between the two set of the provisions and therefore not giving the process proper enforcement.<sup>107</sup>

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<sup>102</sup> The African Commission on Human and Peoples' Rights Guidelines on The Submission of Communication: Information Sheet No. 2, 14

<sup>103</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 200

<sup>104</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 200

<sup>105</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 201

<sup>106</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 201

<sup>107</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 201-202

The role and/or duty of the Secretary-General in the inter-Communication processes both under Article 47 and Article 49 is not clear or defined.<sup>108</sup> It seems to have been put there just as a mere formality which has no function, this should have been used more clearly and probably in the case of settling the disputes peacefully as a mediator.<sup>109</sup>

As earlier mentioned, the inter-state communications is rarely exploited by the state parties to bring complaints against other states, probably due to the fact of state sovereignty.<sup>110</sup> This fact is further worsened by the fact that the “neither Charter nor the rules of procedure indicate the types of disputes or violations of the Charter are envisaged under Article 47 and Article 49.”<sup>111</sup> The provisions are also not clear when it comes to another state party intervening where another state party is in violation of the rights of its nationals, the provisions seem to suggest that it is when the other state party is in violation of the rights of the state complaining.<sup>112</sup> However, I would think violation of the Charter also involves the violation in relation of the national of that state.

As Orlu points out, “when a state ratifies the Charter that state is obliged to enforce the rights of the citizenry of Africa, irrespective of the nationality of the persons whose rights are violated.”<sup>113</sup> The question is “whether African states can take it upon themselves to enforce

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<sup>108</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 202

<sup>109</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 202

<sup>110</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 202

<sup>111</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 202

<sup>112</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 203

<sup>113</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 203



the violations of human rights against other African States remains a big question”.<sup>114</sup> He further goes ahead to say “African States’ relations and practice do not give positive indication of this and until this happens, the inter-states communication procedures cannot be seen to serve the interest of effective human rights disputes resolution in Africa.

The African Commission being one of the youngest human rights institution from the other established regional mechanism may have need time to grow and have real impact in the protection and promotion of human rights. Time and experience has shown that the other two regional human rights institutions, i.e. European and the Inter-American, took time “before the infrastructure and awareness necessary for major impact are established”.<sup>115</sup>

As the saying goes that “Charity begins at home”, for the protection and promotion of human rights to be effective in the African continent, there has to be protection at the lowest level at the states themselves.<sup>116</sup> The local state government have to be empowered to protect and defend the human rights of the individuals even though they are “the greatest abusers of human rights”.<sup>117</sup> Welch argues that “strengthening governmental institutions which can protect or assist the realisation of human rights must go hand in hand with enhancing the standards of performance”.<sup>118</sup>

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<sup>114</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 203

<sup>115</sup> Claude E. Welch, Jr. “The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment”, Human Rights Quarterly, Vol. 14 No. 1 (Feb. 1992), pp. 43-61, at p. 56

<sup>116</sup> Jack Donnelly, “Universal Human Rights in Theory and Practice”, Cornell University Press, New York, 1989, at 250

<sup>117</sup> Claude E. Welch, Jr. “The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment”, Human Rights Quarterly, Vol. 14 No. 1 (Feb. 1992), pp. 43-61, at p. 58

<sup>118</sup> Claude E. Welch, Jr. “The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment”, Human Rights Quarterly, Vol. 14 No. 1 (Feb. 1992), pp. 43-61, at p. 58

Further since it has been seen that the OAU now the AU has reluctance to question the actions of other states since this is construed as interfering in the sovereignty of the other states, then the real effort should be towards the strengthening the states first to respect human rights.<sup>119</sup>

It is also high time that African “democracies” moved away from not only just making references from the international and regional human rights treaties in their constitutions and go ahead to making practical steps in promotion and protection of human rights.<sup>120</sup>

It has also been put forward that “democracy go hand in hand in with respect for human rights, however this might not be the case since even with holding of regular and competitive elections may not guarantee respect and promotion of human rights.<sup>121</sup> Other factors that lay within the society may affect the stability and respect for human rights, such issue as economic inequalities may lead to political violence like it happened in Kenya in 2007/2008.

It is worth also noting that the protection of human rights grew “together with respect for individualism”.<sup>122</sup> This has to be distinguished with the African context, as noted earlier, where the prevailing norm under the Charter is that of the community and not that of the individual and the individual has duty to the community and not the community having the duty towards the individual.

Finally there has been a challenge with the extending the Charter to the domestic courts as most individual states have to domesticate the Charter in order to apply in the local Courts.

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<sup>119</sup> Claude E. Welch, Jr. “The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment”, *Human Rights Quarterly*, Vol. 14 No. 1 (Feb. 1992), pp. 43-61, at p. 58

<sup>120</sup> Claude E. Welch, Jr. “The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment”, *Human Rights Quarterly*, Vol. 14 No. 1 (Feb. 1992), pp. 43-61, at p. 58

<sup>121</sup> Claude E. Welch, Jr. “The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment”, *Human Rights Quarterly*, Vol. 14 No. 1 (Feb. 1992), pp. 43-61, at p. 58-59

<sup>122</sup> Claude E. Welch, Jr. “The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment”, *Human Rights Quarterly*, Vol. 14 No. 1 (Feb. 1992), pp. 43-61, at p. 59

Other Individual states, mostly from “the Franco-phone sates have the reciprocity principle that prevents the Charter from being applicable until all the Anglo-phone states have made it applicable in domestic law”.<sup>123</sup>

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<sup>123</sup> Theodore S. Orlin, “Human Rights Development in Africa: The Banjul Conference of the African Association of International Law”, Institute for Human Rights, 1990, at p. 12

# CHAPTER TWO

## *2.1 Effectiveness of the African System*

The African System of the protection of human rights as earlier mentioned is composed of the African Commission<sup>124</sup> and the now the African Court on Human Rights<sup>125</sup>, however the court is yet to be fully operational. According to Welch, “the armatures of human rights protection provided domestically by most African states, and regionally by the Banjul Charter, are far weaker than in most Western European states”.<sup>126</sup> The commission at the inception was developed in a sense of “being body of promotion of human rights than a body to protect human rights.”<sup>127</sup> The Commission is made up of the eleven members “chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality, and competence in matters of human and peoples’ rights; particular consideration being given to persons having legal experience”.<sup>128</sup> The protective function of the Commission operates as a quasi “judicial body” and “[the] are formally non-binding”<sup>129</sup> Steiner and Alston have described the African system as “the newest, the least developed or effective..... the most controversial of the three established regional human rights regimes

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<sup>124</sup> Under Article 30 of the African Charter of Human and Peoples’ Rights

<sup>125</sup> Established through the 1998 Protocol to the African Charter of Human and Peoples Rights

<sup>126</sup> Claude E. Welch, Jr., “The African Commission on Human and Peoples’ Rights: A five year Report and Assessment”, in *Human Rights Quarterly*, Vol. 14, No. 1 (Feb. 1992), pp. 43-61, p. 43

<sup>127</sup> Claude E. Welch, Jr., “The African Commission on Human and Peoples’ Rights: A five year Report and Assessment”, in *Human Rights Quarterly*, Vol. 14, No. 1 (Feb. 1992), pp. 43-61, p. 44

<sup>128</sup> Article 31 of the African Charter of Human and Peoples’ Rights, see also Obiora Chinedu Okafor, “The African Human Rights System, Activist Forces, and International Institutions”, (Cambridge University Press, Cambridge, 2007) p. 66

<sup>129</sup> Obiora Chinedu Okafor, “The African Human Rights System, Activist Forces, and International Institutions”, Cambridge University Press, Cambridge), 2007, p. 65

[European, Inter-American and African] involve African states”.<sup>130</sup> Also Donnelly added his views about the African system by saying that “fears raised by the language in which the norms of the Banjul Charter are specified would seem to be confirmed by its relatively weak implementation provisions”.<sup>131</sup> Murray another scholar described the Charter as having provisions that are not clear.<sup>132</sup>

Oloka-Onyango another African scholar has attributed the performance of the Commission to funding problems and pointed out that “most positive reviews of the performance of the major mechanism of implementation of the Charter, the African Commission on Human and Peoples’ Rights, generally agree that the institution has performed at less than par”.<sup>133</sup> He further continues to say that this has contributed to the success of the Commission and “the questions that have been raised is regarding the perceived independence and commitment of the some of the members of that body; and the low level of state compliance with their reporting obligations”.<sup>134</sup> I would tend to agree with Oloka-Onyango and attribute to the fact that the weakness has lead to lack of protecting Africans from very grave human rights violations.

Another issue that has been raised in relation to the effectiveness of the commission is in relation to the proceedings and more so in terms of the aspect of confidentiality. This has remained an issue and as Benedek view on this is that the “rules of procedure of the African

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<sup>130</sup> H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (New York, Oxford University Press, 2000), p. 920

<sup>131</sup> J. Donnelly, “International Human Rights”, (Boulder, Westview Press, 1993), p. 91-92

<sup>132</sup> R. Murray, “Serious or Massive Violations under the African Charter on Human and Peoples’ Rights: A Comparison with the Inter-American and European Mechanisms”, 17 *Netherlands Quarterly of Human Rights* 109 (1999) at p. 127

<sup>133</sup> J. Oloka-Onyango, “Human Rights and Sustainable Development in Contemporary Africa: A new Dawn, or Retreating Horizons?”, 6 *Buffalo Human Rights Law Review* 39 at 70

<sup>134</sup> J. Oloka-Onyango, “Human Rights and Sustainable Development in Contemporary Africa: A new Dawn, or Retreating Horizons?”, 6 *Buffalo Human Rights Law Review* 39 at 70-71

Commission in relation to the sittings that are held in private are unnecessary restrictive”.<sup>135</sup>

In as much as the meetings of the sessions have are now being held in public after the NGO putting pressure and advocating for the same the rules of procedure are still restrictive on the proceeding and have provisions in terms camera sittings.<sup>136</sup> Although Benedek provides three things that has led to the change in operations as “the increased self-confidence the commission has gained over time, the growing number of qualified observers and the need that the work of the commission be understood and supported by the public in order to be effective”.<sup>137</sup>

The issue of the not having NGO that are developed or that have taken their proper niche in the human rights sector in Africa can also be attributed to the effectiveness of the commission.<sup>138</sup>

Ankumah has further elaborated the commission’s weakness through its decision and where she pointed out that the decisions are not clearly reasoned or supported with proper evidence.<sup>139</sup> Amnesty International and international human rights organisation has also added its voice on this issue and pointed out that “eleven years after it came into existence...

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<sup>135</sup> Wolfgang Benedek, “The 9<sup>th</sup> Session of the African Commission on Human and Peoples’ Rights”, *Human Rights Law Journal* 12:5 (May 1991) at p. 217

<sup>136</sup> Claude E. Welch, Jr., “The African Commission on Human and peoples’ Rights: A Five-Year Report and Assessment”, *Human Rights Quarterly*, Vol. 14 No. 1 (Feb. 1992), pp 43-61 at p. 55

<sup>137</sup> Wolfgang Benedek, “The 9<sup>th</sup> Session of the African Commission on Human and Peoples’ Rights”, *Human Rights Law Journal* 12:5 (May 1991) at p. 217

<sup>138</sup> <sup>138</sup> Claude E. Welch, Jr., “The African Commission on Human and peoples’ Rights: A Five-Year Report and Assessment”, *Human Rights Quarterly*, Vol. 14 No. 1 (Feb. 1992), pp 43-61 at p. 55

<sup>139</sup> Evelyn Ankumah, “The African Commission on Human and Peoples’ Rights: practice and procedures.” (The Hague: Martinus Nijhoff, 1996), at 40

the commission..... struggles to address the serious and massive violations of human rights that continue [throughout] the length and breath of the [African] continent”.<sup>140</sup>

A good number of scholars tend to see and critic the African system on the basis of its weakness or lack to implement and enforce its decision and I am of the same view. This lack of power to enforce its decision has been viewed by many that it can be cured through establishing of a court which can implement the decisions.<sup>141</sup> Dlamini on his part views that having no court has made the Banjul Charter to be “ineffective”.<sup>142</sup>

Oloka-Onyango also points out that the Commission has not in any way changed the operations of the African “democracies”.<sup>143</sup> He argues that “more than ten years after it commenced operations, the commission has not even slightly threatened the “business-as-usual” modus operandi that prevails among African states and within the OAU [AU] and its operations do not even marginally affect the status quo”.<sup>144</sup> This position is currently still the same and this can be shown by the African Union (AU) protection of the Sudanese President Omar Al-Bashir over the arrest warrants issued by the International Criminal Court<sup>145</sup> concerning the mass atrocities against human rights in the Darfur region. The same African Union does not offer solution or come in to intervene in the situation in the Darfur region.

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<sup>140</sup> Amnesty International, “credibility in Question: Proposal for Improving the Efficiency and Effectiveness of the African Commission on Human and Peoples’ Rights”, AI Index: IOR 63/02/98 at 3

<sup>141</sup> Obiora Chinedu Okafor, “The African Human Rights System, Activist Forces, and International Institutions”, Cambridge University Press, Cambridge), 2007, p. 79

<sup>142</sup> C.R.M Dlamini, “Towards a Regional Protection of Human Rights in Africa: The African Charter on Human and Peoples’ Rights” 24 Comparative and International Law Journal of Southern Africa (1991) at 202

<sup>143</sup> J. Oloka-Onyango, “Human Rights and Sustainable Development in Contemporary Africa: A new Dawn, or Retreating Horizons?”, 6 Buffalo Human Rights Law Review 39 at 71

<sup>144</sup> J. Oloka-Onyango, “Human Rights and Sustainable Development in Contemporary Africa: A new Dawn, or Retreating Horizons?”, 6 Buffalo Human Rights Law Review 39 at 71

<sup>145</sup> Established by the Rome Statute of 17<sup>th</sup> July 1998, which come into effect on 1<sup>st</sup> July 2002 that establishes the court which is a permanent criminal court to deal with impunity for the perpetration of most serious crimes of concern to the international community

Another African scholar notes that “in practice, there is a huge gap between the anticipated goals of the commission .... and the achievements on the ground ... despite these odds, the commission has made some progress”.<sup>146</sup>

The commission and the Organisation of African Union (OAU) now the African Union has been seen as an organ that has not been capable to deal with the violations of human rights and has “emphasized the issue of domestic sovereignty”.<sup>147</sup> The decision of the commission are not “binding and attract little, if any, attention from governments and the international human rights community”<sup>148</sup>. The lack of attention could be explained by denial to publish the decision of the commission.<sup>149</sup> However this change in 1994 and the commission must get the authority of the OAU Assembly of heads of States and Government before publishing.<sup>150</sup> This to me is still a not a good since the Assembly of Head of States and Governments may refuse such authority and this will not go well with the promotion and protection of human rights. The enforcement mechanism of the Charter and the Commission is also lack to some aspect, where as both of them do not have “enforceable remedies” and there is way of monitoring and ensuring that the state or parties are enforcing or complying with the decision of the commission.<sup>151</sup>

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<sup>146</sup> U. Essien, “The African Commission: Eleven years After” 6 Buffalo Human Rights Law Review 93 at 96

<sup>147</sup> Claude E. Welch, Jr., “The African Commission on Human and Peoples’ Rights: A five year Report and Assessment”, in Human Rights Quarterly, Vol. 14, No. 1 (Feb. 1992), pp. 43-61, p. 44

<sup>148</sup> Makau Mutua, “The African Human Rights Court: A Two-Legged stool” Human Rights Quarterly, Vol. 21, No. 2 (May, 1999), pp. 342-363 at 348

<sup>149</sup> Makau Mutua, “The African Human Rights Court: A Two-Legged stool” Human Rights Quarterly, Vol. 21, No. 2 (May, 1999), pp. 342-363 at 348

<sup>150</sup> Makau Mutua, “The African Human Rights Court: A Two-Legged stool” Human Rights Quarterly, Vol. 21, No. 2 (May, 1999), pp. 342-363 at 349

<sup>151</sup> Makau Mutua, “The African Human Rights Court: A Two-Legged stool” Human Rights Quarterly, Vol. 21, No. 2 (May, 1999), pp. 342-363 at 349



With the coming into entry of the African Charter of Human and Peoples' Rights in 1986 , five years did not even pass with the before there were calls for change in the mechanism for the protection and promotion of human rights.<sup>152</sup> This calls were based on "the alleged inadequacy and inherent normative flows of some contents of the Charter and the lack of adequate or effective enforcement institutions".<sup>153</sup> The normative problems were mainly on the "clawback" provisions or the limitation on some of the rights that were provided and these meant that the "Charter's protection was confined to the protection of rights to the definition of the domestic laws and therefore the States were permitted to restrict basic human rights to the extent allowed by domestic law".<sup>154</sup>

Under the European Convention for the Protection of Human rights and Fundamental Freedoms, the derogation provision is very clear and provides that: "in time of war or other public emergency threatening the life of the nation any high contracting Party (state party) may take measures derogating from its obligations under [the] convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law".<sup>155</sup>

It further provides "no derogation to the rights to life, except in respect of deaths that result from lawful acts of war, or from the prohibition of torture, or slavery & servitude, or punishment that is not provided by law".<sup>156</sup>

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<sup>152</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 243

<sup>153</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 243

<sup>154</sup> Vincent O. Orlu, "The African Human Rights System: Its Laws, Practice and Institutions", Kluwer Law International, The Hague (2001), p. 243

<sup>155</sup> Article 15(1) of the European Convention for the Protection of Human rights and Fundamental freedoms

<sup>156</sup> Article 15(2) of the European Convention for the Protection of Human rights and Fundamental freedoms

Finally it provides that “any state party that avails itself of this right to derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons thereof and also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the convention are again fully executed”.<sup>157</sup>

The American Convention on Human Rights also has similar provisions on the derogation of and suspension of the convention.<sup>158</sup> It provides for that, “in time of war, public danger, or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligations under the [ ] convention”.<sup>159</sup>

Both the European and the inter-American Convention have a clear provision for derogation of the rights under the convention. Under the African Charter it has been argued that “what the Charter needs is an excision of the clawback clauses in favour of a derogation provision, which will specify non-derogable rights and which rights states can derogate from, when and under what circumstances, in keeping with the generally accepted principles of international law”.<sup>160</sup>

Another issue that can be seen as lacking in the Charter is the “provisions on women rights”.<sup>161</sup> The issue of women rights under the Charter has not been catered for and this has

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<sup>157</sup> Article 15(3) of the European Convention for the Protection of Human rights and Fundamental freedoms

<sup>158</sup> This is provided under Article 27 of the American Convention on Human Rights

<sup>159</sup> Article 27(1) of the American Convention on Human Rights

<sup>160</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 243

<sup>161</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 243

been lumped up together with other rights for children, family and the disabled.<sup>162</sup> According to Mutua, “the provisions of the Charter have been thought to condone and support repressive and retrogressive structures and practices of social and political ordering”.<sup>163</sup> Further according to Mutua the clauses in the Charter in regard of women rights “places duties to the family on the state and individuals, have been interpreted as entrenching oppressive family structures that marginalised and exclude women from participating in most spheres outside the home”.<sup>164</sup> It has also been the argument of various people that the Charter is “discriminatory” towards the women in relation to “gender in marriage, property ownership, and inheritance, and impose on them unconscionable labour and reproductive burdens”.<sup>165</sup> This perception of the lack of protection is one of the reasons that has called for an instrument to protect the rights of the African women.<sup>166</sup> It is argued that such a document as the Charter “that is inspired by the virtues and the values of African civilization, cannot *per se* be an effective tool to protect the rights of women in view of the role of women in the traditional African family”.<sup>167</sup>

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<sup>162</sup> Article 18 of the African Charter of Human and Peoples’ Rights, see also Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 243

<sup>163</sup> Makau Mutua, “The African Human Rights Court: A Two-Legged stool” Human Rights Quarterly, Vol. 21, No. 2 (May, 1999), pp. 342-363 at 359

<sup>164</sup> Makau Mutua, “The African Human Rights Court: A Two-Legged stool” Human Rights Quarterly, Vol. 21, No. 2 (May, 1999), pp. 342-363 at 359

<sup>165</sup> Makau Mutua, “The African Human Rights Court: A Two-Legged stool” Human Rights Quarterly, Vol. 21, No. 2 (May, 1999), pp. 342-363 at 359

<sup>166</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 244, see also Evelyn Ankumah, “The African Commission on Human and Peoples’ Rights: practice and procedures.” (The Hague: Martinus Nijhoff, 1996), at 151-152

<sup>167</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 244

The Charter has also be seen as not having adequate guarantees to provide for a fair hearing, “such as the public hearing of cases, the provision of legal assistance, the right to an interpreter, the right against self-incrimination, the right to cross-examine witness and the right to compensation, which other international and regional rights instrument are known to guarantee”.<sup>168</sup>

## ***2.2 European Human Rights System***

The European human rights system is the first regional mechanism on the protection of human rights and most of the European states are members of this convention and the system.<sup>169</sup> Article 3 of the Statute of the Council of Europe requires “every member of the Council of Europe must accept the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter 1 [Aims of the Council of Europe]”. This provision builds on the “collective guarantee in the European context”.<sup>170</sup>

Noteworthy is the mechanism created by the system in relation to the protection of human rights within the establishing instruments.<sup>171</sup> The adoption by the Europeans of the European human rights protection system was done just some years after the Universal Declaration of

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<sup>168</sup> Vincent O. Orlu, “The African Human Rights System: Its Laws, Practice and Institutions”, Kluwer Law International, The Hague (2001), p. 244, see also Evelyn Ankumah, “The African Commission on Human and Peoples' Rights: practice and procedures.” (The Hague: Martinus Nijhoff, 1996), at 123-132

<sup>169</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, Signed on 4<sup>th</sup> November 1950 and entered into force on 3<sup>rd</sup> September 1953

<sup>170</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 44

<sup>171</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 44

Human Rights.<sup>172</sup> one of the reason might have been that the Declaration was just aspirations and not binding as declarations. Also the other may be associated with the depressing situation that the region had witnessed in the two world wars.<sup>173</sup> Accordingly it was understood and appreciated by many that there was much need of good governance to avert the “dangers of dictatorship and war”.<sup>174</sup> Further “they were aware that the first step towards dictatorship was usually, the gradual suspension of individual rights, which if went on unchecked, would become increasingly difficult to stop”.<sup>175</sup> With all this in mind it become needful to come set up a mechanism for “rights and freedoms that must be respected in a democratic society and to create institutions to see that they were observed”.<sup>176</sup>

When it comes to implementation of the rights under the European Convention, the convention establishes institutional mechanism which consisted of the European Commission and the European Court of Human Rights.<sup>177</sup> This mechanism is to provide a way for the monitoring “the observance of the obligations of State Parties”.<sup>178</sup> Additionally “the Council of Europe is charged with the supervising the enforcement of the decision of the Court and

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<sup>172</sup> Adopted on December 10, 1948 by the General Assembly of the United Nations

<sup>173</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 45

<sup>174</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 45

<sup>175</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 45

<sup>176</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 45

<sup>177</sup> This was under Article 19 before it was amended by Protocol 1, which was opened for signature on 11<sup>th</sup> May 1994 and entered into force on 1<sup>st</sup> November 1998, under this protocol the two-tier mechanism consisting of the European Commission and the Court was replaced with a single full time Court.

<sup>178</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 47

deciding what measures are to be taken when it determines that there has been a violation of rights guaranteed in the Convention”.<sup>179</sup>

The revision of the European Convention was necessitated by various factors, however the one of the major factor was the high number of communications to the Commission and the Court brought about the need for revision.<sup>180</sup> Initially the Convention’s mechanisms were designed for the a few of the founding members of the Council of Europe “and it [had] become quite impossible for [the system] to work effectively with expected forty or more states, with the growing number of member states and the joining of states from Eastern and Central Europe to the Council brought about the revision.”<sup>181</sup> The aim of the new system was to “make the machinery more accessible to individuals, speed up the procedure and make for greater efficiency”.<sup>182</sup> The revision in the system was specifically aimed at having “an unfettered right for the individual access to the court as well as the need to check the influence of the Committee of Ministers, a political body, on the judicial process”<sup>183</sup> according to Brazta and O’byle, the aim of Protocol 11 “is to bring an improvement in the Convention’s enforcement machinery which will lead to the examination of human rights

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<sup>179</sup> Article 46(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>180</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 48

<sup>181</sup> Andrew Drzemczewski, “The European Human Rights Convention: A new Court of Human Rights in Strasbourg as of November 1, 55 Wash. & Lee. L. Rev. 697 (1998) at 715

<sup>182</sup> Andrew Drzemczewski, “The European Human Rights Convention: A new Court of Human Rights in Strasbourg as of November 1, 55 Wash. & Lee. L. Rev. 697 (1998) at 715

<sup>183</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 48, see also Yvonne Klerk, “ Protocol No. 11 to the European Convention on Human Rights: A Drastic Revision of the Supervisory Mechanism under the ECHR”, Netherlands Q. Human Rights, 35(1196), 35-36

complaints by a single [court] within a reasonable time”.<sup>184</sup> “With the removal of the duplication of procedures that characterises the existing machinery, encompassing both the Commission and the Court, there ought to be a significant reduction in the amount of time it takes to process the large volume of complaints registered by the single Court”.<sup>185</sup>

The Convention that was adopted in 1950 had significantly changed through the adoption of the various protocols (protocol 1-10) and this had made it necessary for the streamlining the system through the eleventh protocol.<sup>186</sup>

The judges of the European Court of Human Rights are drawn from the number of the member state each member state has a judge in the court.<sup>187</sup> For one to be a judge one has to be a person “of high moral character and must either possess the qualifications required for appointment to high judicial office or to be juriconsults of recognised competence”.<sup>188</sup> The judges of the court “sit on the court in their individual capacity”<sup>189</sup> and “during their term of office shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office”<sup>190</sup>

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<sup>184</sup> Nicholas Bratza and Michael O’Boyle, “The Legacy of the Commission to the New Court Under the Eleventh Protocol in The Birth of The European Human Rights Law: Studies in Honour of Carl AAGE NORGAARD 377. () Michaëlle De Salvia & Mark Villiger, eds., 1998), at 379

<sup>185</sup> Nicholas Bratza and Michael O’Boyle, “The Legacy of the Commission to the New Court Under the Eleventh Protocol in The Birth of The European Human Rights Law: Studies in Honour of Carl AAGE NORGAARD 377. () Michaëlle De Salvia & Mark Villiger, eds., 1998), at 379

<sup>186</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 49

<sup>187</sup> Article 20 of The European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>188</sup> Article 21(1) of The European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>189</sup> Article 21(2) of The European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>190</sup> Article 21(3) of The European Convention for the Protection of Human Rights and Fundamental Freedoms

The respective members of the Council of Europe nominate three candidates to be judges of the European Human Rights Court, and then the Parliamentary Assembly elects judges from this list.<sup>191</sup>

With the adoption of the eleventh Protocol it removed the decision making role of the Committee of Ministers and limited its role to that of supervising the execution of the judgements of the European Human Rights Court.<sup>192</sup>

So as to provide for a smooth change from the old dispensation of the Convention to the one that is provided by Protocol 11, the protocol under Article 4 provided that the effective date of the Protocol will be “the first day of the month one year after the last State Party to the Convention has ratified the Protocol”.<sup>193</sup> Further the Protocol provides for the way the communications that were filed with Commission, the former Court and those at the Committee of Ministers before the coming into effect of the Protocol are to be dealt with and for this it provides for the Court to deal with them.<sup>194</sup> According to Drzemczewski “the drafters of the Protocol were concerned not to make the Committee of Ministers redundant”.<sup>195</sup> “They thought it inappropriate to try to tie the hands of the an organ whose

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<sup>191</sup> Article 22 (1) of The European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>192</sup> Article 46 (2) of The European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>193</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 51

<sup>194</sup> Article 5 of Protocol 11 to The European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>195</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 52, see also Andrew Drzemczewski, “The European Human Rights Convention: A new Court of Human Rights in Strasbourg as of November 1, 1998”, 55 Wash. & Lee. L. Rev. 697, at. P. 702



existence predated the European human rights mechanism, and especially as the Council of Europe's executive works independently of the Convention mechanism".<sup>196</sup>

### **2.3 The Inter-American Human Rights System**

The Human Rights system under the Inter-American System is one that is based on two important documents with the Inter-American, on is the Charter of the Organisation of American States (OAS Charter)<sup>197</sup> "it made only general references to human rights"<sup>198</sup> and the American Convention on Human Rights<sup>199</sup> (Inter-American Convention).<sup>200</sup> Also with the adoption the OAS Charter, the same conference adopted the American Declaration of the Rights and Duties of Man,<sup>201</sup> and the same was "merely in the form of a nonbinding conference resolution".<sup>202</sup> And "before the Inter-American Convention the human rights provision of the OAS Charter read together with the American Declaration, provided the sole, albeit rather weak, legal basis for the protection of human rights by the OAS".<sup>203</sup> Both the

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<sup>196</sup> Andrew Drzemczewski, "The European Human Rights Convention: A new Court of Human Rights in Strasbourg as of November 1, 1998", 55 Wash. & Lee. L. Rev. 697, at P. 702

<sup>197</sup> Signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993, available at [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm)

<sup>198</sup> Thomas Buergenthal, "The Evolving International Human Rights System", 100 American Journal of International Law(2006), pp. 783-807, at p. 794

<sup>199</sup> Adopted at San Jose, Costa Rica on 22<sup>nd</sup> November 1969 and come into force on 18<sup>th</sup> July 1978, available at <http://www.oas.org/juridico/english/sigs/b-32.html>

<sup>200</sup> See also Vincent O. Orlu Nmeihielle, "The African Human Rights System: Its Laws, Practice and Institutions" Kluwer Law International, Hague, 2001, p. 54-55; Thomas Buergenthal, "The Evolving International Human Rights System", 100 American Journal of International Law(2006), pp. 783-807, at p. 794

<sup>201</sup> Adopted by the Ninth International Conference of American States, Bogota, Colombia, 1948, available at [http://www.oas.org/en/about/our\\_history.asp](http://www.oas.org/en/about/our_history.asp)

<sup>202</sup> Thomas Buergenthal, "The Evolving International Human Rights System", 100 American Journal of International Law(2006), pp. 783-807, at p. 794

<sup>203</sup> Thomas Buergenthal, "The Evolving International Human Rights System", 100 American Journal of International Law(2006), pp. 783-807, at p. 794

OAS Charter and the American Declaration “[were] adopted several months before the Universal declaration [of Human Rights] was adopted by the United Nations, and two and half years before the European Convention was adopted”.<sup>204</sup>

The “supervisory mechanism is seen to have evolved from the OAS Charter” within the Inter-American human rights system.<sup>205</sup> The supervisory mechanism within the Inter-American human rights system makes it possible for the “member states to be held responsible for human rights violations as long as they continue to be members of the OAS Charter, even though they have not ratified The Inter-American Convention”.<sup>206</sup>

The OAS Charter never made concrete obligations towards the “fundamental rights of the individual” provided under Article 3 of the OAS Charter and there was no mechanism provided for the safeguarding the “fundamental rights of the Individual” under Article 3.<sup>207</sup> It is also viewed that the American Declaration “states rules of customary international law for the American States, in the same way the Universal Declaration of [Human Rights] does at the universal level”.<sup>208</sup>

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<sup>204</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 55; see also Henry J. Steiner & Philip Alston, “International Human Rights in Context: Law, Politics and Morals, Clarendon Press: Oxford (1996), at p. 641

<sup>205</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 55

<sup>206</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 55

<sup>207</sup> Thomas Buergenthal, “Human Rights in a Nutshell, West Publishing Company: St. Paul, Minnesota, 2<sup>nd</sup> Edition (1995), at p. 178; see also Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 56

<sup>208</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 56

The Inter-American Commission on Human Rights<sup>209</sup> was brought into being by a resolution to deal with the weakness of the Inter-American human rights system.<sup>210</sup>

“The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter”.<sup>211</sup> The creation of the Inter-American Commission was one of surprise as it was created by the American Declaration, which was viewed as just a declaration and not binding.<sup>212</sup> However, the Commission’s powers under Article 9 of the Statute of the Commission are “general and limited powers of research and making recommendations on human rights situations”.<sup>213</sup>

“The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights”.<sup>214</sup> The members of “the Commission shall represent all the member states of the Organization”.<sup>215</sup>

According to Buergenthal and Shelton the mandate of the Commission is obtained from the Statute which was “derived from [the] OAS conference resolution of un-certain legal force”.<sup>216</sup> This position was later on change when the Protocol of Buenos Aires came into effect

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<sup>209</sup> Established by a resolution of the Fifth meeting of the Ministers of Foreign Affairs in Santiago, Chile in 1959 and promulgated in 1960.

<sup>210</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 56

<sup>211</sup> Article 1 of the Statute of the Inter-American Commission on Human Rights

<sup>212</sup> Thomas Buergenthal & Dinah Shelton, “Protecting Human Rights In The Americas: Cases and Materials, International Institute of Human Rights, Strasbourg/N.P. Engel, Fourth revised Edition(1995), at p. 40

<sup>213</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 57

<sup>214</sup> Article 2 (1) of the Statute of the Inter-American Commission on Human Rights

<sup>215</sup> Article 2 (2) of the Statute of the Inter-American Commission on Human Rights

<sup>216</sup> Thomas Buergenthal & Dinah Shelton, “Protecting Human Rights In The Americas: Cases and Materials, International Institute of Human Rights, Strasbourg/N.P. Engel, Fourth revised Edition(1995), at p. 40

in 1970 when under Article 53(e) of the OAS Charter recognised the Inter-American Commission as one of its organs that the “OAS accomplishes its purposes”<sup>217</sup> the “principal function [of the Commission] shall be to promote the observance and protection of human rights and to serve as a consultative organ of the organization in these matters”.<sup>218</sup>

The Commission in its initial stages never did much in terms of promotion and protection of human rights and it “was kept busy preparing reports on human rights situations in various countries and these reports were [based] in on-site visits and information in petitions presented to it”.<sup>219</sup> The on-sites visits provided much of the work of the Commission throughout before the coming and adoption of the Inter-American Convention on Human Rights, which provided for the Inter-American Court on Human Rights and most of the OAS member states never “rati[fied] the convention until the installation of democratic regimes in their countries”.<sup>220</sup> The works of the “Commission provided the only means for pressuring these states to improve their human rights conditions”.<sup>221</sup>

The American Convention on Human Rights<sup>222</sup> provides for civil and political Rights.<sup>223</sup> In as much as the American Convention provides the rights similar to those in the International

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<sup>217</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 57; see Article 53 (e) of the Charter of the Organization of America States, available at <http://humanrights.law.monash.edu.au/iachr/oascharter.html>

<sup>218</sup> Articles 53 and, 106(1) of the Charter of the Organization of America States as amended

<sup>219</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 795

<sup>220</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 795

<sup>221</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 795

<sup>222</sup> Concluded in San Jose, Costa Rica, in 1969 and come into force in 1978, available at <http://www.oas.org/juridico/english/sigs/b-32.html>

<sup>223</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 795. Economic, social and cultural rights are provided for in another

Covenant on Civil and Political rights, other rights are informed by the environmental surroundings and beliefs within the American states, “such as the right to life, it is provided, that it shall be protected by law from the moment of conception”.<sup>224</sup> This was influenced due the “overwhelming Catholic Countries [from Latin America] insisted on this provision during the drafting of the Convention”.<sup>225</sup>

The model of the Inter-American Convention is basically similar to the initial European Convention, which provided for a two-tier institutional mechanism for the promotion and protection of human rights, that is the Commission and the Court.<sup>226</sup>

The Commission as it is a creature of the Charter as well as a creature of the Convention and it did not loose the functions and powers donated to it by the OAS Charter as its organ.<sup>227</sup>

“The Inter-America Commission on Human Rights under the American Convention “shall be composed of seven members, who shall be persons of high moral character and recognised competence in the field of human rights”.<sup>228</sup> Under the Convention “the Commission shall represent all the members of the Organization of American States”.<sup>229</sup> The selection of the “commissioners of the Commission shall be elected in the personal capacity by the General Assemble of the Organization from a list of candidates proposed by the governments of the

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treaty of the Organization of American States, the additional Protocol to the MERICAN Convention on Human rights in the Area of Economic, Social and Cultural Rights (The Protocol of San Salvador), entered into force on November 16, 1999

<sup>224</sup> Article 4(1) of the American Convention on Human Rights

<sup>225</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 796

<sup>226</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 796

<sup>227</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 796

<sup>228</sup> Article 34 of the American Convention on Human Rights

<sup>229</sup> Article 35 of the American Convention on Human Rights

member states”.<sup>230</sup> The list that is proposed by the member states shall have “three candidates, who may be national of the states proposing them or of any member state of the Organization of American States and when a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate”.<sup>231</sup> The tenure of the commissioners is “[for] four years and may be re-elected only once, but the terms of three of the members chosen in the first election shall expire at the end of two years and this shall be determined by the General Assembly by lot immediately following the elections”.<sup>232</sup> There shall be “no two nationals of the same state” being commissioners at the same time.<sup>233</sup> The Inter-American Court of Human rights is established by the American Convention on Human Rights.<sup>234</sup> The composition of the court is provided as to “consist of seven judges, nationals of the member states of the Organization [of American States], elected in an individual capacity from among jurists of the highest moral authority and of recognised competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates”.<sup>235</sup> Similar with the Inter-American Commission the Inter-American Court shall not have two judges from the one state.<sup>236</sup>

Selection of the judges is by election which is through “secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization,

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<sup>230</sup> Article 36(1) of the American Convention on Human Rights

<sup>231</sup> Article 36(2) of the American Convention on Human Rights

<sup>232</sup> Article 37(1) of the American Convention on Human Rights

<sup>233</sup> Article 37(2) of the American Convention on Human Rights

<sup>234</sup> Article 52 of the American Convention on Human Rights

<sup>235</sup> Article 52(1) of the American Convention on Human Rights

<sup>236</sup> Article 52(2) of the American Convention on Human Rights

from a panel of candidates proposed by those states”.<sup>237</sup> Members of the Organization of the American States “may propose up to three candidates, nationals of the state that proposes them or of any other member state of the organization of American States; however one of the proposed candidate must be a national of the proposing state”.<sup>238</sup> The Convention does not say what should happen if two candidates from the same state are chosen through the secret ballots to be judges of the Court, it only provides that “no two judges may be nationals of the same state”.<sup>239</sup>

The tenure of the judges of the Inter-American Court of Human rights is “for a term of six years and may be re-elected only for once, the term of three judges [just like in the Commission] chosen in the first election shall expire at the end of three years and this names are determined by lot by the General Assembly immediately after the [first] election.”<sup>240</sup>

Most of the Member states of the Organization of American States did not ratify the Convention and where therefore not subject to the Inter-American Court on Human Rights, however the “the Commission continued to apply the human rights provisions of the [OAS] Charter and the American Declaration of the Rights and Duties of Man to these states that had not ratified the Convention”.<sup>241</sup>

By this fact of some of the member states of OAS not ratifying the Convention, more the dictatorial states, the Commission played a dual role which permitted it to deal massive violations of human rights that, though not within [the] jurisdiction [of the] convention, [but]

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<sup>237</sup> Article 53(1) of the American Convention on Human Rights

<sup>238</sup> Article 53(2) of the American Convention on Human Rights

<sup>239</sup> Article 52(2) of the American Convention on Human Rights

<sup>240</sup> Article 54(1) of the American Convention on Human Rights

<sup>241</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 796

addressed [within the] Charter regardless of the of whether or not the state in question is a party to the convention”.<sup>242</sup>

Under the Inter-American Convention, once a states accepts the jurisdiction of the Convention the “Commission shall [have powers to hear] and appear in all cases before the Court”.<sup>243</sup>

Access to the Inter-American Commission is by “any person or of persons, or any non-governmental entity legally recognised in one or more member states of the Organization, may lodge petitions with the Commission containing denunciation or complaints of violation of th[e] Convention by a state party”.<sup>244</sup>

For Inter-State Complaints to be possibly made against a state party against another state party, first “any state party when it deposits its instrument of ratification of or adherence to [the] Convention, or at any later time, declares that it recognises the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in [the] Convention”.<sup>245</sup> Therefore Inter-State Communications “may [only] be admitted and examined if they are presented by a State Party that has made a declaration recognising the [] competence of the Commission and also no inter-state communication shall be made against a State Party that has not made such a declaration”.<sup>246</sup>

Complaints and communications of violation of human rights submitted to the Commission are first considered for admissibility by the Commission and then data is sought from the

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<sup>242</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 796

<sup>243</sup> Article 57 of the American Convention on Human Rights

<sup>244</sup> Article 44 of the American Convention on Human Rights

<sup>245</sup> Article 45(1) of the American Convention on Human Rights

<sup>246</sup> Article 45(2)4 of the American Convention on Human Rights



state that the complaint has been made against and the Commission will set out the time frame within which the information should be given by the offending state, and all “the circumstances of each case are considered when coming up with the time frame”.<sup>247</sup>

Once information is obtained from the concerned state or the time that was set by the commission is over “the Commission shall ascertain whether the grounds for the petition or communication still exist and they do not exist it shall order the record be closed”.<sup>248</sup>

If the Commission concludes that there still is violation of human rights and there is need for it to be addressed “it shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts and if necessary and advisable carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities”.<sup>249</sup>

At all times the parties are at liberty and free to provide information to the commission and the commission is open for any interaction and the aim of the process is “to reach[] a friendly settlement of the matter on the basis of respect for the human rights recognised in th[e] Convention”.<sup>250</sup>

When it comes to “serious and urgent cases, only the presentation of a petition or communication that fulfils all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed”.<sup>251</sup>

Once the Commission achieves to reach a friendly settlement “the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to th[e]

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<sup>247</sup> Article 48(1)(a) of the American Convention on Human Rights

<sup>248</sup> Article 48(1)(b) of the American Convention on Human Rights

<sup>249</sup> Article 48(1)(d) of the American Convention on Human Rights

<sup>250</sup> Article 48(1)(f) of the American Convention on Human Rights

<sup>251</sup> Article 48(2) of the American Convention on Human Rights

Convention, and shall then be communicated to the Secretary General of the Organisation of American States for Publication, report shall contain a brief statement of the facts and of the solution reached”.<sup>252</sup>

In cases where the Commission is unable to deliver a friendly settlement, “it shall draw up a report settling forth the facts and stating its conclusion and if the report is not agreed unanimously by the members of the Commission, any member may attach to it a separate opinion<sup>253</sup> and it shall be submitted to the states concerned”.<sup>254</sup> The Commission’s report “may make such proposals and recommendations as it sees fit”.<sup>255</sup>

After “a period of three months from the date of the transmi[ssion] of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration”.<sup>256</sup>

When making its opinion and conclusions, “[it] shall make pertinent recommendations and shall prescribe a period within which the measures that are incumbent upon the situation examined<sup>257</sup> and after the set period is over, “[it] shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report”.<sup>258</sup>

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<sup>252</sup> Article 49 of the American Convention on Human Rights

<sup>253</sup> Article 50(1) of the American Convention on Human Rights

<sup>254</sup> Article 50(2) of the American Convention on Human Rights

<sup>255</sup> Article 50(3) of the American Convention on Human Rights

<sup>256</sup> Article 51(1) of the American Convention on Human Rights

<sup>257</sup> Article 51(2) of the American Convention on Human Rights

<sup>258</sup> Article 51(3) of the American Convention on Human Rights

In all cases when the convention provides that the Commission shall decide by an absolute majority, the convention falls short of provided what should happen when the requirement of the absolute majority is not/never achieved.

Where there is matter or a issue of “an adamant government or state the Commission is allowed to consider measures of preventive nature and in serious or urgent cases the Commission may request that the state should take some provisional measures to avoid irreparable damage<sup>259</sup> and also may request the Inter-American Court to adopt any provisional measures it deems pertinent to avoid irreparable damage”.<sup>260</sup>

When it comes to the it has two main jurisdiction contentious and advisory, mainly the “contentious jurisdiction is extension of the Commission’s handling of individual petitions, while the advisory jurisdiction mainly [deals with] the clarification of the conformity of national laws and practice with the legal standards of the OAS human rights instrument and adjudication”.<sup>261</sup> Contentious is dealt with only when the concerned state “has accepted the court’s contentious jurisdiction either generally or in a specific case”.<sup>262</sup>

The accessibility of the court is not open to “aggrieved individuals who have no standing before the court”<sup>263</sup> “Only the State Parties and the Commission shall have the right to submit a case to the Court”.<sup>264</sup>

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<sup>259</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 62; see Article 25(1) of the Rules of Procedure

<sup>260</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 62; see Article 74 of the Rules of Procedure of the Inter-American Commission

<sup>261</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 63

<sup>262</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 63; see Article 62 of the American Convention on Human Rights

<sup>263</sup> <sup>263</sup> Vincent O. Orlu Nmechielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 63

The issue of the Commission refusal to refer a case to the Court, where the concerned state has not accepted the court competence of the court to determine individual complaints, has been raised as one that can be a hindrance in to accessibility of court.<sup>265</sup> And the court in one of the cases determined such an issue and in trying to deal with this issue made the Commission appear on behalf of the aggrieved party.<sup>266</sup>

However the procedure is also changing as the Individuals are currently getting more standing recognition in cases that are before the Court.<sup>267</sup> The rules of procedure, “under rule 23, after the commission refers a case to the court and the case is admitted, the alleged victim, their family, or their duly accredited representatives can present their requests, arguments and evidence autonomously during the all stages of the proceedings”.<sup>268</sup>

But this in as much as it gives some access to individual it is still limited as this is only when the Commission refers a case to the Court but does not allow the individual direct access own his/her own.<sup>269</sup>

When the after hears the submissions of the parties, “the Court can find there has been a violation of a right or freedom protected by th[e] Convention and shall order that the injured party be ensured the enjoyment of his right or freedom and if appropriate, that the

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<sup>264</sup> Article 61 of the American Convention on Human Rights

<sup>265</sup> <sup>265</sup> Vincent O. Orlu Nmeihielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 64

<sup>266</sup> *Velasquez Rodriguez v. The State of Honduras, Judgment of July 29, 1988, Series C No. 4.*

<sup>267</sup> Article 23 of the Rules of Procedure of the Inter-American Court

<sup>268</sup> Vincent O. Orlu Nmeihielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 64

<sup>269</sup> Vincent O. Orlu Nmeihielle, “The African Human Rights System: Its Laws, Practice and Institutions” Kluwer Law International, Hague, 2001, p. 64

consequences of the measures or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”.<sup>270</sup>

When it comes to the enforcement of the decisions of the Court, “the court shall submit, for the General Assembly’s consideration, a report on its work and specify, in particular, the cases in which a state has not complied with its judgements, making any pertinent recommendations”.<sup>271</sup>

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<sup>270</sup> Article 63 of the American Convention on Human Rights

<sup>271</sup> Article 65 of the American Convention on Human Rights

## Conclusions and Recommendations

The research has so far consider the three regional human rights systems (European, Inter-American and the African) of promotion and protection of human rights. The three systems have been seen to have grown from one aspect to another.

The Changes that were brought by the eleventh protocol to the European Convention on Human Rights are very much welcomed in the protection and promotion of human rights. I think the mandatory individual petitions<sup>272</sup>, provides a good avenue for dealing with the massive human violations in the African Context. Under the African Human Rights system for the promotion and protection of human rights individual's access to the Commission and the Court is limited and not direct. The individual's access to the African Commission is limited to "cases which reveal the existence of a series of serious or massive violations of human and peoples' rights".<sup>273</sup> One is left to wonder what is "a series of serious or massive violations of human and peoples' rights"? and whether that which is not a series is not suppose to go before the Commission for examination and does "massive" carter for the individual complaints.<sup>274</sup>

The African Human rights system suffers from lack of financial resources, it should be considered to have the Commission and the new Court merged as the European Commission and the European Court on Human Rights into a single judicial body. This has been seen and

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<sup>272</sup> Article 34 of Protocol 11 to the European Convention on Human Rights

<sup>273</sup> Article 58(1) of the African Charter on Human and Peoples' Rights

<sup>274</sup> Thomas Buergenthal, "The Evolving International Human Rights System", 100 American Journal of International Law(2006), pp. 783-807, at p. 799

“believed that will change and improve the previous procedures and provide for more efficiency”.<sup>275</sup>

Also the African Human Rights System Should consider having the role the African Union Assembly of heads of States and Government even with new Court coming into effect and full operation remain with the supervisory work and do not have the decision making role as it is with the European and the Inter-American Systems.<sup>276</sup>

The African Commission and by extension the new African Court should be made more independent in its work. The work of the African Commission is much more restricted than that of the other regional Human Rights bodies, this is because the work of the Commission’s “findings with regard to the communications it receives cannot be made public without the permission of the African Union’s Assembly of Head of States and Government, a political body that has traditionally not been inclined to take strong action against serious violators of human rights”.<sup>277</sup>

The mandate of the new African Court on Human rights provides that it is not only to consider the African Charter on Human and Peoples’ Rights but includes “any other relevant Human Rights instrument ratified by the states concerned”.<sup>278</sup> Since the Protocol came into effect in the year 2006 and the Court is yet to become fully operative, there is still no jurisprudence to show how the court will deal with the “other relevant human rights instrument” while examining the cases before it, either on the advisory and the contentious

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<sup>275</sup> Rachel Murray, “The African Commission on Human and Peoples’ Rights and International Law”, (Hart Publishers; Oxford, 2000) at p. 31

<sup>276</sup> Rachel Murray, “The African Commission on Human and Peoples’ Rights and International Law”, (Hart Publishers; Oxford, 2000) at p. 31

<sup>277</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, 100 American Journal of International Law(2006), pp. 783-807, at p. 799

<sup>278</sup> Article 3 of the Protocol to the African Charter on Human and Peoples’ Rights

jurisdiction of the court.<sup>279</sup> I would suggest that the African Court on Human and Peoples' Rights should take into consideration the jurisprudence from institutions that the concerned party has ratified the human rights instrument.

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<sup>279</sup> Thomas Buergenthal, "The Evolving International Human Rights System", 100 American Journal of International Law(2006), pp. 783-807, at p. 800



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