



**INDIVIDUAL COMPLAINT MECHANISM IN THE  
JURISPRUDENCE OF THE AFRICAN HUMAN RIGHTS SYSTEM  
VIS A VIS THE EUROPEAN AND THE INTER-AMERICAN  
HUMAN RIGHTS SYSTEMS: INADEQUACIES AND PROSPECTS**

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## **DEDICATION**

This thesis is dedicated to my parents for bringing me forth into this world and utilizing their inexhaustible knowledge to teach me the importance of keeping peace with the universe and the need to respect, embrace and acknowledge life splendid and constant mysteries.

## DECLARATION

I declare that this thesis which I submit in accordance with the requirements for the degree of Masters of Law at Central European University is my own original work and has not previously been submitted by me for a degree at another university. All primary and secondary sources used have been duly acknowledged.

Kamau Njeri Esther

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Date

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## **LIST OF ACRONYMS**

OAU	Organization of African Unity
ECHR	European Court on Human Rights
AU	African Union
OAS	Organization of American States
UN	United Nations
NGO	Non Governmental Organization
ICJ	International Commission of Jurists



## ABSTRACT

The establishment of the three regional systems; the European, the Inter-American and the African systems of human rights gives an indication of the great significance that is accorded to the protection of human rights. However, although the three systems have exemplified that their core values and obligations are backboned on the protection of human rights, the degree of protection that is offered by the systems differs from one system to another. In the earlier days, the three systems were giving priorities to the inter-state applications therefore turning a blind eye on the needs of individuals of human rights violations. However, there has been a slow paradigm shift in the jurisprudence of the three systems whereby individual complainants are slowly being allowed to access the systems just as state parties are. This move has been made possible by the realisation that individuals are more vulnerable to human rights violations as opposed to states. Sadly, despite the jurisprudential paradigm shift that is slowly taking place in the regional systems, the African system still maintains a requirement whereby the right for an individual to access the system is still pegged on the good will of the member states to make a declaration acknowledging the jurisdiction of the Court to deal with individual applications.<sup>1</sup> This paper contends that it is elusive to continue assuming that individual complainants do not have redress-able rights without the intervention of their respective states.

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<sup>1</sup> Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, Journal of African Law, Vol. 43, No. 2 (1999), pp. 201-213, Cambridge University Press, At 211-212

*I believe we should try to move away from the vocabulary and attitudes which shape the stereotyping of developed and developing country approaches to human rights issues. We are collective custodians of universal human rights standards, and any sense that we fall into camps of “accuser” and “accused” is absolutely corrosive of our joint purposes. The reality is that no group of countries has any grounds for complacency about its own human rights performance and no group of countries does itself justice by automatically slipping into the “victim” mode.<sup>2</sup>*

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<sup>2</sup>Mary Robinson, United Nations High Commissioner for Human Rights

## INTRODUCTION

Over the years, the world has taken cognizable efforts in emphasizing the need to promote and protect human rights. Some of these efforts have been reflected in creation and development of regional systems for protection of human rights such as the African,<sup>3</sup> the European and the Inter-Americas systems of human rights as one way of addressing human rights violations.<sup>4</sup>

Accordingly, the existing regional systems have put in place various complaint mechanisms in order to facilitate an avenue through which regional states as well as individuals can address their grievances and get redress for violations occasioned to them. Nevertheless, despite the existence of these regional systems and complaints procedures, individuals' human rights do not only continue to be abused, but accessing the regional systems for redress still remains a mystery for most of individual victims of human rights violation.<sup>5</sup> Therefore, this paper seeks to scrutinize the accessibility of regional systems by individual complainants: the paper will mainly focus on the African system but it will heavily borrow some comparative aspects from the Inter-American and the European systems of human rights.

So far, the African system has been noted in many literatures as being lenient in as far as violation of human rights in the African continent is concerned. While it is premature to make such a confident assessment at this juncture, this paper is not blind to the fact that some of the writers' viewpoints hold some truth in them. Thus, this paper acknowledges the general proposition held by a number of writers who argues that human rights situation in

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<sup>3</sup> In this paper, the African system of human right will be restricted to the African Commission on Human Rights, the African Court of Human Rights and the proposed African Court of Justice.

<sup>4</sup> Michelo Hansungule, "*Protection of Human Rights under the Inter-American System: An Outsider's Reflection*" in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 681-684, (2001)

<sup>5</sup> Supra note 4

Africa is so dire to an extent that the existence of the African system of human rights as a regional framework for protection of human rights does not seem to salvage the situation.<sup>6</sup>

Similarly, critics such as Nsongurua J. Udombana opines that, although the “African continent has come a long way over the past fifty years in establishing a human rights framework, institutions, and structure at the national and regional level (. . .) the discourse of human rights (. . .) has not been translated into rights reality”.<sup>7</sup>

In fact, the African system has, on a number of occasions been termed as inefficient when compared with the Inter-American and the European systems of human rights. Illustratively, David J. Bederman and Charles Chernor Jalloh have consigned the African system to the ‘least developed or effective category’ in as far as protection of human rights is concerned.<sup>8</sup> The two authors purport that the African system has been termed by commentators as a “disappointment, if not an embarrassment for the continent”.<sup>9</sup> Similar sentiments were echoed during the 42nd Ordinary Session of the African Commission held in Congo Brazzaville, by Yasir Sid Ahmed Hassan: the then Vice-Chair of the African Commission on Human and Peoples’ Rights who remarked that the “general human rights landscape on the African continent remains a cause for grave concern”.<sup>10</sup>

In the light of the foregoing, one can rightly argue that human rights situation in Africa has been the lens through which the effectiveness of the African system has been scrutinized. Illustratively, the existence of endemic human rights violation in most African

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<sup>6</sup> Jo Pasqualucci, *The Americas* in INTERNATIONAL HUMAN RIGHTS LAW, Moeckli Daniel et al, Oxford University press, at 433, (2010)

<sup>7</sup> Nsongurua J. Udombana, *Toward the African Court on Human And Peoples’ Rights: Better Late than Never*, Yale Human Rights & Development L.J., Vol 3.45, at 46

<sup>8</sup> David J. Bederman & Charles Chernor Jalloh, *Michelot Yogogombaye V. Republic of Senegal*, The American Journal of International Law, Vol. 104, No. 4 (October 2010), American Society of International Law pp. 620-628 at 623

<sup>9</sup> Supra note 8

<sup>10</sup> Remark made by Yasir Sid Ahmed Hassan (the then Vice-Chair of the African Commission on Human and Peoples’ Rights) during the African Commission’s 42nd Ordinary Session in Congo Brazzaville, in November 2007) See, George Mukundi Wachira, *African Court on Human And Peoples’ Rights: Ten Year so on and Still No Justice*, (2008), available at <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf> (lamenting the Court’s failure to hear a single case a decade after its formal creation).

states has made many scholars to view the ratification of the African Charter by African Governments as an “empty gesture” accompanied by vague commitments to protect human rights.<sup>11</sup>

It is on the basis of the standoff between the general human rights situation in African, and the rights of individual victims of human rights violations to access the regional systems for redress, that this paper will analyse the Inter-American and the European systems of human rights with the view of identifying some aspects that could be useful if incorporated in the African system. Therefore, this paper will highlight the challenges, successes, loopholes and prospects that the African system has encountered or continues to experience in its endeavours in redressing human rights violations and try to recommend some solutions through a comparative analysis of the European and Inter-American systems.

Accordingly, the European and the Inter-American systems of human rights have been carefully selected for this comparison for various reasons. Firstly, although, as opposed to the African system, the European and the Inter-American systems of human rights are viewed as the most developed systems in as far as the protection of human rights through individual complaints procedures is concerned; their development and success did not come easy. It was through constant efforts and embracement of hard lessons that the two systems managed to be well established and efficient in their works.<sup>12</sup> Demonstratively, while analyzing the development of the European system, Paul Lemmens and Wouter Vandenhoe observe that;

[T]he history of the “European” right of individual petition has been a steady, long march towards the effective realization of full justiciability for all human rights at a supranational level.<sup>13</sup>

<sup>11</sup> George Mukundi Wachira, *African Court on Human And Peoples’ Rights: Ten Year so on and Still No Justice*, (2008), available at <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf>

<sup>12</sup> Lemmens Paul & Vandenhoe Wouter, *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS*, Antwerpen-Oxford, 2005 at 48

<sup>13</sup> Lemmens Paul & Vandenhoe Wouter, *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS*, Antwerpen-Oxford, 2005 at 48

Secondly, the passage of time has also played a significant role in strengthening and influencing the efficiency of the Inter-American and the European systems of human rights. Notably, one of the logical arguments that have been put forward is that the European and the Inter-American systems came into existence several years before the ‘birth’ of the African System. While supporting this argument, Steve Greer opines that Europe and Inter-American jurisdictions were the “birthplace of the now global processes of political, social, legal, and economic modernization which embody, amongst other things, liberalization, democratization, marketization, and internationalization.”<sup>14</sup> Similarly, the fact that the European system of human rights was the only regional mechanism deciding contentious cases for almost three decades before the Inter-American Court issued its first merits judgment in 1988 and before the establishment of the African system of human rights are factors that can be accounted as having contributed towards the efficiency of the European system of human rights.<sup>15</sup>

In the light of the above, chapter one of this paper will give a historical background of the African, European and the Inter-American systems of human rights with specific focus on individual complaint mechanisms. The chapter will highlight chronological events that took place during the adoption of the respective founding documents as well as the enforcement machineries that makeup the three systems. Chapter two will deal with comparative aspects of the three regional systems: the European, Inter-American and the African while chapter three will deal with the challenges, inadequacies and prospects that the African system faces. The chapter will also consider some of the lessons that the African system can enumerate from the European and Inter-American systems.

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<sup>14</sup> Steve Greer, *Europe* in, INTERNATIONAL HUMAN RIGHTS LAW, Moeckli Daniel et al Oxford University press 2010, at 455

<sup>15</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011 at 5

# CHAPTER ONE

## 1. HISTORICAL BACKGROUND: AN OVERVIEW OF THE SYSTEMS

### 1.1 *African System of Human Rights*

#### 1.1.1 The African Charter on Human Rights

The laying of the foundation for the adoption of the African Charter began on 28<sup>th</sup> November 1979 when Organization of African Union (here in after OAU) Secretary General organized a conference in Dakar with the aim of initiating the drafting process of the Charter.<sup>16</sup> The conference which was made up of approximately twenty African experts managed to successively draft the first version of the Africa Charter.<sup>17</sup>

Subsequently, after two unsuccessful ministerial sessions<sup>18</sup> during which deliberations on the adoption of the Charter were inflexibly discussed, the participants agreed on a draft<sup>19</sup> which was subsequently adopted in Banjul in January 1981.<sup>20</sup> The Charter was finally adopted on 28<sup>th</sup> June 1981 in the Kenyan capital-Nairobi<sup>21</sup> and entered into force on 21

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<sup>16</sup> B. Obinna Okere *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159, The Johns Hopkins University Press at 158. See also, Dinah Shelton, REGIONAL PROTECTION OF HUMAN RIGHT, Oxford University Press, 2008 (who arguing that even way before the initiation of the formulation of the Charter, the UN had, for a long time been advocating for the "establishment of a regional Human Right Institution in Africa").

<sup>17</sup> Germain Baricako, *The African Charter and African Commission on Human and peoples' Rights* 1-20 in THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS: THE SYSTEM IN PRACTICE, ed, Malcolm Evans and Rachael Murray, (2nd ed 2008). Cambridge University Press, at 7

<sup>18</sup> The first session was held in Banjul on 9<sup>th</sup> June 1980 while the second was held in Freetown, Sierra Leone in June 1980

<sup>19</sup> The draft had 68 Articles and a preamble

<sup>20</sup> Germain Baricako, *The African Charter and African Commission on Human and peoples' Rights* 1-20 in THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS: THE SYSTEM IN PRACTICE, ed, Malcolm Evans and Rachael Murray, (2nd ed 2008). Cambridge University Press, at 7

<sup>21</sup> See, George Mukundi Wachira, *African Court on Human and Peoples' Rights: Ten Years on and Still No Justice* (2008), available at <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf> (lamenting the Court's failure to hear a single case a decade after its formal creation).

October 1981 after it was ratified by the required majority of the OAU (now African Union) member states.<sup>22</sup>

Although the rights that are provided under the African Charter are, in most facets, similar to most international norms, the Charter has to some extent been tailored to suit the realities of the African situation, customs and experience. For instance, an overview of the Charter reveals an integration of the African's ideologies of the "conception of man (being not) that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity".<sup>23</sup> Thus, it is not a surprise that most of the rights that are guaranteed by the Charter are to be enjoyed collectively and in consideration of other people. Illustratively, the Charter accords a wide range of rights to Individuals but the same rights are correlated with corresponding duties and obligations to society, families and state.

Additionally, the Charter preconditions individuals' enjoyment of rights and freedoms on "collective security, morality and common interest" of others.<sup>24</sup> The Charter therefore goes into specific details on duties and obligations that individuals have to fulfil in order to preserve groups as well as family unity. For example, children have a duty to maintain their parents in case of need; the duty to preserve the harmonious development and cohesion of the family; individuals have a duty to promote, safeguard, and reinforce mutual respect and tolerance; the duty to serve the national community by placing one's physical and intellectual abilities at its service, or by paying taxes imposed by law in the interest of society; the duty to preserve and strengthen positive African cultural values; and the duty to contribute to the promotion and achievement of African unity.<sup>25</sup>

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<sup>22</sup> Murray, Rachel, Dr. & Wheatley, Steven, *Groups and the African Charter on Human and Peoples' Rights*, Human Rights Quarterly, Volume 25, Number 1, February 2003, pp. 213-236, The Johns Hopkins University Press, at 216

<sup>23</sup> Obinna Okere *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159, The Johns Hopkins University Press, at 148

<sup>24</sup> Article 27 of the African Charter

<sup>25</sup> Article 29 of the African Charter



Accordingly, the Charter has been criticized for providing broad and expansive rights but failing to create effective mechanism through which those rights can be enforced. Fatsah Ouguergouz, for example views the African Charter as a legal instrument which is “technically poor”.<sup>26</sup> He reasons that the Charter lacks precision in regards to the rights it guarantee hence providing “individual with only poor legal protection”.<sup>27</sup>

However, despite his criticism, Fatsah Ouguergouz also argues that, although the Charter is “not self sufficient”, its expansiveness embraces great flexibility thus creating room for broader interpretation of rights to individual’s advantage.<sup>28</sup> Before I conduct an in-depth exposition of certain elements of the Convention (under Chapter 2), It is important to carry out a preliminary overview of the African Commission.

### **1.1.2 The African Commission on Human Rights**

The first proposal to create an Africa Commission on Human and People’s Right was instigated by the International Commission of Jurists (ICJ) through a proposal in 1961 during the “first congress of the African jurist” in Lagos, Nigeria. However, nothing took place after this initiation and the proposal had to be followed up with a series of deliberations.<sup>29</sup>

The most comprehensive steps after the ICJ’s proposal steamed up in a seminar in Cairo whose theme revolved around the need to create a regional Commission of Human Rights in Africa. Subsequently, the UN’s Commission on human rights during its 34<sup>th</sup> Session in 1978 adopted a resolution which urged the UN’s Secretary General to reflect on

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<sup>26</sup>F Ouguergouz, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA*, Martinus Nijhoff , 2003 at 784

<sup>27</sup> Supra note 2, at 786

<sup>28</sup> Supra note 26, at 786

<sup>29</sup> Germain Baricako, *The African Charter and African Commission on Human and peoples’ Rights* 1-20 in *THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS: THE SYSTEM IN PRACTICE*, ed, Malcolm Evans and Rachael Murray, (2nd ed 2008). Cambridge University Press, at 1

the possibility of giving assistance to the OUA for the facilitation of the establishment of an African Commission of Human Rights.<sup>30</sup>

Visible developments started to shape up in Liberia during a seminar on the creation of regional human rights Commissions, in particular for Africa. It was in this seminar that a draft document entitled *the Monrovia Proposal on the Establishment of an African Commission on Human Rights* was adopted.<sup>31</sup> Inevitably, approximately six years after the adoption of the African Charter, the African Commission on human right was inaugurated on 2 November, 1987.<sup>32</sup>

The Commission is made up of eleven members who are chosen from different African states such that not more than one member comes from the same state.<sup>33</sup> So far, the Commission has been the most valuable body in the protection of human right in the African system because of its accessibility by individuals.<sup>34</sup> The Commission is entrusted with the mandate of promoting human and peoples' rights; protection of human and peoples' rights; interpretation of the African Charter and performance of any other tasks that may be entrusted to it by the AU Assembly.<sup>35</sup>

### 1.1.3 African Court on Human and Peoples' Rights

Like the establishment of the African Charter and the African Commission on Human Rights which took years of deliberation, the possibility of having an African Court of Human

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<sup>30</sup> Germain Baricako, *The African Charter and African Commission on Human and peoples' Rights* 1-20 in *THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS: THE SYSTEM IN PRACTICE*, ed, Malcolm Evans and Rachael Murray, (2nd ed 2008). Cambridge University Press, at 4

<sup>31</sup> Supra note 30, at 5

<sup>32</sup> U. O. Umozurike, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS*, The Hague: Kluwer law International, (1997), at 67

<sup>33</sup> Articles 31-32 of the African(Banjul) Charter on Human and Peoples' Rights

<sup>34</sup> B. Obinna Okere *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159, The Johns Hopkins University Press at 158 at pp150-152

<sup>35</sup> See Chapter two of the African Charter see also Magdalene Sepulveda et al, *HUMAN RIGHTS REFERENCE HANDBOOK*, (200), University for peace, at 163(who summarizes the mandates of the Commission as entailing "three principle functions: examining state reports (Article 62 ACHPR), considering communications alleging violations of human rights from both individuals and states (Articles 47 and 55 ACHPR) and interpreting provisions in the African Charter (Article 45(3) ACHPR).

right remained an invisible idea until the adoption of a resolution<sup>36</sup> on 15 June 1994 by the OAU Assembly of Heads of States meeting in Tunis. The resolution proposed to the Secretary-General of the OUA to consider arranging a meeting of Government experts together with the African Commission on Human and Peoples' Rights in order to discuss the feasibility of establishing an African Court of Human and Peoples' Rights.<sup>37</sup>

Accordingly, a group of government experts met in Cape Town South Africa in September 1995 and put together a Draft Protocol establishing the African Court of Human and Peoples Rights.<sup>38</sup> The Draft was recommended for adoption in December 1997 in Addis Ababa-Ethiopia and officially approved by the OAU Assembly of Heads of States and Government in Ouagadougou-Burkina Faso on June 9, 1998 as the official document establishing the African Court of Human and Peoples' Rights.<sup>39</sup>

Interestingly, despite having voted for the establishment of the African Court, many African states have been hesitant to bring it into operation.<sup>40</sup> Currently, only a few states out of all the African States who are signatory to the Charter are parties to the Protocol establishing the African Court of Human and Peoples Rights.<sup>41</sup> Additionally, states have even being more hesitant when it comes to acknowledging the Court's jurisdiction to adjudicate on individual complaints. So far only a few states like Mali, Malawi, Tanzania and Burkina Faso

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<sup>36</sup> AHG/Res. 230(XXX)

<sup>37</sup> U. O. Umozurike, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS*, The Hague: Kluwer law International, (1997), at 67

<sup>38</sup> The Court was meant to complements the "protective mandate of the African Commission on Human and Peoples": see- Nsongurua J. Udombana, *An African Human Rights Court And An African Union Court: A Needful Duality Or A Needless Duplication?*, Journal of International Law, Brooklyn Law School

<sup>39</sup> Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or A Needless Duplication?*, Journal of International Law, Brooklyn Law School, see also Makau Mutua, *The African Human Rights Court: A Two-Legged Stool*, Human Rights Quarterly 21.2 (1999) 342-363, The Johns Hopkins University Press

<sup>40</sup> Over ten years after the adoption of the Protocol establishing the Court, the Court is not yet fully operational.

<sup>41</sup> See, George Mukundi Wachira, *African Court on Human and Peoples' Rights: Ten Years On And Still No Justice* (2008), available at <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf>

– have granted individuals and NGOs direct access to the Court” in accordance to the provisions of Article 5(3)<sup>42</sup> and 34(6)<sup>43</sup> of the Protocol.<sup>44</sup>

As I will discuss later in chapter two of this paper, the African Court has both “contentious and advisory jurisdictions”. Its contentious jurisdiction extends to cases and disputes that are filed before it concerning the interpretation and application of the Charter as well as most of the relevant Human Rights instrument ratified by the States concerned.<sup>45</sup> Similarly, the Court is mandated with the role of providing legal opinion to and on the request of Member State of the AU, the AU itself or any of its organs, or any African organization recognized by the AU.<sup>46</sup>

The Court is making cognizable efforts in redressing human rights violations. Illustratively, it recently delivered its first ever judgment in the case of *Michelot Yogogombaye versus the Republic of Senegal*.<sup>47</sup> Although the Court did not indulge on the merit of the case, the case still acts as a good start for the Court.<sup>48</sup> However, the future of the Court remains blurred following the adoption of the Constitutive Act of the African Union (AU) in July 11, 2000 (during its Thirty-sixth Ordinary Session in Lome, Togo). The Act

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<sup>42</sup> Sections provides that “The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol”.

<sup>43</sup> The section provides that “At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration”.

<sup>44</sup> David J. Bederman and Charles Chernor Jalloh, *Michelot Yogogombaye v. Republic of Senegal*, The American Journal of International Law, Vol. 104, No. 4 (October 2010), American Society of International Law pp. 620-628 at 623

<sup>45</sup> Article 3 of the Protocol to the African Charter

<sup>46</sup> Article 4 of the Protocol to the African Charter

<sup>47</sup> Application No. 001/2008

<sup>48</sup> Murungu, Chacha Bhoke, *Judgment in the First Case before the African Court on Human and Peoples' Rights: A Missed Opportunity or Mockery of International Law in Africa?* (December 21, 2009). Available at SSRN: <http://ssrn.com/abstract=1526539> . see also David J. Bederman and Charles Chernor Jalloh, *Michelot Yogogombaye v. Republic of Senegal*, The American Journal of International Law, Vol. 104, No. 4 (October 2010), American Society of International Law pp. 620-628 at 623, ( when noting that the issuance of the first Judgement by the Court is a positive step, they argue that “In a continent rife with human rights violations, the judgment marks the beginning of an era in which African states, individuals, and NGOs may have disagreements about important human rights matters Adjudicated by this regional Court”. They also argue that the case highlights the innovative approaches the Court has taken in interpreting the provisions of Article 34(6) broadly in order to accommodate individual complaints. Additionally, they view the long duration the Court took before delivering the judgment as a pointer to one of the flaws of the Courts

does not only aim at replacing the Charter of the OAU but it also makes provision for the establishment of an African Court of Justice (AU Court).<sup>49</sup> Consequently, a Protocol<sup>50</sup> merging the African Court of Human and peoples' Rights and the Africa Court of justice of the African Union has been adopted and it is currently awaiting ratifications from the member states.<sup>51</sup>

## **1.2 The European System of Human Rights**

### **1.2.1 The European Convention on Human Rights**

The European Convention on Human Rights was entered into force on 3rd September 1953 after a long process of deliberation<sup>52</sup> between the Committee of Ministers<sup>53</sup> and the Consultative Assembly.<sup>54</sup>

When it was first adopted, the Convention was a bit restrictive in regards to redressability of individual victims of human rights violation. However, as Gordon Weil points out, most of the limitations presented by the Convention were later amended through the adoption of Protocols therefore enhancing the protection of individual complainants. So far fourteen Protocols to the Convention have been adopted: with the most relevant Protocol in as far as the evolution of individual complaint mechanisms is concerned being Protocol 9. The

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<sup>49</sup> Nsongurua J. Udombana, *An African Human Rights Court And An African Union Court: A Needful Duality Or A Needless Duplication?*, Journal of International Law, Brooklyn Law School

<sup>50</sup> Protocol on The Statute of The African Court of Justice and Human Rights

<sup>51</sup> Article 1 of the Protocol provides that: "The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso and which entered into force on 25 January 2004, and the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, are hereby replaced by the present Protocol and Statute annexed as its integral part hereto, subject to the provisions of Article 5, 7 and 9 of this Protocol", while article 9(1) provides that "the Protocol and the Statute annexed to it shall, enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States".

<sup>52</sup> Jack Donnelly, *International Human Rights: A Regime Analysis*, International Organization, Vol. 40, No. 3 (Summer, 1986), pp. 599-642, The MIT Press

<sup>53</sup> Composed of the Minister of Foreign Affairs of each member state

<sup>54</sup> composed of parliamentarians of both the government and the opposition parties in each member state

Protocol guarantees a right of access to the Court by individual complainants once their respective states ratify the Protocol.<sup>55</sup>

The adoption of this Protocol opened a floodgate of cases from individual complainants hence creating an enormous workload for the Court in the nineties.<sup>56</sup> This state of affairs necessitated the adoption of Protocol No.11 which aimed at “shortening the length of proceedings while strengthening the judicial character of the system”.<sup>57</sup> The Protocol therefore made the jurisdiction of the Court compulsory for every member state and abolished the adjudicative role that was been played by the Committee of Ministers.<sup>58</sup>

Subsequently, Protocol 14 was adopted with the view of dealing with the bloating workload. The Protocol aims at placing restrictive measures in respects of individual complaints by establishing new admissibility grounds which are meant to sieve ‘unserious’ complaints at preliminary stage before they are heard on merit.<sup>59</sup> This paper will cover certain aspects of Protocol 14 in details later on in Chapter 2.

### 1.2.2 The European Commission on Human Rights

The European Commission on Human Right came into existence in May 18, 1954 following an election by the Committee of Ministers of the Council of Europe. The Commission was entrusted with two tasks:

<sup>55</sup> *European Court of Human Rights Annual report 2003*, Registry of the European Court of Human Rights Strasbourg, 2004, available at [http://www.echr.coe.int/NR/rdonlyres/6B93E29C-36E0-42C7-B982-721440881AC7/0/Annual\\_Report\\_2003.pdf](http://www.echr.coe.int/NR/rdonlyres/6B93E29C-36E0-42C7-B982-721440881AC7/0/Annual_Report_2003.pdf), last accessed on 19<sup>th</sup> March, 2011

<sup>56</sup> *European Court of Human Rights Annual report 2003*, Registry of the European Court of Human Rights Strasbourg, 2004, available at [http://www.echr.coe.int/NR/rdonlyres/6B93E29C-36E0-42C7-B982-721440881AC7/0/Annual\\_Report\\_2003.pdf](http://www.echr.coe.int/NR/rdonlyres/6B93E29C-36E0-42C7-B982-721440881AC7/0/Annual_Report_2003.pdf), last accessed on 19<sup>th</sup> March, 2011 (the report articulates that, with the adoption of the Protocol, “The number of applications registered annually with the Commission increased from 404 in 1981 to 4,750 in 1997. By that year, the number of unregistered or provisional files opened each year in the had risen to over 12,000. The Court’s statistics reflected a similar story, with the number of cases referred annually rising from 7 in 1981 to 119 in 1997”).

<sup>57</sup> Lemmens Paul & Vandenhoe Wouter, *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS*, Antwerpen-Oxford, 2005 at 48

<sup>58</sup> *European Court of Human Rights Annual report 2003*, Registry of the European Court of Human Rights Strasbourg, 2004, at pp 8-11

<sup>59</sup> Accordingly, Lemmens Paul and Vandenhoe Wouter argue that, the coming into force of Protocol 14 may undermine the very essence of individual complaint mechanism especially because of the “new inadmissibility ground” which bestows upon the Court the powers to “dismiss individual applications at a preliminary stage of the proceeding”.

(1) to consider any alleged breach of the Convention by a party referred to it by another party to the Convention through the Secretary General of the Council of Europe; and (2) to receive petitions through the Secretary General of the Council of Europe "from any person, non-governmental organization or group of individuals claiming to be the victim of a violation" by a party of the Convention rights, provided that the party has recognized this competence of the Commission.<sup>60</sup>

The European Commission, as the first ever body to be created with the intention of addressing human right violation in European continent was vital in emphasizing the purpose and objective of the European Convention. The Commission made it clear that the Convention is not only meant to vindicate disputes between states but it also contains "obligations implicating the 'public order' of Europe which are of an objective nature and protect the fundamental rights of individual"<sup>61</sup> The Commission stressed this fact in the case of *Ireland v UK*,<sup>62</sup> when it articulated that:

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagement between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the preamble, benefit from a 'collective enforcement'.<sup>63</sup>

Although the Commission was dissolved on October 31, 1998, the work it carried out during its existence was so fundamental and revolutionary in as far as individuals' rights to file complaints was concerned.<sup>64</sup>

### 1.2.3 The European Court of Human Rights

The European Court of Human Rights, which has its seat in Strasbourg, was established in 1959 and it started its operations as a permanent Court following the adoption

<sup>60</sup>Denys P. Myers, *The European Commission on Human Rights*: The American Journal of International Law, Vol. 50, No. 4 (Oct., 1956): American Society of International Law, at pp 949-951

<sup>61</sup> Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, European Journal of International Law (2003) 14(3): 529-568 doi:10.1093/ejil/14.3.529

<sup>62</sup> 58 ILR(1980) 188,

<sup>63</sup> Ireland v UK 58 ILR(1980) 188, AT 291

<sup>64</sup> Denys P. Myers, *The European Commission on Human Rights*: The American Journal of International Law, Vol. 50, No. 4 (Oct., 1956): American Society of International Law, at 950

of Protocol 11”.<sup>65</sup> The Court is made of a numbers of judges’ equivalent to the number of member states of the Council of Europe.<sup>66</sup>

The Court has reported numerous successes especial in redressing the rights of individual complainants. In their book (*International human rights in context*), Steiner, Alston and Goodman view the Court as the initial hallmark of considering and protecting individual rights through individual complaint mechanism.<sup>67</sup> Elaborating on this fact, Paul Lemmens and Wouter argues that, the right of individual to petition before the Court has come a long way. They note that, initially, individuals had no right to petition the Court directly, applications could only be made to a “quasi –judicial body”, the European Commission of Human Rights, which had the sole mandate to refer a case to the Court if it deemed the case meritorious. On the contrary, states parties had powers to petition the Court as well as powers to decide whether or not to accept the jurisdiction of the Court.<sup>68</sup> After the adoption of Protocol 9, victims of human rights violations were given a leeway to refer their cases directly to the Court. However, every application had to be screened for admissibility by the Commission before being forwarded to the Court.<sup>69</sup>

On a more positive note, the coming into force of Protocol 11 fundamentally brought about a lot of reforms in as far as access to Court by individual complainants was concerned. Firstly, the Commission and the Court were merged to form a “full time single Court” and

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<sup>65</sup> European Court of Human Rights Annual report 2003, Registry of the European Court of Human Rights Strasbourg, 2004, at pp 8-11

<sup>66</sup> J.G Merrills, *The Development of international Law by the European Court of Human Rights*, 2<sup>nd</sup> ed, Manchester University Press, 1993, at p 6

<sup>67</sup> H.J. Steiner et al, *International human rights in context*, 3<sup>rd</sup> edition, Oxford University, 2008, p 939

<sup>68</sup> Lemmens Paul & Vandenhoe Wouter, *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS*, Antwerpen-Oxford, 2005 at 45

<sup>69</sup> Lemmens Paul & Vandenhoe Wouter, *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS*, Antwerpen-Oxford, 2005 at 45, see also European Court of Human Rights Annual Report 2003 see also Article 32 of the European Convention for the Protection of Human Rights and Fundamental freedoms.



victims were also allowed direct and unlimited access to the Court. Additionally, “the jurisdiction of the Court became compulsory for every states party.”<sup>70</sup>

The European Court of Human Rights has been commended for-among other things- its ‘pro-victim’ approach in as far as the interpretation of the Convention is concerned. For example, Lemmens and Wouter are of the view that, the Court’s liberal interpretation of the notion of ‘victims’ as including the so called ‘indirect victims and potential victims’ has expanded the scope of protection of individuals rights by the Court.<sup>71</sup> The concept has been applied in situations involving expulsion, extradition, deportation and other circumstance that would expose a person to inhuman and degrading treatment.<sup>72</sup> This paper will discuss the concept of “potential victims” in details in the subsequent chapters. At this juncture, I would like to cover a brief overview of the Inter-American system of human rights

### ***1.3 Inter-American System of Human Rights***

#### **1.3.1 American Convention on Human Rights**

Although the Organization of American States (OAS) was in existence way before the Second World War,<sup>73</sup> protection of human rights was not stipulated as one of its chief objectives in its early days. However, this state of affair changed in 1948 when OAS adopted the ‘American Declaration of Rights and Duties of Man’ with the view of protecting civil,

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<sup>70</sup> Supra note 69, see also European Court of Human Rights Annual Report 2003 see also Article 32 of the European Convention for the Protection of Human Rights and Fundamental freedoms.

<sup>71</sup> Supra note 69, at 45

<sup>72</sup> See the Case of *Chahal v UK*, where the applicant; an Indian national leaving in the UK claimed that he had well founded fear of persecution if a deportation order was effected against him. THE European Court of Human Rights concluded that deporting the applicant back to India would result to a violation of Article 3 of the European Convention.

<sup>73</sup> Michelo Hansungule, “*Protection of Human Rights under the Inter-American System: An Outsider’s Reflection*” in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, (2001), at 685

political, economic, social and cultural rights.<sup>74</sup> This first step towards embracement of human rights' protection was later followed by the adoption of the American Convention of Human Rights<sup>75</sup> in November 1969 which came into force in 1978.<sup>76</sup>

The American Convention of Human Rights establishes two distinct bodies, 1) the Inter-American Commission which is a quasi judicial body which “acts as the first instance for victims of human rights violations who wish to bring cases before the system”.<sup>77</sup> 2) The Inter-American Court of Human Rights.<sup>78</sup>

The Convention explicitly guarantees civil and political rights<sup>79</sup> with its most fundamental element being its attitude toward individual complainants: the Convention allows individuals alleging human rights violations to petition to the Commission for redress. By ratifying the Convention, the states automatically become bound by the provisions of Article 44 of the Convention which allow individuals to file a petition before the Commission.<sup>80</sup>

The Inter-American Court of Human Rights has been in the forefront in laying bare the purpose and objects of the Convention through its interpretations of cases and its advisory opinion. For example, in its advisory opinion on effects of reservations, the Court clearly articulated that the “(...) object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of

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<sup>74</sup> Supra note 73

<sup>75</sup> Also referred to as the “Pact of San Jose, Costa Rica”

<sup>76</sup> The American Declaration of Rights and Duties of Man and the American Convention of Human Rights are the two principal documents that are key in protection of human rights in the region. see Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, Human Rights Quarterly, Vol. 12, No. 4 (Nov., 1990), pp. 439-464, at 440 The Johns Hopkins University Press

<sup>77</sup> Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, American Journal of International Law, The American Society of International Law, January, 1985, 79 A.J.I.L. 1

<sup>78</sup> Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, American Journal of International Law, The American Society of International Law, January, 1985, 79 A.J.I.L. 1

<sup>79</sup> Jo Pasqualucci, *The Americas* in INTERNATIONAL HUMAN RIGHTS LAW, Moeckli Daniel et al, Oxford University press, (2010) at 437

<sup>80</sup> Article 44 of the American Convention on Human Rights

all individual human beings within the Americas, irrespective of their nationality”.<sup>81</sup> The Court went further to state that:

[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.<sup>82</sup>

In addition to the Court, the Inter-American Commission on Human Rights has been very fundamental in the interpretation of the American Convention too. I will deal with a short description of the Commission’s structure and mandate before covering some specific provisions of the Conventions in details in the upcoming chapters.

### 1.3.2 Inter-American Commission

The Inter-American Commission on Human Rights was founded as an independent body of organization of American States in 1959 following a resolution passed during the “Fifth Meeting of Consultation of Ministers of Foreign Affairs”. The Commission is made up of seven members<sup>83</sup> who are elected by the OAS General Assembly<sup>84</sup> and has been vested with two roles under the Convention. Firstly, by virtue of its status as an organ of the OAS,<sup>85</sup> the Commission is mandated with the role of promoting “respect for and defence of human

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<sup>81</sup> Inter-American Court of Human Rights Advisory Opinion Oc-2/82 of September 24, 1982; THE EFFECT OF RESERVATIONS ON THE ENTRY INTO FORCE OF THE AMERICAN CONVENTION ON HUMAN RIGHTS (ARTS. 74 AND 75), Requested By The Inter-American Commission on Human Rights

<sup>82</sup> Supra note 81, at 43 Para. 1

<sup>83</sup> The Commission is established under Section 34 of the American Convention on Human Rights which provides that: “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>84</sup> David Harris, REGIONAL PROTECTION OF HUMAN RIGHTS: INTER-AMERICAN ACHIEVEMENT. “THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS”, Ed. David J. Harris and Stephen Livingstone, Oxford Press, (2004). at 19

<sup>85</sup> Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, Human Rights Quarterly, Vol. 12, No. 4 (Nov., 1990), pp. 439-464, The Johns Hopkins University Press

rights”<sup>86</sup> in the territories of all OAS members’ states. Secondly, by being an organ of the Convention,<sup>87</sup> the Commission has a supervisory role which entails monitoring human rights situation in the OAS’s territories.<sup>88</sup>

Initially, at the time of its inception, the Commission was only involved in “abstract investigations” of matters relating to human rights violations.<sup>89</sup> The creators of the Commission essentially overlooked a situation where the Commission would deal with individual or isolated cases of human rights violation.<sup>90</sup> However, this state of affairs changed when applications started coming in from individual victims of human rights violations shortly after the establishment of the Commission. The massive inflow of applications provoked the Commission to strive not only in promoting human rights but also in protecting them.<sup>91</sup>

Consequently, the Commission had to adjust its operations so as to be flexible enough to accommodate individual’s complaints it was receiving. The Commission therefore adopted a procedure through which it took cognizance of “individual complaints and used them as a

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<sup>86</sup> Article 41 of the American Convention on Human Rights

<sup>87</sup> Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, Human Rights Quarterly, Vol. 12, No. 4 (Nov., 1990), pp. 439-464, The Johns Hopkins University Press

<sup>88</sup> The Commission’s mandate is as stipulated under Article 41 of the Convention includes developing an awareness of human rights among the peoples of America; making recommendations to the governments of the member states, preparing studies or reports, requesting the governments of the member states to supply it with information on the measures adopted by them in matters of human rights, responding to inquiries made by the member states on matters related to human rights, taking action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention, and submitting an annual report to the General Assembly of the Organization of American States.

<sup>89</sup> See Dinah Shelton, *The Jurisprudence of the Inter American Court Of Human Rights*, The American University Journal of International Law & Policy, Washington College of Law, The American University (1994), she argues that, “The Commission lacked a firm juridical basis until the 1967 Protocol of Buenos Aires extensively amended the OAS Charter and made the Commission a principal organ of the organization pursuant to article 51(e) and 112. Protocol of Buenos Aires.

<sup>90</sup> Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, Human Rights Quarterly, Vol. 12, No. 4 (Nov., 1990), pp. 439-464, The Johns Hopkins University Press

<sup>91</sup> Supra note 90

source of information about gross, systematic violations of human rights in the territories of the OAS member states”.<sup>92</sup>

Subsequently, in 1965, OAS formally allowed the Commission to handle individual complaints by adopting a resolution (Resolution XXII) which allowed the Commission to examine “isolated human rights violations, with a particular focus on certain rights”.<sup>93</sup> Unfortunately, even with this new development, the Commission still faced several hindrances in addressing individual claims: for example, they could only examine an individual complaint after the individual/s had exhausted local remedies plus the Commission depended a lot on the information it received from the government of the countries concerned.<sup>94</sup>

Additionally, the opinions of the Commissions were not so useful because the powers of the Commission only went to the extent of declaring whether or not there was a violation of human rights on the part of the state concerned. Therefore, in order for the Commission to remain relevant to individual petitions and maintain the flexibility it had adopted, it interpreted Resolution XXII as granting it the powers to examine communications concerning individual violations of certain rights specified in the resolution. The Commission however still maintained its powers to “take cognizance of communications concerning the rest of the human rights protected by the American Declaration”.<sup>95</sup>

Sadly, even with this innovative approach, individual cases and petitions were never a priority per se. As Cecilia Medina argues, the Commission concentrated its efforts on “general situation of human rights in each country” and they only processed individual cases “only

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<sup>92</sup> David Harris, REGIONAL PROTECTION OF HUMAN RIGHTS: INTER-AMERICAN ACHIEVEMENT. “THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS”, Ed. David J. Harris and Stephen Livingstone, Oxford Press, (2004). at 19

<sup>93</sup> Supra note 90

<sup>94</sup> Supra note 90. See also Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, The University of Miami Inter-American Law Review, Vol. 26, No. 2, University of Miami Inter-American Law Review

<sup>95</sup> Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, Human Rights Quarterly, Vol. 12, No. 4 (Nov., 1990), pp. 439-464, The Johns Hopkins University Press

because it had a duty to do so and not because of a conviction that its intervention could be helpful”.<sup>96</sup>

Currently, the Inter-American Commission does more than just preceding over petitions. Apart from having jurisdiction to issue provisional measures, it mandates also extends to conducting local visit in countries where it suspect that there is massive violation of human rights. After the country visit/s the Commission comes up with a country reports and/or thematic reports articulating the kind of human rights violations that are being mete out.<sup>97</sup>

The Inter-American system’s strategy on country report acts as a principal lens through which collective human rights violations are divulged. Similarly, country reports offers a platform through which the Commission can identify structural causes of human rights violations by scrutinizing recurring issues from a group of complainants. Additionally, since litigation is an option that is only available to a small percentage of victims; focusing on a “broad strategic approach” like the country visit and country report serves a big percentage of victims who would otherwise not access justice if they were to be expected to present their petition to the system.<sup>98</sup>

Apart from the country report, the Inter-America system is also maintains special rappouters on various human rights issues and they play a big role in enhancing the

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<sup>96</sup> Cecilia Argues that the Commission reaction to individual complaint might have been caused by the fact that “Commission v viewed itself more as an international organ with a highly political ask to perform than as a technical body whose main task was to participate in the first phase of a quasi-judicial supervision of the observance of human rights”

<sup>97</sup> The peculiarity of Inter-American system’s approach towards country reports is manifest because, unlike the European and the African systems of human rights whose jurisdiction only applies to the states that are party to the Convention, country report applies to state that have not ratified the American Convention like Cuba and the USA.. See, Cecilia Medina, The Inter-American Commission on Human rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture; in INTERNATIONAL HUAMN RIGHTS IN CONTEXT:LAW POLITICS MORALS,3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 1029

<sup>98</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law , Accessed on 30/01/2011 at 770

performance of the Commission.<sup>99</sup> Additionally, the Commission has also adopted a way of monitoring and shaming the countries that are still perpetuating human rights violation. It does this through a chapter on “human rights Development in the Region” which is included in its annual report.<sup>100</sup> Therefore, although the Commission has no jurisdictional powers to enforce its recommendations and other orders, the effects of its publication normally have positive result considering, in the words of Jo M. Pasqualucci: “negative publicity is a persuasive force” (that) can compel governments to comply with international human rights norms”.<sup>101</sup>

### 1.3.3 Inter-American Court of Human Right

The Inter-American Court on Human Rights was formed in 1979 after the adoption of the American Convention on Human Right as an exclusive “Judicial Organ of the OAS”.<sup>102</sup> The Convention mandates the Court to settle ‘contentious cases’ and provide advisory opinions on the request of the Commission, OAS member states, and other organs of the OAS.<sup>103</sup> The Court can also order the states to take provisional measures in order to protect individuals who are or are likely to be in imminent danger.<sup>104</sup>

The Court is located in San Jose, Costa Rica but may also sit in other countries “in the territory of any member state of the Organization of American States when a majority of the Court considers it desirable”.<sup>105</sup> The Court is made up of 11 Judges who are elected for a

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<sup>99</sup> Supra note 98, at 779

<sup>100</sup> Cecilia Medina, The Inter-American Commission on Human rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture; in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS, 3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 1029

<sup>101</sup> Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, The University of Miami Inter-American Law Review, Vol. 26, No. 2, University of Miami Inter-American Law Review at 353

<sup>102</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011

<sup>103</sup> Supra note 102

<sup>104</sup> Jo Pasqualucci, *The Americas* in INTERNATIONAL HUMAN RIGHTS LAW, Moeckli Daniel et al, Oxford University press, (2010), at 442

<sup>105</sup> Article 58 of the American Convention on Human Rights

period of six years by the states parties to the Convention.<sup>106</sup> The judges may be re-elected<sup>107</sup> for another term but two judges cannot be elected from the same country at a given time.<sup>108</sup> Additionally, the Judges are elected “in their capacity as individuals and not as representatives of the states of which they are citizens”<sup>109</sup>

For a state to fall under the jurisdiction of the Court, it has to ratify the ACHR and subsequently accept the “Court’s contentious jurisdiction”. Similarly, before the Court decides on the merit of any case, it has to establish that the case has met “certain admissibility requirements”. This means that the petitions that are filed before the Court have to go through “several phrases” before their final determination.<sup>110</sup>

The Court has gone through tremendous development from the time of its inception and especially after issuing its first judgment on its first contentious case- *Velásquez Rodríguez v. Honduras*-<sup>111</sup> in 1988. For instance, initially, the Court did not allow individual petitioners to participate directly in the proceedings of their case. Instead, the Commission had to first file the case before the Court as a “neutral arbiter” and then switch its role to litigant on behalf of the petitioner once the case was before the court.<sup>112</sup>

Currently, the Court allows individual petitioners to participate alongside the Commission. Additionally, as an attempt to deal with its ever increasing workload, the Court has made procedural changes for example, by combining “various phases of each case

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<sup>106</sup> Article 52 of the American Convention on Human Rights

<sup>107</sup> Article 54 of the American Convention on Human Rights

<sup>108</sup> Article 52(2) of the American Convention on Human Rights

<sup>109</sup> Gay J. McDougall, Executive Director, Global Rights, Using the Inter-American System for Human Rights: A Practical Guide for NGOs. See Article 52 of the American Convention on Human Rights

<sup>110</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011

<sup>111</sup> Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

<sup>112</sup> Jo Pasqualucci, *The Americas* in INTERNATIONAL HUMAN RIGHTS LAW, Moeckli Daniel et al, Oxford University press, (2010), (criticizing the Inter-American System of Human Rights’ “two-tiered system, in which cases must be considered first by a Commission and then by a Court



(preliminary objection, merits, reparation) into a single judgment” as well as reducing “the average number of days of public hearing”<sup>113</sup>.

In summary, this chapter has highlighted the establishment and the roles that are played by each of the three regional human rights systems and their respective organs in as far as enforcement of individual’s human rights are concerned. The intentions of this discussion were to lay the basis and foundations of the theory that this paper intends to raise in the subsequent chapters.

It is my contention that individual complaint mechanisms are important aspect of any regional systems: regional systems will be meaningless if they are not accessible to individuals and victims of human rights violations<sup>114</sup>. Therefore, for regional systems to remain relevant and important to the field of human rights, their procedures and judgments must also be relevant to not only the states but also to individuals and other human rights actors.<sup>115</sup>

In the light of the above, the next chapter will concentrate more on how the organs in the three regional systems function and how accessible they are in respect of individual complainant. The chapter will concentrate on the African system as the focal point and analyze the system against the backdrop of Inter-American and the European systems of human rights.

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<sup>113</sup> Supra note 110

<sup>114</sup> See Mark W. Janis, Richard S. Kay, Anthony Wilfred Bradley, *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS*, 3<sup>rd</sup>ed.oxford University Press, 2008, (arguing that : “The principle that the rule of law ought to protect the human rights of individual against the abuses of the Government”, the authors make reference to the Magna Carta period when, at , Runnymede, “on 15<sup>th</sup> June 1215,British barons forced a reluctant King John to acknowledge a great many liberties, including some important rights respecting the law and the Courts”

<sup>115</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, *The American Journal of International Law*, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law , Accessed on 30/01/2011 , See also, for example, K. Mathews, *The OAU and political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples’ Rights; 1981*, *Africa Today*, Vol 34, No.1/2, Humana Rights: The African Context (1<sup>st</sup> Qtr-2ndQtr,1997)pp.85-103, at 97( arguing that “the procedure for submitting complaints to the African Commission on Human and peoples Rights, and the corrective actions(if any) that might be taken in respect of those complaints, can only be considered effective if they produced a satisfactory result”)

## CHAPTER TWO

### 2. INDIVIDUAL ACCESS TO COURT IN THE AFRICAN SYSTEM OF HUMAN RIGHTS: DRAWING LESSONS FROM THE INTER-AMERICAN AND THE EUROPEAN SYSTEMS OF HUMAN RIGHTS

#### ***2.1 An overview of individual access to the African system and factors hindering its full accessibility***

##### **2.1.1 Interpretation of Article 55 of the African Charter**

Technically, the African Charter, the American Convention and the European Convention make provisions allowing individual complainants to access the three systems in case of endemic human rights violations.<sup>116</sup> However, unlike in the European and the Inter-American systems where the right to access the systems by individual complainants is expressly provided for, the African system of human rights does not clearly make such provisions.<sup>117</sup> Accordingly, the right of individual to petition has largely being dependant on the African Commission's generous interpretation of the African Charter; especially the provisions of Article 55 which provides that:

Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission

Therefore, despite the Africa Charter's misty provisions under Article 55, the African Commission has facilitated evolvement of individual right to petition before it as well as before the African Court by avoiding the temptation to indulge in a rigid formalism which would defeat the purpose and object of the Charter. As such, the Commission has been able to accommodate applications from individuals as well as NGOs through its inclusive

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<sup>116</sup> See Article 55 of the African Charter, Article 44 of the American Convention and Article 34 of the European Convention respectively

<sup>117</sup> Oji Umzurike, *The Complaint Procedure of the African Commission on Human and Peoples Rights*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 708 (2001),

interpretation of the phrase “other than” as provided under Article 55.<sup>118</sup> Consequently, besides states parties to the African Charter being able to access the African system, NGOs as well as individuals have been able to send their applications to the system too.<sup>119</sup>

However, despite the fact that the Commission has been trying to manoeuvre away from the rigidity set by the Charter. The conflicting roles between the Commission and the Court may present a potential hiccup in as far as the pace of the proceedings before the system is concerned. As already mention, the African system of human rights is founded on a two-tier system whereby the African Court of Human and Peoples’ Rights has to co-exist with the African Commission on Peoples and Human Rights.

Accordingly, the African Commission is expected to adjudicate on the “admissibility and substantive questions (of a case) unless a case is submitted directly to the African Court”.<sup>120</sup> Furthermore, considering (as already stated), the rights of individuals to make a direct submission to the Court depends on whether the state in question has made a declaration recognizing the rights of individuals to file a complaints, the rights of individual to access the Court even in circumstances where they have a right to send their applications

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<sup>118</sup> F Ouguergouz, THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA, Martinus Nijhoff , 2003 at 584 (While emphasizing on the efforts that the African Commission has been putting in place in embracing a broader interpretation of Article 55(1) despite facing endless political hindrances, F Ouguergouz argues that “At the present, the real Achilles heel of the African Charter is its safeguard mechanisms, whose inadequacy is manifest in as much as the text of the African Charter is very reserved on communications from individuals and gives pride of place to the assembly of Heads of state and Government as regards the Commission’s activity to protect human and people’s rights. Yet the weak powers of the African Commission in this respect and the pre-eminent role of the Assembly of Heads of state and Government are far from being an Impediment, as the Commission’s current practice shows”

<sup>119</sup> Christof Heyns and Magnus Killander, *The African Regional Human Rights System* in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, 3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 1067

<sup>120</sup> Erika de Wet, *The Protection Mechanism under the African Charter and the Protocol on the African Court of Human and Peoples’ Rights*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, et al, Martinus Nijhoff, 679-707, at 724 (2001),

directly to the Court (hence avoiding the Commission) is preconditioned on the state's acceptance of the Court's jurisdiction.<sup>121</sup>

The situation is complicated further by the provision of Article 6(3) of the Protocol which gives the African Court discretionary powers to transfer a case filed before it to the African Commission.<sup>122</sup> The effect of the provision of Article 6(3) is well captured by Erika de Wet who laments that:

[T]he fact that the Court under article 6(3) has the power to transfer individual's applications to the Commission underscores the fact that individuals right to send complaint to the Court only arises when the Commission has taken a decision on the complaint.<sup>123</sup>

Accordingly, one would actually conclude that the provision of the Protocol especially under Article 5(3) and 6(3) encourages duplicity of efforts within the two organs hence defeating the purpose for which the African Court was established.<sup>124</sup> The problem of two-tier system has also been experienced by the Inter-American system of human rights which is structured in such a way that the Commission receives all the complaint and screens them before they reach the Court. This hitch is aggravated by the fact that, Individual Complainants have no rights of audience before the Inter-American Court of Human Rights and therefore the Commission has to act on their behalf.<sup>125</sup> It is worth to note that, although a

<sup>121</sup> Erika de Wet, *The Protection Mechanism under the African Charter and the Protocol on the African Court of Human and Peoples' Rights*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 724 (2001),

<sup>122</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998 (entered into force Jan. 25, 2004), Article 6(3)

<sup>123</sup> Erika de Wet, *The Protection Mechanism under the African Charter and the Protocol on the African Court of Human and Peoples' Rights*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 724 (2001),

<sup>124</sup> See the intended purpose of the African Court of Human Rights as articulated under the Protocol to The African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Preamble Paragraph 8

<sup>125</sup> See Article 61 of the American Convention on Human Rights which provides that; "Only the States Parties and the Commission shall have the right to submit a case to the Court". See also, Michelo Hansungule, "Protection of Human Rights under the Inter-American System: An Outsider's Reflection" in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 703 (2001),

double-tiered system was also a feature in the European system before the coming into force of Protocol 11,<sup>126</sup> the European Court of Human Rights currently has a compulsory jurisdiction therefore making it accessible to individuals as of right.<sup>127</sup> Therefore, although this paper does not advocate for a total disbandment of the African Commission, I am of the opinion that the African system needs to review the mandate of both the Commission and the Court in order to ensure that there is no replication of roles.

### **2.1.2 Restrictions occasioned by Article 5(3) as read together with Article 34(6) of the Protocol establishing the African Court**

Although the African Commission has been able to equivocate from the provisions of Article 55 through its creative interpretations of the Article with the view of making the African system more accessible to individual applicants, the Commission's endeavours have been occasionally frustrated by the provisions of other core documents in the systems. For instance, Individual right to petition under the system is restricted by the provisions of Article 5(3)<sup>128</sup> which empowers the African Court to allow NGOs with observer status before the Commission as well as individual applicant to access the Court as long as they have met the prerequisites that are outline under article 34(6)<sup>129</sup> of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.<sup>130</sup>

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<sup>126</sup> Frans Viljoen , *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at p. 6

<sup>127</sup> Christof Heyns and Magnus Killander, *The African Regional Human Rights System* in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS, 3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 940, see also Article 34 of the European Convention as amended by Protocol 11

<sup>128</sup> The Article provides that : The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.

<sup>129</sup> The Article provides that, "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration"

<sup>130</sup> Christof Heyns and Magnus Killander, *The African Regional Human Rights System* in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS, 3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 1067

Although Article 5(3) allows individuals as well as NGOs with observer status before the Commission to institute their claims directly before the African Court, the Article is subject to limitation placed by Article 34(6). It follows that, in order for claims that instituted under Article 5(3) to be admissible, the state/s concerned must have made a declaration accepting the jurisdiction of the Court to receive and adjudicate on cases filed by Individuals as well as NGOs.<sup>131</sup> As such, Article 34(6) establishes two hypothetical roads leading to the African Court. According Frans Viljoen, one road leads to the African Commission: Under this “road”, Individuals complainants are not allowed to submit complaint in total exclusion of the Commission because at the end of the day it is the Commission that has to rule on the admissibility of the complaint. The second “road” leads directly to the African Court hence bypassing the African Commission: However, only states parties may allow “complainants to bypass the African Commission by making an Article 34(6) declaration to that effect”.<sup>132</sup> Accordingly, the provision of Article 5(3) as read together with Article 34(6) empowers the Commission and the Respondent states to acts as “gatekeepers” in as far as individual complainants are concerned.<sup>133</sup>

Considering that the discretionary powers of the state to make a declaration allowing individual’s direct access to the African Court is more of an “exception rather than the rule”,<sup>134</sup> most cases that reach before the African Court are first filed before the African Commission therefore occasioning a duplication of efforts. This replication of procedure has negative impact on individual applicants especially bearing in mind that the rationale for establishing the African Court was to “enhance the efficiency”<sup>135</sup> as well as to “complement

<sup>131</sup> Read Article 5(3) together with Article 34(6)

<sup>132</sup> Frans Viljoen , *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at p. 6

<sup>133</sup> Supra note 132

<sup>134</sup> Frans Viljoen , *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at p. 6

<sup>135</sup> Protocol To The African Charter On Human And Peoples' Rights On The Establishment of An African Court On Human And Peoples' Rights, Preamble Paragraph 6

and reinforce the functions of the African Commission on Human and Peoples' Rights".<sup>136</sup> If anything, one can rightly argue that the African Court does not compliment the functions of the Commission considering that the Commission has to go through all applications in order to make a ruling on their admissibility before transmitting them to the Court.<sup>137</sup>

The intricacy of the provisions of Article 34(6) was clear in the recent case of *Michelot Yogogombaye v. Republic of Senegal*<sup>138</sup>, where it became apparent that individuals complaining against a state cannot have a standing before the Court unless the state in question has made a declaration acknowledging and accepting to be bound by the Court's contentious jurisdictions. In the case, the applicant, Michelot Yogogombaye, a Chadian citizen living in Switzerland filed an application against Senegal seeking to prevent Senegalese authorities from prosecuting former President Hissein Habré who was accused of ordering the torture and deaths of Chadians during his eight years term in office. The applicant claimed that the African Court had jurisdiction to proceed over the case because Senegal had allegedly filed a declaration in accordance with Article 34(6).

However, the African Court rendered its first ever judgment and declared the case inadmissible because it turned out that Senegal had not made a declaration as articulated under Article 34(6) and therefore the Court did not have jurisdiction to deal with the matter.<sup>139</sup>

Through a separate opinion, Judge Ouguergouz observed that Article 34(6) raises an important question which the majority opinion did not bother to address. For example, he raised the question whether filing the optional declaration is the only way through which a

<sup>136</sup> Protocol To The African Charter On Human And Peoples' Rights On The Establishment of An African Court On Human And Peoples' Rights, Preamble Paragraph 8

<sup>137</sup> Supra note 134

<sup>138</sup> App. No. 001/2008, where the applicant, Michelot Yogogombaye; is a Chadian living in Switzerland filed a petition before the African Court on August 11, 2008, seeking an order to prevent Senegalese authorities from prosecuting former President Hissein Habré who was allegedly responsible for "ordering the torture and deaths of up to forty thousand Chadians during his eight years in office".

<sup>139</sup> *Michelot Yogogombaye v. Republic of Senegal*, APP. No. 001/2008

state can acknowledge the Court's Jurisdiction to deal with Individual's applications.<sup>140</sup> Judge Ouguergouz's query was based on the fact that the provision of article 34(6) does not seem to expressly hinder a state from acknowledging the Court's jurisdiction "in a manner other than through the optional declaration".<sup>141</sup> Therefore, considering that the African Court has jurisdiction to interpret the Charter as well as the Protocol, its failure to comprehensively interpret the unclear provision of Article 34(6) leaves the fate of individual applicant on the hands of state parties.<sup>142</sup> In fact, similar concerns were raised in the European system of human rights therefore leading to the enactment of Protocol 11 which made the European Court to have a compulsory jurisdiction over every member state. The rationale behind this move can be traced in the reasoning of the European Court while dealing with cases that are filed before it. The Court was and has always been keen to articulate that:

The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, as part of the system of individual applications. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.<sup>143</sup>

Additionally, a critical analysis of the Article 5(3) provisions reveals even deeper restriction on individual applicants especially to the extent the article limits access to "relevant NGOs with observers' status". This is a unique—and potentially restricting—provision because, as Nsongurua J. Udombana articulates, the requirement of obtaining

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<sup>140</sup> *Michelot Yogogombaye v. Republic of Senegal*, APP. No. 001/2008, Judge Ouguergouz's separate opinion, Para. 27

<sup>141</sup> *Michelot Yogogombaye v. Republic of Senegal*, APP. No. 001/2008, Judge Ouguergouz's separate opinion, Para. 29

<sup>142</sup> David J. Bederman and Charles Chernor Jalloh, *Michelot Yogogombaye v. Republic of Senegal*, *The American Journal of International Law*, Vol. 104, No. 4 (October 2010), American Society of International Law pp. 620-628 at 625

<sup>143</sup> See *Soering V United Kingdom*, Series A No.161) (1989) 11 EHRR 439



“observer status” before the Commission potentially implies a longer, more expensive process that few small NGOs are likely to be unable to undertake.<sup>144</sup>

In essence, the dogmatic nature of some of the quintessential requirements that NGOs have to fulfil present a potential hiccup to newly established or small NGOs which might not have any financial backbone. For instance, the requirement that an NGO must declare its financial resources as a precondition for it to be granted observers status shut out many NGOs which do not have constant financial inflow.<sup>145</sup>

By contrast, Under the Inter-American system of human rights, any non-governmental entity legally recognized in one or more member states of the Organization of American States may lodge petitions with the Inter-American Commission. This generous provision opens the door to a larger number of NGOs, both small and large, throughout the region.<sup>146</sup> NGOs in both Inter-American and European systems play a very important role of representing individuals as well as groups whose rights have been violated.<sup>147</sup>

Furthermore, there are millions of other reasons why one can argue that, while compared to the African Charter, the Inter-American and European Conventions have been

<sup>144</sup> Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never* YALE HUMAN RIGHTS AND DEVELOPMENT L.J. [Vol. 3:45, at 99-100]

<sup>145</sup> See ACHPR /Res.33 (XXV) 99: Resolution on the Criteria for Granting and Enjoying Observer Status to Non- Governmental Organizations Working in the field of Human and Peoples' Rights (1999), which provides that “ 1. All Non-Governmental Organisations applying for observer status with the African Commission on Human and Peoples' Rights shall be expected to submit a documented application to the Secretariat of the Commission, with a view to showing their willingness and capability work for the realisation of the objectives of the African Charter on Human and Peoples' Rights. 2. All organisations applying for observer status with the African Commission shall consequently: (a) Have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter and in the African Charter on Human and Peoples' Rights; (b) Be organisations working in the field of human rights; (c) Declare their financial resources. 3. To this effect, such an Organisation shall be requested to provide: (a) A written application addressed to the Secretariat stating its intentions, at least three months prior to the Ordinary Session of the Commission which shall decide on the application, in order to give the Secretariat sufficient time in which to process the said application; (b) Its statutes, proof of its legal existence, a list of its members, its constituent organs, its sources of funding, its last financial statement, as well as a statement on its activities. 4. The statement of activities shall cover the past and present activities of the Organisation, its plan of action and any other information that may help to determine the identity of the organisation, its purpose and objectives, as well as its field of activities”

<sup>146</sup> Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never* YALE HUMAN RIGHTS AND DEVELOPMENT L.J. [Vol. 3:45, at 99-100]

<sup>147</sup> Thomas Buergenthal, *The Evolving International Human Rights System*, *The American Journal of International Law*, Vol. 100, No. 4 (Oct., 2006), pp. 783-807, *American Society of International Law*

explicit in providing for the right of individual to petition through individual complaint mechanisms. For instance, although states parties to the Convention have to accept the jurisdiction of the Inter-American Court on Human Rights to examine individual complaints,<sup>148</sup> the jurisdiction of the Inter-American Commission to consider individual complaints is automatic when states become party to the American Convention.<sup>149</sup> Similarly, after the adoption of Protocol 11, the jurisdiction of the European Court of Human Rights became mandatory for every member state therefore becoming accessible to not only the state but also individual complainant as well as NGOs. Accordingly, Article 34 of the European Convention allows individuals as well as NGOs to file before the European Court of Human Rights; any claims of human rights violations by one of the High Contracting Parties provided the claims meets the conditions specified under Article 35 of the European Convention.<sup>150</sup>

From the foregoing, it is clear that the African system needs to rethink on the question of its accessibility by individual complainants. This will call for both normative and institutional reforms with the view of ensuring that the rules and procedures that govern the system's accessibility by individual's applicants are flexible enough. As illustrated above, it is obvious that the Inter-American and the European systems offer a good example in as far as the required reforms are concerned. Similarly, since accessibility of any system by individuals is to some extent inseparable from the individuals' financial ability, it is important to consider the steps that the three systems have taken in order to ensure that people who are financially challenged are not hurdled from accessing the systems.

### **2.1.3 Individual access to Court and the question of legal aid in the systems**

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<sup>148</sup> Article 62 of the American Convention

<sup>149</sup> See Article 44 of the American Convention. See also, *Thomas Buergenthal, The Evolving International Human Rights System*, *The American Journal of International Law*, Vol. 100, No. 4 (Oct., 2006), pp. 783-807, American Society of International Law at p 796

<sup>150</sup> Article 34 of the European Convention of Human Rights

Unlike the African system of human rights, both the European and the Inter-American systems have adopted several measures with the view of making the systems more accessible to individual victims of human rights violations. For example, individual applicants are not only allowed to file petitions before the European Court of Human Rights provided they have legal presentation during the Court's proceedings, but in order to ensure that the Court is even more accessible to as many people as possible, the Council of Europe has established a financial aid scheme to aid the indigent applicants.<sup>151</sup> Similarly, the European Court has established a precedent through which the states that have violated individual rights are made to compensate the cost and expenses that the applicant incurred in the course of proceeding. Illustrative, in the case of *Mamatkulov and Abdurasulovic v. Turkey*, the Court ordered that the applicant be compensated an equivalent of 10,000 Euros.

Additionally, as this paper will articulate below<sup>152</sup>, the Inter-American system has identified instances where an applicant can be availed special considerations for reasons of indigent.<sup>153</sup> This is an innovative measure that is conspicuously absent in the African system; despite the fact that the Protocol establishing the African Court provides that "any party to a case shall be entitled to be represented by a legal representative of the party's choice,"<sup>154</sup> the Protocol is not explicit in addressing the fate of those who may not be able to afford a legal representative of their "choice" due to financial challenges.<sup>155</sup> It is worthy to note that, although the other systems' establishing documents have not expressly stipulated how indigent people can access a representative of their choice, it is important for the African

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<sup>151</sup> See for example the case of *Mamatkulov and Abdurasulovic v. Turkey*, Application 46827/99, 46951/99; where the Applicant benefited from a legal aid to the tune of 905 Euros. See also, Philip leach, Access to the European Court of Human Rights: From A legal Entitlement to a lottery? In *INTERNATIONAL HUAMN RIGHTS IN CONTEXT: LAW POLITICS MORALS*, 3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 943

<sup>152</sup> See pp 49-51

<sup>153</sup> Olivier De Schutter, *International Human RIGHTS law*, Cambridge University Press, 2010, at p 952

<sup>154</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998 (entered into force Jan. 25, 2004), Article 10(2)

<sup>155</sup> Frans Viljoen, *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at 13

system to be particularly clear on the question of representation of indigent people; especially considering the economic situation of most African states.

Additionally, although the Protocol stipulates that free legal representation "may be provided where the interests of justice so require,"<sup>156</sup> the Protocol does not identify nor define the parameters of justice in question neither does it define the conditions that have to be met by the intended beneficiaries. In the words of Frans Viljoen, the Protocol does not identify the "subject or the object" of the free legal representation. Although it would be logical to conclude that legal aid cannot be given to everyone, the language of the Protocol in its current form may however leave many people wondering whether they qualify for such aid or not.<sup>157</sup>

On a related note, although lack of specific fund allocated for legal aid does not necessarily reflect a characteristic deficiency on part of the African system, the system might have to consider establish such a scheme for the sake of ensuring comprehensive expediency of justice especially to most deserving applicants.<sup>158</sup>

From an analysis of the Inter-American and the European systems and how the two systems handles the question of legal aid and representation, one can rightly conclude that the African system needs to enumerate some of the strategies that the two systems have been employing.

#### **2.1.4 Court's Contentious Jurisdiction in the African system**

Although the African, Inter-American and the European Courts have jurisdiction to precede on contentious issues emanating from human rights violations, the Protocol establishing the African Court is not very clear in its definition of the African Court's

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<sup>156</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998 (entered into force Jan. 25, 2004), Article 10(2)

<sup>157</sup> Supra note 155

<sup>158</sup> Frans Viljoen, *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at 13

contentious jurisdiction.<sup>159</sup> As such the provisions of the Protocol on the Court's contentious jurisdiction may be misinterpreted or at least given multiple interpretations. Firstly, a literal reading of the Protocol under Article 3 gives the impression that the African Court has an expansive contentious jurisdiction; this is especially so to the extent the Article provides that:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.<sup>160</sup>

Accordingly, a *prima facie* reading of the phrase “other relevant human rights instrument ratified by states concerned” would easily give the impression that the jurisdiction of the Court is so expansive and unspecific. If this was to be the case, then it would follow that the jurisdiction of the African Court would be extensive enough to cover any violation executed under a bulk of International instruments including, for example, all the UN documents.<sup>161</sup>

Similarly, the article can also be interpreted restrictively depending on the approach that is taken. For instance, one might interpret the words “relevant” and “ratified” as factor that qualifies the extent of cases that the Court jurisdiction covers. As such, one possible outcome of such restrictive interpretation is that the Article can be construed to mean that the Court's contentious jurisdiction does not necessary covers all the human rights instruments but only those which are ratified by member states and are equally relevant.<sup>162</sup>

Accordingly, this qualification may actually be limiting the Court's contentious jurisdiction because if one was to strictly interpret the word “ratified” to strictly mean

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<sup>159</sup> Supra note 158

<sup>160</sup> Article 3 of the Protocol Establishing the African Court of Human and Peoples' Rights

<sup>161</sup> Frans Viljoen, *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at pp 11-13

<sup>162</sup> Supra note 162

treaties, this interpretation may exclude other non-binding human rights texts.<sup>163</sup> It is worth to note that the Articulations of both the Inter-American and the European Conventions leave no doubt in regards to the scope of the Jurisdiction of the Inter-American and the European Courts respectively.<sup>164</sup>

Apart from the above interpretation, it is also possible to give the provision of Article 3 another interpretation. As Frans Viljoen points out, the omission of the adjective “Africa” before the phrase “Human Rights Instruments” might be interpreted to mean that the Court contentious jurisdictions extends to all matters arising “under UN human rights treaties to which AU members, who are also UN members, are parties”.<sup>165</sup> Consequently, such an interpretation will imply that individual complainants can send their communications to the Courts relying on violation of UN human rights treaty if the respondent state has ratified it. Such an extended interpretation will mean that the African Court has jurisdiction to deal with communications based on a variety of UN human rights treaties, for example ICCPR.<sup>166</sup>

Additionally, the phrase “by the States concerned” might be interpreted to mean the state/s against which complaints are filed as opposed to the state/s parties to the Protocol; subsequently, were this interpretation to be followed, even a state that has not ratified the Protocol providing for individual complaint may find itself falling under the jurisdiction of the African Court under Article 3.<sup>167</sup>

<sup>163</sup> Christof Heyns, *The African Regional Human Rights System: In Need of Reform?* 1 AFR. HUM. RTS. L.J. 155, 166-67 (2001)

<sup>164</sup> See Article 32 of the European Convention which provides that “the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47”. See also Article 62(3) of the American Convention which provide that “the jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement”

<sup>165</sup> Evarist Baimu, *The African Union: Hope for Better Protection of Human Rights in Africa?* 1 AFR. HUM. RTS. L.J. 299 (2001) See also, Frans Viljoen, *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at pp 11-13

<sup>166</sup> Udemé Essien, *The African Commission on Human and Peoples' Rights: Eleven Years After*, Buffalo Human Rights Law Review 93, State University of New York at Buffalo School of Law, (200) at 8.

<sup>167</sup> Frans Viljoen, *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at pp 11-13

As mentioned above, the American and the European Conventions are quite precise when it comes to articulating the Courts' Contentious jurisdiction. For instance, Article 44 of the American Convention provides that, any person or group of persons, or any Non Governmental entity, may lodge a petition with the Commission containing complaints of human rights violation. Article 44, therefore present a distinctive feature that is noticeably absent in both the European and the African systems of human rights by creating a leeway through which parties other than actual victims can file complaints before the Commission.<sup>168</sup> According to Michelo Hansungule, such a leeway would be very crucial especially in the developing countries where "people's knowledge of their rights let alone how to claim them is a major problem".<sup>169</sup>

Closely related to the provisions of Article 44 is the interpretative jurisprudence that has been formulated by the European Court on Human Rights in regards to the interpretation of the European Convention on Human rights. Through a generous interpretation of the Convention, the Court has been able to accommodate not only victims but also "potential victims" of human rights violation. The Court while interpreting the provisions of the Convention for example under Article 13 or Article 8, has gone further to hold that individual with an arguable claim can qualify as victims of human rights violation and should therefore be guaranteed access to local remedies and redress. Conversely, if such individuals are denied access to local remedies, they have a right to approach the European Court of Human Rights for redress. For example, in the case of *Klass v. Germany*,<sup>170</sup> where the applicant lawyers' complained about a German domestic law on secret surveillance, the Court held that, even though the applicants had no evidence whether or not they had been under surveillance, the "applicants should not be prevented from claiming to be victims of an

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<sup>168</sup> Article 44 of the American Convention

<sup>169</sup> Michelo Hansungule, "Protection of Human Rights under the Inter-American System: An Outsider's Reflection" in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 700 (2001),

<sup>170</sup> *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A) , at 29, Para. 64 (1978).

alleged violation simply because, in view of the secrecy of the measures in question, their specific use against the applicants could not be proved”.<sup>171</sup>

On a more positive note, the African system while usurping its contentious jurisdiction has been keen to borrow lead from the Inter-American and European systems which integrates laws and precedents from other regions while making a decision.<sup>172</sup>

## ***2.2 Individual access to Court and the general restrictions placed by the Conventions***

As discussed above, the three regional systems do not exercise their jurisdiction over the merit of a case until certain admissibility criteria are met. As such, they have all laid down some basic conditions that every petitioner has to comply with before his/her petition is admitted. Some of the prerequisite set by the African Charter indicates that a communication can only be considered if:

1) (They) [i]ndicate their authors even if the latter request anonymity, 2) are compatible with the Charter of the Organization of African Unity or with the present Charter, 3) are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity, 4) are not based exclusively on news discriminated through the mass media, 5) are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, 6) are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and 7) do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.<sup>173</sup>

Although the above conditions are almost similar to those set by Articles 35 of the European Conventions and 46 of the American Conventions respectively, there are certain distinctive provisions in the three systems that warrant some attention. Therefore, this paper

<sup>171</sup> Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, American Journal of International Law, The American Society of International Law, 2003 at 11

<sup>172</sup> Philip Leach, *Access to the European Court of Human Rights: From A legal Entitlement to a lottery?* In *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS*, 3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 1028

<sup>173</sup> Article 56 of the African Charter



will not elaborate on all the conditions that have to be met by individual complaint in the three systems, but rather it will select just a few conditions that have the greatest impact on individual complainant.

### 2.2.1 Exhaustion of local remedies and Exception to the Exhaustion of Local Remedies

In all the three system, there is a uniform requirement that local remedies must be exhausted. This requirement gives a chance the states concerned to resolve matters of human rights violation using its internal jurisprudence instead of being meet head-on with an international proceeding.<sup>174</sup> In any case, the international jurisdiction is supposed to complement the national jurisdiction.<sup>175</sup>

Accordingly, the African Charter provides that all communications that are submitted under article 55 of the African Charter are to be subjected to the conditions that are spelt out under Article 56 of the Charter. Specifically, Article 56(5) of the Charter provides that communication from both the states and individuals shall only be considered after and when all the existing local remedies have been exhausted unless it can be shown that such remedies are unduly prolonged.

The African Commission while elaborating on the requirement of exhaustion of local remedies in the case of *Constitutional Rights project, Civil Liberties Organization and Media Rights Agenda v Nigeria*<sup>176</sup> stated that, the exhaustion of local remedies is just one of the conditions articulated under Article 56, but one that requires the most attention since it is the first aspect that the Commission has to consider before engaging in any substantive

<sup>174</sup> Inter-American Court of Human Rights, Gangaram panday case, Preliminary Objections, Judgment of 4 December 1991, (Sec,C) No. 12(1994): paragraph 38

<sup>175</sup> Velásquez Rodríguez Case, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989). See also *Free Legal Assistance Group v Zaire* and *Rencontre Africaine pour la Défense de Droits de l'Homme v Zambia*, where the African Commission held that the whole essence of the requirement of exhaustion of local remedies is to ensure that “a government [ ] have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body”.

<sup>176</sup> Communications 140/94, 141/94

interpretation of a case.<sup>177</sup> Accordingly, the African Commission has therefore been keen to conduct a background check during the admissibility stage with the view of establishing whether an individual has exhausted local remedies before proceeding to the merit of the case. In the event that the local remedies are not exhausted and there is no prove that remedies were unduly prolonged, the Commission will out-rightly consider the case inadmissible even if all the other conditions that are spelt out under Article 56 have been met.<sup>178</sup>

The case of *Anuak Justice Council v Ethiopia*<sup>179</sup> serves as a good example to illustrate the Commission adamancy to admit a case when the local remedies are not fully exhausted. In the case, the complainant alleged that the Ethiopian Government through its agents, the Ethiopian Defence Forces, was executing “massive discrimination resulting in serious human rights abuses and violations” through massacre, wounding, torture detention, rape, property destruction and disappearance of the people of Anuak ethnicity. The Commission however declared the application inadmissible even after the applicant had given a list of reasons why it was impossible to exhaust local remedies.<sup>180</sup>

However, although the African Commission is strict on the requirement of exhaustion of local remedies, there are instances where it has been lenient on this requirement. For instance, if an applicant can demonstrate that there are no available local remedies or the one that exist are insufficient, the Commission’s precedent has demonstrated that there are chances that such an application will be admitted. The Commission’s case laws therefore indicates that there are certain factors that determines the availability or/and sufficiency of local remedies. In the event that such factors are missing, then the remedies are considered to

<sup>177</sup> Constitutional Rights project, Civil Liberties Organization and Media Rights Agenda v Nigeria, Communications 140/94, 141/94

<sup>178</sup> Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, American Journal of International Law, The American Society of International Law, 2003 at 13, see also Bissangou v Republic of Congo(2006) AHRLR 80 (ACHPR 2006)

<sup>179</sup> (2006) AHRLR 97 (ACHPR 2006)

<sup>180</sup> Anuak Justice Council v Ethiopia(2006) AHRLR 97 (ACHPR 2006)

be either unavailable or insufficient. While outlining some of the elements that have to be present in a local a remedy, the African Commission in the case of *Anuak Justice Council v Ethiopia*<sup>181</sup> articulated that:

In the jurisprudence of this Commission, three major criteria could be deduced in determining the rule on the exhaustion of local remedies, namely: that] the remedy must be available, effective and sufficient.’ According to this Commission, a remedy is considered to be available if the petitioner can pursue it without impediments or if he can make use of it in the circumstances of his case. The word ‘available’ means ‘readily obtainable; accessible’; or ‘attainable, reachable; on call, on hand, ready, present; ... convenient, at one’s service, at one’s command, at one’s disposal, at one’s beck and call.’<sup>182</sup>

Similarly, in the case of *Jawara v The Gambia*<sup>183</sup>, the former Head of State of the Republic of Gambia filed a communication condemning, among other things, the endemic abuse of power and human rights violation by the Military government that took over after the military coup of 1994. The complainant also alleged that the “abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree No. 30/31 ousting the competence of the Courts to examine or question the validity of any such Decree” was a violation of human rights. The Commission held that a claim by the state to the effect that indeed a remedy is available shall not be condoned to the detriment of individual applicant in the event it is not clear whether a remedy is available or not. The Commission replicated this statements in the case of *Rencontre Africaine Pour la Défense des Droits de l’Homme v Gambia*<sup>184</sup>: The case had been filed by a Senegalese NGO, Rencontre Africaine pour la Défense des Droits de l’Homme, on behalf of 517 West Africans who were expelled from Gambia in 1992 on allegations of being in Gambia illegally. The Commission stated that in the event of a respondent state contesting the admissibility of a communication on the basis of non exhaustion of local remedies, the state in question has the onus of proving that indeed

<sup>181</sup> (2006) AHRLR 97 (ACHPR 2006)

<sup>182</sup> *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) Paragraph 51

<sup>183</sup> *Jawara v The Gambia* Communications 147/95, 149/96, [(2000) AHRLR 107 (ACHPR 2000)] para 31

<sup>184</sup> Communication 71/92, *Rencontre Africaine Pour la De’fence des Droits de l’Homme v Gambia*, Tenth Annual Report of the Commission-1996/1997

there exist reasonable local remedies which are available to the applicant and that the applicant has failed to exhaust them.<sup>185</sup>

Additionally, the Commission has established a jurisprudence through which it has considered many communications admissible on the basis of “the principle of constructive exhaustion of local remedies.”<sup>186</sup> On this basis, the Commission has been lenient on communications where local remedies have been unreasonably prolonged. For example in the case of *John K. Modise v Botswana*<sup>187</sup> where the applicant had been trying to establish a Botswana nationality legally since 1978 but his appeal was still pending in the local Court at the time of his application to the African Commission.

Furthermore, the African Commission may, and has often made exception to the rule of exhaustion of local remedies where a large number of people are affected by a violation of human rights hence making it impractical to utilize local remedies. In the case of *Malawi African Association and Others v Mauritania*<sup>188</sup> for example, the Commission opined that the human rights situation in the country and the “great number of victims involved render[ed] the channels of remedy unavailable in practical terms”<sup>189</sup> hence making the process unduly prolonged. Similarly, in the case of *Amnesty International and Others v Sudan*<sup>190</sup> which come up as a result of massive human rights violations following the *coup* of 30 July 1989. The Commission concluded that; considering the “seriousness of the human rights situation

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<sup>185</sup> Communication 71/92, *Rencontre Africaine Pour la De’fence des Droits de l’Homme v Gambia*, Tenth Annual Report of the Commission-1996/1997

<sup>186</sup> See Communication 232/99, *John D. Ouko v Kenya* Para 19, (where the Commission while Replicating its earlier decision in communication 215/98 *Rights International v Nigeria*, held that “the complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugee. The Commission therefore declared the communication admissible based on the principle of constructive exhaustion of local remedies.

<sup>187</sup> Communication 97/93, *John K. Modise v Botswana*, Tenth Annual Report of the African Commission-1996/1997

<sup>188</sup> *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)]

<sup>189</sup> *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)] para 80

<sup>190</sup> Communications 48/90, 50/91, 52/91, 89/93 [(2000) AHRLR 297 (ACHPR 1999)]

in Sudan and the great numbers of people involved”<sup>191</sup>, the Special Tribunal that had been established by the Sudanese Government through a decree that suspended the jurisdiction of the regular Courts in favour of the Tribunals did not offer effective remedy.

Accordingly, in a situation where there is massive violation of human rights, it is assumed that the state is well aware of that fact and if it does not take any step to prevent the violation, then the Commission will be lenient to the requirement of exhaustion of local remedies. This was elaborated in the case of *Organisation Mondiale Contre la Torture and Others v Rwanda*<sup>192</sup> where the Commission articulated that the pervasiveness of human rights violations can be one of the factors that may trigger the dispensation of exhaustion of local remedies; especially more so in the event that the state in question takes no steps to prevent or stop violations of human rights.

While compared to the African and the European systems, the Inter-American system tends to be even less stringent when it comes to the exhaustion of local remedies. Although the American Convention provides that local remedies must be exhausted, it lays down rather flexible conditions upon which an individual can be exempted from exhausting the remedies. Illustratively, the Convention provides that local remedies will be considered unavailable if:

- 1) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; 2) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or 3) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.<sup>193</sup>

The above provisions seem more flexible and may likely present a chance to many applicants who might approach the system without having exhausted the local remedies for

<sup>191</sup> Communications 48/90, 50/91, 52/91, 89/93 [(2000) AHRLR 297 (ACHPR 1999)] para 32.

<sup>192</sup> *Organisation Mondiale Contre la Torture and Others v Rwanda* 27/89, 49/91, 99/ 93 [(2000) AHRLR 282 (ACHPR 1996)].

<sup>193</sup> Article 46(2) of the American Convention

varied reasons provided that this reasons falls within the confines of Article 46 of the Convention.

Additionally, by way of an opinion, the Inter-American Court has elaborated circumstances under which a complaint will be admissible regardless of whether there exist local remedies which are yet to be exhausted. According to the Court, a local remedy is adequate only if it is “suitable to address the infringement of a legal right” and it is only effective if it is “capable of producing the designed result”.<sup>194</sup> Therefore, in its first contentious judgment in the case of *Velásquez Rodríguez*<sup>195</sup>, the Inter-American Court replicated European Courts of Human Rights’ sentiments by stating that it is up to a state claiming non exhaustion of local remedies to prove the existence and effectiveness of such remedies.

The Inter-American Court has also gone further to illustrate that, it is not only about the exhaustion of local remedies that act as a precondition for a case admissibility but rather there are circumstances other than the exhaustion of local remedies that come into play. For example, it is possible for somebody to be excluded for the requirement of exhaustion of local remedies on basis of indigent. This fact was made clear by the Inter-American Court through its advisory opinion while answering a questions that had been posed by the Commission in regards to the requirement of exceptions to the exhaustion of local remedies under Article 46(1), 46(2)a and 46(2)b. The Commission questions were whether the requirement of exhaustion of local remedies can apply to “*an indigent, who because of economic circumstances is unable to avail himself of the legal remedies within a country*” and whether “*the same requirement applied where a person is unable to retain*

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<sup>194</sup> Dinah Shelton. *The Jurisprudence of the Inter American Court Of Human Rights*, The American University Journal of International Law & Policy, Washington College of Law, The American University(1994) at p. 345

<sup>195</sup> Velásquez Rodríguez Case, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989).

*representation due to general fears in the legal community, and therefore cannot avail himself of legal remedies provided by law in the country”.*<sup>196</sup>

The Court elucidated on this questions by stressing that, the national systems have an obligation to “organize their governmental apparatus and to create the structure necessary to guarantee human right”.<sup>197</sup> Therefore, in the event that legal services are required in order for a person to be able to utilize the existing local remedies, a person who is not able to access such legal services because of indigence might be excepted from the requirement of exhaustion of local remedies if it became apparent that he could not exhaust the available remedies because of financial constrains.<sup>198</sup> Secondly, the Court articulated that the same principle applied to a situation where an individual is prevented from exhausting local remedies due to generalized fear in the legal community.<sup>199</sup> Therefore, a remedy will be deemed insufficient if for example a person cannot approach the judiciary because of fear for her life or those of her relatives.<sup>200</sup>

Another aspect that makes the Inter-American system friendlier to individual applicant as compared to the African system is the fact that the Inter-American system has adopted a precedent of integrating International law<sup>201</sup> while dealing with questions of exhaustion of local remedies.<sup>202</sup>

While the European system is not as flexible as the Inter-American system when dealing with the questions of exhaustion of local remedies, the European Court of Human

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<sup>196</sup> Olivier De Schutter, *INTERNATIONAL HUMAN RIGHTS LAW*, Cambridge University Press, 2010, at p 952

<sup>197</sup> Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies* (Article 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of 10 August 1990 requested by the Inter-American Commission on Human Rights, Para 30

<sup>198</sup> Supra note 197

<sup>199</sup> Supra note 197, at Para 33 & 34

<sup>200</sup> *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) Paragraph 52

<sup>201</sup> See Article 46 of the American Convention which make provision for the exhaustion of local remedies in accordance with generally recognized principles of international law.

<sup>202</sup> Michelo Hansungule, “*Protection of Human Rights under the Inter-American System: An Outsider’s Reflection*” in *INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER*, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 701 (2001)

Rights has addressed the issue in the cases of *De Jong, Baget and Van Den Brink v Netherlands* and *Rodić and 3 others v. Bosnia and Herzegovina* quite comprehensively. In the Rodić case for example, the Court clearly articulated that:

The rule (on exhaustion of local remedies) is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.<sup>203</sup>

As a result, the European Court went ahead and declared the application admissible despite Bosnia's contention about non exhaustion of local remedies by the applicant.

In the light of the above one can argue that the African system has a lot to learn from the two regional systems; and more so from the Inter-American system. As demonstrated, the Inter-American system normally considers various aspects that may hinder an individual from exhausting local remedies rather than treating non-exhaustion of local remedies with finality.

Having looked at the general conditions that individual applicants are expected to fulfil before filing their complaints under the three systems, it is equally important to consider some of the specific restrictions that inhibit individual applicants' access to the systems.

### ***2.3 The systems discretionary powers when dealing with individual applications***

Despite the requirement for exhaustion of local remedies, the Inter-American, African and the European systems of human rights have other requirement that may restrict individual applications from accessing the systems. For example, Article 47(b) of the American Convention provides that a petition or a communication shall not be considered if it is established that it is "manifestly groundless or obviously out of order". Similarly, under

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<sup>203</sup> See *Rodić and 3 others v. Bosnia and Herzegovina* (application no. 22893/05), at Para 53



Article 35(3)<sup>204</sup> of the European Convention, there is a proviso to the effect that, an application shall be deemed inadmissible if in the Courts opinion, the application is “manifestly ill-founded” or the “applicant has not suffered a significant disadvantage”.

Lastly, under the African Charter, Article 56(3) provides that a communication shall only be considered by the Commission only in the event that it is not “written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity”<sup>205</sup> and only when such communications are “submitted within a reasonable period from the time local remedies are exhausted”.<sup>206</sup> Accordingly, the above provisions give powers to the systems to strike out applications before they are heard on merit.<sup>207</sup> A look at these restrictions separately will shed some light on the both positive and negative effects that this restriction are likely to have on individual application.

### 2.3.1 Time requirement under the African Charter

Unlike the American and the European Conventions which make precise provisions in respect of time requirement within which individual’s applicant have to file their petitions before the systems, the African Charter does not make specific provisions in this regard.<sup>208</sup> Instead, Article 56(6) of the Charter provides that individual’s applications shall be considered by the Commission only when they are sent within reasonable time. Thus, lack of specification by the African Charter leaves a loophole hence encouraging different interpretations of the phrase “reasonable time”.

Thus, one of the possible conclusion from a literal interpretation of the provisions of Article 56(6) would be that, considering the possible difficulties individual complainant are likely to face (especially in terms of poor infrastructure and telecommunication) while trying

<sup>204</sup> As amended by Article 12 of Protocol No.14 which entered into force on 1<sup>st</sup> June 2010

<sup>205</sup> Article 56(3) of the African Charter on Human and Peoples’ Rights

<sup>206</sup> Article 56(6) of the African Charter on Human and Peoples’ Rights

<sup>207</sup> Michelo Hansungule, “*Protection of Human Rights under the Inter-American System: An Outsider’s Reflection*” in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 701 (2001),

<sup>208</sup> See Article 56(6) of the African Charter

to access the African system, the Commission as well as the Court are likely to interpret the term “reasonable time” inclusively rather than exclusively.<sup>209</sup> Therefore, it would not be out of context to think that the Commission and/or the Court are likely to consider a communication sent to them slightly out of time provided there are practical reasons for such a delay.<sup>210</sup> However, this misty provision may presents glitch to potential applicants who are not privy to the jurisprudence of the African system.

As such, my contention is that the provisions of the Inter-American and the European Conventions illuminate a good example by clearly stipulated that an application has to be filed within six months upon the exhaustion of local remedies.<sup>211</sup> In my opinion, the word ‘reasonable’ in the African Charter leaves room for potential abuse but it also presents the danger of having discrepancies in the Court’s precedent since what is reasonable is relative. In fact, what might amount to ‘reasonable time’ to one person might seem unreasonable to another. As such, having a specified time within which applications must be file will avoid having varied interpretations of what is reasonable or unreasonable time.

### **2.3.2 Other restrictions: Disparaging language, manifestly ill founded and significant disadvantage**

As stated above, Article 56(3) of the African Charter articulates that an application shall not be admitted if it is written in a disparaging language. As a result, the African Commission has occasionally declared applications inadmissible on basis of the language used. For example, in the case of *Ligue Camerounaise des Droits de l’Homme v Cameroon*<sup>212</sup> where the applicant alleged several instances of human rights violation by the government of Cameroon, the Commission declared the application inadmissible for among other reasons;

<sup>209</sup> Michelo Hansungule, “Protection of Human Rights under the Inter-American System: An Outsider’s Reflection” in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 701 (2001),

<sup>210</sup> F Ouguergouz, THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA, Martinus Nijhoff, 2003 at 612

<sup>211</sup> Articles 35(1) of the European Convention and 46(1) b of the Inter-American Convention

<sup>212</sup> *Ligue Camerounaise des Droits de l’Homme v Cameroon*(2000) ACHRLR 61 (ACHPR 1997)

the use of disparaging language because the application contained statements such as: ‘Paul Biya must respond to crimes against humanity’; ‘30 years of the criminal neo-colonial regime incarnated by the duo Ahidjio/Biya’; ‘regime of torturers’; and ‘government barbarisms’.<sup>213</sup>

Accordingly, one can rightly argue that, although individual rights to access the Court is not completely canalised or hindered by the provisions of Article 56(3), it is hard to deny the fact that the provision restricts individual access to the system to a certain measure. In this regard, Fatsah Ouguergouz while questioning the necessity of the provision of Article 56(3) opines that the subjective language used in the Article confers a “sovereign power of appraisal on the African Commission”.<sup>214</sup> He also argues that it is difficult to “reduce the concept of disparaging language or insulting language ...to objective criteria”.<sup>215</sup>

Fatsah Ouguergouz arguments are logical; and rightly so because, it is hard to have a standard decent language or insulting language. Incidentally, what could be insulting language to one person might not be so to another. As such, the provision of Article 56(3) has the potential to lock out genuine claims of human rights violation in the expense of language.

Although neither the European nor the Inter-American Convention make reference to the language to be used in an application. Both systems have other limitations that are almost tantamount to the restriction played by Article 56(3) of the African Charter. For instance, Article 47(b) of the American Convention empowers the Inter- American Commission to declare an application inadmissible if it considers the application to be manifestly ill founded.<sup>216</sup> Similarly, under the European system, the European Court of Human Rights has a wide discretion under Article 35(3)a of the European Convention to declared a case inadmissible on the basis of being manifestly ill founded. Hence, one can argue that Article

<sup>213</sup> *Ligue Camerounaise des Droits de l’Homme v Cameroon*(2000) ACHRLR 61 (ACHPR 1997)

<sup>214</sup>F Ouguergouz, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA*, Martinus Nijhoff , 2003 at 598

<sup>215</sup> Supra note 214

<sup>216</sup> Article 47(b) of the AMERICAN Convention

35(3)a empowers the Court to have discretionary power to make a decision in regards to the seriousness of an application before the case is heard on merit.<sup>217</sup>

Thus, the European Commission on Human Rights (during its existence) as well as the European Court of Human Rights has occasionally turned down applications if and when they opine that the applications are manifestly ill founded. For example, in the case of *X. v. Iceland*<sup>218</sup>, the European Commission, without even hearing the merit of the case decided that the discrepancies created by the Icelandic electoral system could not be concluded to be of such magnitude as to be arbitrary or abusive.<sup>219</sup>

Another restriction that has been placed on individual applicants under the European system is the provisions of Article 35(3) of the European Convention to the effect that a Court may declare an application inadmissible if it considers that the applicant has not suffered significant disadvantage. This provision was as a result of an amendment<sup>220</sup> on Article 35(5) by article 12 of Protocol No. 14. Consequently, in its recent judgments in the cases of *Holub v. the Czech Republic*<sup>221</sup> and *Bratři Zátkové, v. The Czech Republic*<sup>222</sup>, the European Court of Human Rights found the applications as manifestly ill-founded where the applicants had alleged numerous violations of the principle of a fair hearing following a dismissal of their constitutional appeals at the domestic level. In these appeals, the complainants had disputed that they had not been “informed of the observations submitted to the Constitutional Court by the lower Courts and by the Supreme Court” therefore abrogating their rights to a fair hearing. The Court therefore ruled that the applicants had not suffered significant disadvantage.<sup>223</sup>

<sup>217</sup> Article 35(3) of the European Convention on Human rights

<sup>218</sup> APPLICATION/REQUETE N° 8941 /80

<sup>219</sup> Mark W. Janis, Richard S. Kay and Anthony W. Bradley, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIAL, 3<sup>rd</sup> ed. Oxford University press, 2008, at p. 41

<sup>220</sup> The amendment was mostly occasioned by the need to tackle the Courts ever increasing workload.

<sup>221</sup> *Holub v. the Czech Republic* (application no. 24880/05 )

<sup>222</sup> *Bratři Zátkové, a.s. v. the Czech Republic* (application no. 20862/06)

<sup>223</sup> See Press Release issued by the Registrar of the European Court of Human Rights on 23/02/2011

The provision of Article 35(5) has therefore been a subject of criticism especially judging from the fact that it has the potential to discourage victims or potential victims from approaching the Court. Most critics lament that: the right of individual to petition the Court as enshrined in the European Convention should remain “sacrosanct” and the magnitude of the damage suffered by an individual should not be used as a determining factor in order to scale-out applications.<sup>224</sup>

Additionally, in expressing their displeasure with the provisions of Article 35(5), some critics have also posed the questions that are worth of serious considerations. For example, “what is to be regarded as a case of minor or secondary importance (or) what case is to be seen as a substantial one”<sup>225</sup> hence the Convention does not stipulate the parameters to be used in deciding this facts. Of course one can understand the core of this criticism especially considering the Article 35(5) can condone dismissal of applicants whom the Court feels they have not suffered significant disadvantaged even if the applicants feels they have been aggrieved.<sup>226</sup>

Before wrapping up this Chapter, it is appropriate to have a look at the enforcement machineries that have been put in place in the three regional systems and the influence they have on individual applicants. This will create a clear picture of individual access to the three systems, especially because enforceability of decisions with the view of redressing violations of human rights is the most important aspects in an individual complaint mechanism.

## ***2.4 Enforcement machineries***

### **2.4.1 Enforcement of the Court’s decisions**

Contrary to the European system where there is an organized organ mandated with the responsibility of supervision execution of Court’s decisions, the Inter-American and the

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<sup>224</sup> Philip leach, *Access to the European Court of Human Rights: From A legal Entitlement to a lottery?* In INTERNATIONAL HUAMN RIGHTS IN CONTEXT:LAW POLITICS MORALS,3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 1011

<sup>225</sup> Supra note, at 1012

<sup>226</sup> The rationale behind this is backboned on the need to avoid turning the European Court of Human Rights into a Constitutional Court or the Court of forth instance.

Africa systems lack such organization. Under the African system, the Africa Court of Human and Peoples' Rights is empowered to "make appropriate orders" with the view of remedying violation of human and peoples' rights as guaranteed under the African Charter. The remedy may include "payment of fair compensation or reparation".<sup>227</sup> However, the African system has not stipulated way through which such Court's order will be enforced neither has it created an enforcement machineries to ensure that the judgments and/or orders of the Court are executed effectively. The only provision that can be deduced as having been intend to give directions on how the Court's orders are supposed to be enforced is the stipulations of Article 30 of the Protocol to the African Charter which lightly provides that: states parties to the Protocol "undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its Execution".<sup>228</sup>

Additionally, as a way of monitoring compliance with its judgments, the African Court is expected to submit a report to the Assembly highlighting its work during the previous year and also noting to pinpoint "the cases in which a State has not complied with the Court's judgment".<sup>229</sup> It is however not clear what steps are expected to be taken by the assembly once it receives a list of states that have not complied with the Court's orders.

On the other hand, the enforcement of Court judgment under the Inter-American system is largely left to the discretion of the member states. Firstly, the decisions of the Court are not legally binding unless the states have acknowledged the Court's jurisdiction.<sup>230</sup> Secondly, the provisions of Article 68 mandate the members' states to ensure compliance with the Court's decision. The Article articulates that; states parties to the Convention "undertake to comply with the decision of the Court following proceedings to which they are

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<sup>227</sup> Article 27 of the Protocol to the African Charter

<sup>228</sup> Article 30 of the Protocol to the African Charter

<sup>229</sup> Article 31 of the Protocol to the African Charter

<sup>230</sup> Philip Leach, Access to the European Court of Human Rights: From A legal Entitlement to a lottery? In INTERNATIONAL HUAMN RIGHTS IN CONTEXT:LAW POLITICS MORALS,3 ed. Henry J. Steiner et al, Oxford University Press, 2008 at 1027

parties”.<sup>231</sup> Accordingly, in the event that a state does not comply with the Court’s judgment, the Court is allowed to inform the General Assembly of the OAS by way of a report on which the Court is also allowed to suggest recommendations in regards to action that should be taken against the defiant states.<sup>232</sup>

Accordingly, it is up to the General Assembly to decide the appropriate action to be taken against such a state because the Convention does not offer any guidance in regards to penalties that should be imposed in case of non-compliance.

In the light of the above, my core thesis is that a situation where a system lacks clear enforcement mechanisms; like in the case of the African and the Inter-American systems presents a potential hitch for the system.<sup>233</sup> For example, such an emblematic hitch arose when the Inter-American Court had to justify its follow-up on compliance of its judgment by the state of Panama; where the state of Panama had taken the view that; *“the stage of monitoring judgments was a post –judgment stage that did not fall within the judicial sphere of the Court, but strictly within the political sphere”*.<sup>234</sup> In reply to this contention, the Court articulated that “according to the provisions of Article 62(1), the Court has jurisdiction in all matters relating to the interpretation or application of the American Convention”. Therefore, if one was to interpret the reasoning of the Court as articulated above, it would be reasonable to conclude that, since “matters relating to the application of the Convention” may encompass issues relating to monitoring compliance with the judgments of the Court, it follows that, the

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<sup>231</sup> See Article 68 of the American Convention. See also, B. Obinna Okere The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159, The Johns Hopkins University Press at 158.

<sup>232</sup> See Article 65 of the American Convention which provides that: To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly’s consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

<sup>233</sup> Michelo Hansungule, *“Protection of Human Rights under the Inter-American System: An Outsider’s Reflection”* in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, *et al*, Martinus Nijhoff, 679-707, at 704 (2001),

<sup>234</sup> Olivier De Schutter, INTERNATIONAL HUMAN RIGHTS LAW, Cambridge University Press, 2010, at p 952

Inter-American Court has jurisdiction to enforce compliance with its decisions provided the states in question have made a declaration recognizing its jurisdiction.<sup>235</sup> However, despite this deducible interpretation, it is still impossible to overlook the adversity caused by lack of a designated or permanent enforcement machinery in the system.<sup>236</sup>

As previously noted, the European system of human rights has more elaborated provisions in regards to enforcement of Court judgment. For starters, the Courts decisions are automatically binding on the state parties. Therefore, after each proceeding, the Court transmits its judgment to the Committee of Ministers which is mandated with the supervisory role of ensuring that the Court's decisions are executed.<sup>237</sup> However, it should be noted that despite having a distinct enforcement machinery, the European system have had a problem with execution of its decision. Illustratively, in a report compiled in 2010, it was apparent that Turkey has the biggest record of non-compliance with the Court Judgement.<sup>238</sup>

#### **2.4.2 Provisional Measures and Enforcement of Decisions by the African Commission**

Although one of the mandates of the African Commission under Article 45(2) of the African Charter is to "protect" human rights, the Charter has a major setback in that it does not make provisions on how the Commission is supposed to implement its findings. While the existence of the Commission in addition to the African Court can lead to instinctive conclusion that the two bodies necessarily signals better protection of human rights, such a disproportionate conclusion would be misleading because; despite the mandate placed on the Commission's shoulder, it lacks remedial authority since it has no jurisdiction to enforce its

<sup>235</sup> See Inter-American Court on Human Rights, Baeno Ricardo et al. case (270 Workers v panama), judgment on competence, 28 November 2003. See also Article 62(3) of the American Convention.

<sup>236</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011 at 784

<sup>237</sup> Article 46 of the European Convention

<sup>238</sup> See a report by the European Court of Human Rights, 50 Years of Activity; The European Court of Human Rights; Some Facts and Figures



orders.<sup>239</sup> The only provision that the Commission can utilize with the view of enforcing its findings is the Articulations under Article 58 (1) of the Charter which direct the Commission to seek the attention of the Assembly of Heads of State and Government in the event it comes across cases revealing “existence of a series of serious or massive violations of human and peoples' rights”.<sup>240</sup> Subsequently, the Assembly of Heads of State and Government may request the Commission to carry out an in-depth study of the cases in questions after which the Commission should submit a report and recommendations on the appropriate measures that should be taken.<sup>241</sup> Sadly, even though the Commission is allowed to make recommendations under Article 58(2), this mandate is watered-down by the fact that even if the Commission reported a case of emergency; which may require issuance of provisional measures, the Chair of the Assembly of Heads of State and Government may still order the Commission to carry out an in-depth study.<sup>242</sup>

The fact that the Commission has to report to the Assembly of Heads of State and Government or/and the Chair of the Assembly of Heads of State and Government may therefore be problematic because; firstly, the Assembly of Heads of State and Government being a political office may lack independence since it might not necessarily be insulated from political emotions. Illustratively, I am thinking of a scenario where the Chair or members of the Assembly of Heads of State and Government is a citizen of a State which is under investigation: and especially not forgetting that Article 52 of the African Charter encourages diplomacy and non-litigious ways of settling disputes.<sup>243</sup> Accordingly, I am of the opinion that, since some situations which call for provisional measures may not leave room for

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<sup>239</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, *The American Journal of International Law*, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011 at 775

<sup>240</sup> Article 58(1) of the African Charter

<sup>241</sup> Article 58(2) of the African Charter

<sup>242</sup> Article 58(3) of the African Charter

<sup>243</sup> See Article 52 of the African Charter

diplomacy or friendly engagements between the states involved and the AU Assembly, it is elusive to precondition the mandate of the Commission on the authority of the AU Assembly.

Therefore, although the European system also relies on a political body: Committee of Ministers, in order to enforce the Court's decision, the same level of efficiency cannot be guaranteed under the African system. As a pointer, the AU Assembly have on several occasions gone mute over human rights violations executed in the African region. Illustratively, Obinna Okere while complaining about the scandalous silence of the former OAU on the face of grave human rights violations argues that:

The individual thus finds himself dissolved in the mass of the collectivity while some despotic regimes protected by the shield of territorial integrity and non-interference (which are the bedrock of the O.A.U.) unleash barbarous repressions against their subjects. The grotesque massacres of Idi Amin of Uganda, the insensate murders of Macias Nguema of Equatorial Guinea, and the sadistic mayhem committed by Jean Bedel Bokassa of the Central African Republic (to cite only a few recent cases) are imprinted on the mind with their gory details.<sup>244</sup>

Secondly, the fact the Assembly of Heads of State and Government and the Chair of the Assembly of Heads of State and Government have discretion to request the Commission to carry an in-depth study of a case even after submitting a report and recommendations on the same implies that the Commission have no final say in a case and it might still be asked to reconsider its reports. A corollary of this discretion is that it may facilitate waste of time and even aggravation of human right violations especially in emergency case.<sup>245</sup>

Although it is not specifically articulated, one may argue that the Commission may also request the respondent state to provide information in the state's periodic report and in accordance with Article 62 explaining measures the state in question is taking in order to guarantee rights as stipulated under the Charter. This would be a scenario especially if the

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<sup>244</sup> Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159P, The Johns Hopkins University Press, at 144

<sup>245</sup> See Article 58 of the African Charter

Commission has previously made recommendations that obligates the state in question to take certain measures in order to remedy a human rights violations<sup>246</sup> However, even if the states were to comply with the Commission's request, such compliance will not have a sweeping effect in the African region since there is no provision in the Charter that obligates the states to comply with the Commission's requests.<sup>247</sup>

From the foregoing, one can conclude that, although the African Commission has been entrusted with a huge mandate, it lacks clear mechanisms through which it can issue provisional measures or enforce its decisions in order to prevent massive violation of human rights. Accordingly, this calls for enumeration of some of the approaches that the Inter-American and the European system have embraced in order to ensure effective enforcement of decisions.

Therefore, having compared various aspects in the three regional systems, it would be prudent to analysis the challenges, inadequacies, and the prospects that the African system has, as well as the lessons that the system can enumerate from the Inter-American and the European systems.

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<sup>246</sup> Olivier De Schutter, *INTERNATIONAL HUMAN RIGHTS LAW*, Cambridge University Press, 2010, at p 952

<sup>247</sup> Makau Mutua, *African Human Rights Court-A two- legged stool*, Human Rights Quarterly 21.2 (1999) 342-363, The Johns Hopkins University Press 1999  
See also Article 62 of the African Charter

## CHAPTER THREE

### 3. AFRICAN SYSTEMS OF HUMAN RIGHTS: INADEQUACIES, CHALLENGES AND PROSPECTS

As mentioned in chapter one of this paper, the African system of human rights has been portrayed in a number of literatures as being paralyzed by inadequacies, passive and retrogressive structures. Although, as I have tried to establish in the previous chapters, some of this sentiments hold some truth in them, this does not necessary mean that the African system is totally disabled. Rather, with keen and lofty enthusiasm, the system can enumerate some lessons from the Inter-American and the European systems of human rights that will enable it to boost its potential and redeemed its dwindling image with the slightest efforts.<sup>248</sup> This section will therefore discuss some of the challenges that the African system faces, the prospects that the system has, and the lessons that the system can embrace in order to achieve its fullest potential.

#### ***3.1 Provisional measures under the African system of human rights***

As discussed under Chapter two<sup>249</sup>, provisional measures are preventive steps that are often taken before a final decision is made mostly with the view of preventing irreparable harm from befalling potential victims of human rights violations.<sup>250</sup> Observably, unlike the Inter-American Convention which mandates the Commission with powers to take provisional measures in order to prevent violation of human rights, the African Charter does not expressly provide for provisional measures. Instead, the African Commission's Rules of Procedure fills this gap by providing that the African Commission may inform a state party

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<sup>248</sup> Makau wa Mutua, *The African Human Rights System in a Comparative Perspective*, 3 Rev. Afr. Comm. Hum. & Peoples' Rts. (1993)

<sup>249</sup> See pp 59-62

<sup>250</sup> See The Danish Institute for Human Rights, *African Human Rights Complaints Handling Mechanisms: A Descriptive Analysis*, African Report, February 2008 at 49

on the "appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation".<sup>251</sup>

However, despite this provision, the implementation of provisional measures by the Commission is still waiting. Firstly, the wording of Rule 109 of the Commission Rules and Procedure does not seem to indicate whether such measures are binding or not. Secondly, the African Commission itself has been modest in utilizing the powers to issue provisional measures as regularly as it should.<sup>252</sup> Illustratively, the Commission has only issued provisional measures on a handful of cases, a majority of which were not only ignored by the offending states but the Commission did not take further steps against such non-compliance.<sup>253</sup> If the Commission was to avoid such hands-off approach and instead be more vigilant to endemic human rights violation and more keener in informing the state on provisional measures they need to adopt in order to prevent violations of human rights, human right discourse in African Continent would slowly take a more positive turn.<sup>254</sup> This is especially so because provisional measures are so key in preventing possible violations of human rights. As Jo M. Pasqualucci opine in his write-up:

Provisional measures have a potentially significant role in the Americas and other developing regions due to the urgent character of many local human rights abuses. The potential for irreparable damage often requires an immediacy of response which can only be provided by provisional measures. This preventive function where the lives and physical security of persons are concerned is far more valuable than the compensatory function of a final judgment.<sup>255</sup>

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<sup>251</sup> African Commission's Rules of Procedure

<sup>252</sup> Mathews, *The OAU and Political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples' Rights*, 1981, Africa Today, Vol. 34, No. 1/2, Human Rights: The African Context (1st Qtr. - 2ndQtr., 1987), pp. 85-103, Indiana University Press

<sup>253</sup> See *Int'l Pen v. Nigeria*, Communications 137/94, 139/94, 154/96, 161/97 12th Ann. Activity Report, concerning Ken Saro-Wiwa and other Ogoni leaders whereby the Commission had adopted interim measures asking the state of Nigeria not to execute them until the Commission had made a decision but the Nigerian Government did not comply.

<sup>254</sup> Mathews, *The OAU and Political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples' Rights*, 1981, Africa Today, Vol. 34, No. 1/2, Human Rights: The African Context (1st Qtr. - 2ndQtr., 1987), pp. 85-103, Indiana University Press

<sup>255</sup> Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, The University of Miami Inter-American Law Review, Vol. 26, No. 2, University of Miami Inter-American Law Review at 312-313

Like the African Commission, the African Court is also accorded the powers to issue provisional measures under Article 27 of the Protocol establishing the Court. The Court has powers to adopt "such provisional measures as it deems necessary" in cases *"of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons"*.<sup>256</sup> Thus, my argument is that individual's applicant and NGOs should be allowed unconditional access to Court considering they might be in a better position to report on human right transgressions that might qualify as deserving urgent measures.<sup>257</sup>

Additionally, there is need to demystify the inter-relation between Article 27 and 31 of the Court's Protocol because they are a bit murky in their current form. While Article 27 seems to talk about "findings", Article 31 seems to be concerned about "Judgement". The difference in the two provisions therefore provokes the question whether the African Court can report the states that have not complied with its "findings" to the Assembly. As such, there is a need for the African Court to elucidate on whether the phrase "findings" as referred in Article 27 is synonymous to the phrase "judgment" under Article 31 for purposes of enforcing the provisions of Article 27. In the event that the two words are synonymous, it will be justifiable to report a state that fails to comply with the provisional measures under Article 27 to the Assembly as articulated under Article 31.<sup>258</sup>

As of now, it is not out of context to assume that a defiant state might argue that provisional measure as provided under Article 27 are not tantamount to a Court's judgement and therefore the Assembly has no jurisdiction to deal with non-compliance with Article 27. In order to intercept such occurrences, the Court should demystify the question of

<sup>256</sup> Article 27(2) of the Protocol Establishing the African Court of Human and Peoples' Rights

<sup>257</sup> Frans Viljoen, *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at p. 6

<sup>258</sup> Article 31 of the Court's Protocol provides that The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgment.

enforceability of Article 27 through; its precedents, its Rules and Procedures and/or issuing an opinion on the same.<sup>259</sup>

### ***3.2 Enforcement machineries in the African system***

The effectiveness of any system in remedying human rights violations principally depends on the system's ability to render and enforce its decisions independently and impartially.<sup>260</sup> However, the element of enforceability under the African system is a bit wobbly; partly because of several hindrances that are occasioned by the provisions of African Charter.<sup>261</sup> For instance, apart from having indistinct enforcement machineries for enforcing its decisions ( as discussed under Chapter two of this paper), the system also lacks comprehensive structure for enforcing friendly settlements as well as provisional measures. For example, the fact that the African Commission under Article 58 is only authorized to report to the Assembly of Heads of States and Governments in the event of an emergency raises empirical questions. Firstly, this means that the Commission is remarkably devoid of the rights to take the relevant actions in order to stop human rights violations without consulting the Assembly. Ironically, even though the Commission is supposed to involve the Assembly, such involvement does not necessarily mean that the situation will be salvaged. This is because the Assembly has discretion to return the Commission to the drawing board by asking it to carry an in-depth study on the case.<sup>262</sup>

Thus, the African Commission is left without powers to either award damages, restitute or recompense victims of human right violations neither does it have the muscle to reprimand nor condemn offending states. Consequently, this does not only dilute the

<sup>259</sup> Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, Yale Human Rights and Development L.J. [Vol. 3:45, at 95. See also Mamatkulov and Abdurasulovic v. Turkey, Application Nos. 46827/99 and 46951/99, where the European Court articulated on the enforceability of provisional measures

<sup>260</sup> Jack Donnelly, *International human rights: a regime analysis*, Massachusetts Institute of Technology and the World Peace Foundation, 1986,

<sup>261</sup> See the discussion under Chapter 2 at pp 58-65

<sup>262</sup> See Article 58 of the African Charter

effectiveness of human rights protection in the region but it also has pejorative effects on the Commission independence. For instance, the role of the Commission is evidently ignored by the member States and its orders and recommendations blatantly disregarded.<sup>263</sup>

On the other hand, the Inter-American as well as the European systems has firm and well established enforcement mechanisms which have wide discretion to take necessary steps aimed at redressing human rights. Illustratively, the Inter-American Commission has a wide discretion in deciding whether to publish the report concerning states non-compliance with its decision.<sup>264</sup> The Commission does this following a vote of absolute majority aimed at deciding whether a state has taken enough measures to remedy a violation of human rights. If the Commission forms an opinion that the state has not taken enough measures; it has the discretion to publish the report.<sup>265</sup>

Apart from the gaps that exists in regards to enforcement of the decisions of the African Commission, the Protocol establishing the African Court is also not clear in regards to measures that can be taken with the view of ensuring that state parties implements the Court's decision. If anything, the only hint that shows the possible existence of enforcement machinery stems from the provision of Article 23(2) of the constitutive Act of the African Union which provides that:

Any member state that fails to comply with the decision and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of political and economic nature to be determine by the Assembly.<sup>266</sup>

In the light of the above and considering that the African Court is somehow an Organ of the African Union, it is my understanding that the African Union Assembly should have a right to sanctions states that fails to comply with the Court's Judgments. The Question that

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<sup>263</sup> Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never* Yale Human Rights and Development L.J. [Vol. 3:45, at 67]

<sup>264</sup> Article 51(3) of the American Convention

<sup>265</sup> Article 51 of the American Convention

<sup>266</sup> Article 23(2) of the constitutive Act of the African Union



remains unanswered is whether the AU Assembly is able and willing to utilize its mandate under Article 23(2) of the Constitutive Act.<sup>267</sup> This doubt can however be avoided with the creation of a distinct enforcement machineries like in the case of the Inter-American or the European system where the General Assembly and the Committee of minister are empowered to enforce Courts Judgments. However, as mentioned before, the enforcement machineries must be independent, impartial and free from political manipulation.<sup>268</sup>

Worryingly, although the African Charter embraces a ‘diplomatic settlement’ of cases of human rights violation through the Commission as opposed to a litigious approach, the Charter is mute on modalities of enforcing such settlements. On the other hand, although the European and the Inter-American systems also encourages friendly settlements of cases, the two systems take a more judicial approach towards settlement of disputes and enforcement of the agreements that are reached as a result of friendly settlements.<sup>269</sup>

Both the Inter-American and the European systems have well established mechanisms for enforcing friendly settlement. For instance, in the event of a friendly settlement under the Inter-American system, the Commission reports to the petitioner as well as to the States parties to the Convention before transmitting the communication to the secretary general of the Organization of American States for publication.<sup>270</sup> Similarly, under the European system, the Committee of Ministers has the discretions to not only supervise the compliance with the Court’s decision but also compliance with friendly settlements.<sup>271</sup> In this regard, the

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<sup>267</sup> See The Danish Institute for Human Rights, *African Human Rights Complaints Handling Mechanisms: A Descriptive Analysis*, African Report, February 2008 at 72

<sup>268</sup> See pp 60-61

<sup>269</sup> See, Kevin Boyle and Hurst Hannum, *Individual Applications Under the European Convention on Human Rights and the Concept of Administrative Practice: the Donnelly Case*, *The American Journal of International Law*, Vol. 68, No. 3 (Jul., 1974), pp. 440-453 at 452, where they emphasis that there is a need to encourage a shift in “enforcement of the Convention from reliance on politics, the watchdog role of the High contracting parties and the closed-door procedure of friendly settlement to a more aggressive assertion of rights by the individuals and communities allegedly suffering from violations of their rights”.

<sup>270</sup> Article 49 of the American Convention

<sup>271</sup> See Articles 39 and 49 of the European and Inter-American Conventions respectively. See also Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A*

European Convention under Article 39 articulates that any decision reached as a result of friendly settlement should be “transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision”.<sup>272</sup>

Similarly, Section 49 of the Inter-American Convention mandates the Commission to draw up a report stating the facts and the resolution reached. The report is transmitted to the petitioner and to the States Parties to the Convention before being *communicated to the Secretary General of the Organization of American States for publication*. Conversely, such articulations are evidently absent in the African Charter.<sup>273</sup>

In order to deal with these deficiencies, the African system need to, firstly, reconsider empowering the African Commission to not only be able to adopt provisional measures in situations that warrants such measures but also to be able to enforce its own decisions.<sup>274</sup> The importance of giving the Commission broader mandates in regards to enforcement of its decisions cannot be clearly articulated in this paper than it has been articulated by Obinna Okere who argues that:

The African Commission should still have its own implementation mechanism, for its integrity’s sake, because having to wait for the Court to enforce its decisions would inevitably delay the availability of relief to victims, especially those who cannot approach the Court directly.<sup>275</sup>

Similarly, although as stated before, the African Court under Article 27(2) has the mandate to adopt provisional measures under Article 27(2) of its establishing Protocol, the Protocol does not vociferously articulate whether such provisional measures have a binding effects on the state party in questions. In the face of such impasse, it is not contemptible to

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*Comparative Analysis with the European and American Systems*, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159P, The Johns Hopkins University Press, at 150-154

<sup>272</sup> See Article 39 of the European Convention

<sup>273</sup> Article 39(4) of the European Convention

<sup>274</sup> Nsongurua J. Udombana, *Toward the African Court on Human and Peoples’ Rights: Better Late Than Never* Yale Human Rights and Development L.J. [Vol. 3:45, at 66

<sup>275</sup> Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems*, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159P, The Johns Hopkins University Press, at 150-154

assume that; since the Court has jurisdiction to make binding decisions, its pronouncements on provisional measures should not only be binding on an offending states but the AU Assembly should be able to sanctions state parties for non-compliance with such pronouncements.<sup>276</sup> As such, the Protocol should be reviewed with the view of ensuring that it addresses the modalities of enforcing provisional measures. In this regard, the European system offers an enumerable lesson where by the European Court on Human Rights made a ruling in the case of *Mamatkulov and Abdurasulovic v. Turkey* and declared that it is mandatory for state parties to comply with provisional measures. The Court vehemently stated that:

A failure to comply with interim measures had to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.<sup>277</sup>

Subsequently, the Court went ahead and found Turkey in violation of its obligations under Article 34 of the European Convention.

### ***3.3 Promulgation of the work of the African Commission and the Court***

Judging from the vastness of the African region and the amount of endemic human rights violations that are perpetrated in most of the African states, it will not be farfetched to conclude that the amount of cases that reaches the African system are not only preposterously disproportionate but they are not representative of human rights situation in Africa. This inconsistency can be attributed to illiteracy and lack of awareness in as far as the existence of the Commission and the African Court is concerned.<sup>278</sup> The problem is compounded by the fact that the African system does not make provisions for legal aid especially to the very poor people who cannot afford to file their complaints to the system. as

<sup>276</sup> See The Danish Institute for Human Rights, African Human Rights Complaints Handling Mechanisms: A Descriptive Analysis, African Report, February 2008 at 72

<sup>277</sup> See *Mamatkulov and Abdurasulovic v. Turkey*, Application Nos. 46827/99 and 46951/99, at Para 110

<sup>278</sup> Udeme Essien, *The African Commission on Human and Peoples' Rights: Eleven Years After*, Buffalo Human Rights Law Review Vol. 93 State University of New York at Buffalo School of Law 2000 at 7

discussed under Chapter two, This situation is totally different in both the Inter-American and European systems where certain financial arrangements have been put down in order to facilitate individuals who cannot afford legal representation on their own.<sup>279</sup>

Furthermore, the work of the Commission and the entire African System is obscured by the requirement set forth under Article 59(1) to the effect that matters that have been dealt with by the Commission shall remain confident “until such a time as the Assembly of Heads of State and Government shall otherwise decide”.<sup>280</sup> Accordingly, the publication of the Commission’s work especially on individuals’ complainants largely depends on the Assembly of Heads of State and Government.<sup>281</sup> It follows that, promulgation and publication of Commission’s decisions is hindered by the provision of Article 59(1) hence making the defiant states secure since they are insulated from public scrutiny.<sup>282</sup>

Although confidentiality might have an elemental tendency of encouraging cooperation by states, non publication of the Commission’s decisions may impede its work and even make it harder for media to profile the Commission’s work hence leading to a diminished public awareness.<sup>283</sup> Additionally, giving the Assembly the overall power to vindicate on the fate of the work of the Commission is somehow suspect since there are possibilities that some parties to the Assembly may lack objectivity or even succumb to the temptation of shielding their states or allies who might be responsible for similar human rights violations.<sup>284</sup>

To remedy some of the above loopholes, there is a moral as well as a legal demand for the African Commission to put more efforts in as far as its promotional mandate is

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<sup>279</sup> See chapter two at pp36-37

<sup>280</sup> Article 59(1) of the African Charter

<sup>281</sup> See The Danish Institute for Human Rights, African Human Rights Complaints Handling Mechanisms: A Descriptive Analysis, African Report, February 2008 at 9

<sup>282</sup> Nsongurua J. Udombana, *Toward the African Court on Human and Peoples’ Rights: Better Late Than Never*, Yale Human Rights and Development L.J. [Vol. 3:45, at 69

<sup>283</sup> Jack Donnelly, *International human rights: a regime analysis*, Massachusetts Institute of Technology and the World Peace Foundation, 1986, at 613

<sup>284</sup> Supra note 282, at 69-70

concerned; this may entail holding seminars and educational workshop more frequently in different African countries with the view of creating more awareness about its work and the procedures of accessing the system. The Commission should also work hand in hand with the media in order to effectively disseminate information regarding its existence and the work that it is carrying out.<sup>285</sup> The African Commission can understandably copy the Inter-American Commission which has gain familiarity through publication of the Country's report, thematic reports and a chapter on 'human rights development in the region' which is published as a way of monitoring and shaming the countries that are still perpetuating human rights violation.<sup>286</sup>

The Court should also illuminate its existence by encouraging its accessibility by individual complainant and NGOs. As mentioned earlier, this can be done by developing Court's rules that are friendlier to individual applicants and more elaborate on steps that need to be taken by such applicants.<sup>287</sup> The African Court can also illuminate its work by publishing it in the websites as well as by way of report. This system of publicity has worked well under the European and the Inter-American systems. The European system for example has an effective website where it publishes its reports, cases, decisions, judgments and even upcoming activities. This has contributed greatly in creating awareness of the Court's existence and the work that it is doing?

As already mentioned, the African Court also needs to stay alive to the situations in the Member states. This however does not necessarily mean that the Court should not pay attention to its role as an impartial arbiter. In the words of James L. Cavallaro and Stephanie Erin Brewer, the Court should specifically pay attention to:

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<sup>285</sup> Claude E. Welch, Jr., *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q.43, 49 (1992).

<sup>286</sup> See details at chapter one at pp 23-26

<sup>287</sup> Frans Viljoen, *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004, at p. 6

(...) factors such as the prevailing social and political climate in countries subject to its jurisdiction; the strategies of relevant national, regional, and international human rights campaigns; existing or planned government projects aimed at addressing human rights problems; and the shape of domestic public opinion on human rights issues.<sup>288</sup>

By paying attention to some of the above factors, the Court will be able to react accordingly to each and every communication that is filed before it. For example, while a Court that is aware that a particular state is undemocratic might consider being less stringent to formalities such as the requirement of exhaustion of local remedies, the same might not be the case if a Court is totally unaware of the situation in the Member states.

Additionally, if the Court was to create awareness about its existence and probably be able to influence state's compliance with its decisions, it needs to bring onboard other audiences apart from its customary audiences. Therefore, in addition to targeting individual applicants, human rights organizations and other human right stakeholders as the "users and consumers of judicial rulings"<sup>289</sup>, the Court in cooperation with other external forces should also consider engaging in tactics that are not only capable of pressuring the Member states but also addressing a bigger audience. One way of doing this would be to employ long-term strategies such as:

(...) grassroots organization and mobilization; use of the media and other strategies to engage public opinion; cooperation with transnational advocacy networks to trigger international shaming<sup>290</sup>

Engaging external forces such as NGOs, media and Human Rights actors is a tool that has been known to create moral demands for change on part of the offending state especially while such states are trying to avoid local and international criticism. Illustratively, the influence of media attention and public support was clearly exemplified in the case of

<sup>288</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011 at 770

<sup>289</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011 at 775

<sup>290</sup> Supra note 289

*Loayza Tamayo v. Peru* whereby Professor Maria Elena Loayza Tamayo was accused and detained in 1993 for alleged association with Peru's Sendero Luminoso (Shining Path) insurgent group. She was sentenced to 20 years imprisonment on a charge of terrorism only to be released following an extensive Media coverage of the case and vast criticism of the Peruvian Government.<sup>291</sup>

### ***3.4 The establishment of the African Court of justice and its proposed merger with the African Court of Human and Peoples' Rights***

On July 11 2000,<sup>292</sup> the African Union proposed and adopted the Constitutive Act of the African Union (AU) with the intentions of replacing the Charter of the OAU and strengthening the African Economic Community (AEC) Treaty. The act was entered into force on May 26, 2001.<sup>293</sup> Accordingly, as a reaction to the articulations of the Constitutive Act, a Protocol establishing the Court of Justice of the African Union was adopted on 11<sup>th</sup> July 2003 and entered into force on 11<sup>th</sup> February 2009.<sup>294</sup>

The proposal to establish a Court of Justice was widely criticized especially because of the numerous loopholes that existed in the establishing documents. For example, although the Court was envisioned to have both “contentious and advisory jurisdiction” as well as powers to adjudicate on individual complaints<sup>295</sup>, the establishing document was not clear on questions of jurisdiction and division of labor between the proposed African Court of Justice

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<sup>291</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011 at 789

<sup>292</sup> During its Thirty-sixth Ordinary Session which was held in Lome, Togo

<sup>293</sup> Nsongurua J. Udombana, *An African Human Rights Court And An African Union Court: A Needful Duality Or A Needless Duplication?*, Journal of International Law, Brooklyn Law School

<sup>294</sup> See The Protocol of the Court of Justice of the African Union Adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union in Maputo on 11<sup>th</sup> July 2003

<sup>295</sup> See Article 30 of the Protocol On The Statute Of The African Court Of Justice And Human Rights which provides that: “Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol” are “entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned”

and the African Court on Human and Peoples' Rights . This oversight left a leeway for potential Jurisdictional Conflict.

While expressing the danger that could result from the existence of both the African Court of Justice as well as the African Court on Human Rights; and especially if the two Courts were to have both contentious and advisory jurisdictions, Nsongurua articulates that:

(There is a) real danger that the two bodies might give conflicting interpretations to treaties invoked before them and thus create disparate legal norms. The problem could be compounded by the fact that neither Court is envisaged to be superior to the other and, thus, neither can overrule decisions of the other. The resultant confusion would impede, rather than facilitate, the development of human rights jurisprudence in Africa.<sup>296</sup>

Similarly, Nsongurua strongly felt that there was no need to establish an African Court of Justice even before the African Court of Human Rights was firmly established. He opined that:

From a pragmatic perspective, it is better to have one African Court that is normatively and structurally strong than having two weak institutions that exist only on paper ( . . . ) it makes inordinately good sense that one Court should give way for the other because a divided house cannot stand. In fact, there are already many sub-regional Courts that could compliment and supplement the work of a single African judicial institution.<sup>297</sup>

Apart from Nsongurua, there are other critics who viewed the establishment and existence of two entities in Africa as a suicidal move. Critics like Dinah Shelton's lamented that "continuous creation of new mechanisms for the protection of human rights in Africa (was) not necessarily helping the situation".<sup>298</sup> She felt that the stakeholders in the African

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<sup>296</sup> Nsongurua J. Udombana, *An African Human Rights Court And An African Union Court: A Needful Duality Or A Needless Duplication?*, Journal of International Law, Brooklyn Law School

At 12-15

<sup>297</sup> Supra note 296

<sup>298</sup> Dinah Sheldon, *REGIONAL PROTECTION OF HUMAN RIGHT*, Oxford University Press, 2008 at 109-110



system should have been more concerned with stabilizing and strengthening the existing mechanisms instead of focusing on creating more mechanisms.<sup>299</sup>

It is on the basis of such convincing criticism that I formed the opinion that, although, “converts are sometimes more zealous than those brought up in the faith”, the move by the African system to employ the European system into the African system in as far as the establishment of a Court of Justice was concerned was somehow imprudent. This opinion is premised on the facts that, firstly, the economic, social, political and technological situations of the two regions are totally different. As such, if the African system is to survive, it has to adopt its own measures that are completely tailored to suit not only the African system but also the African region at large.<sup>300</sup>

Furthermore, the move to establish the Court of Justice was also premature in the sense that it came into conceptualization amid divergence on whether the African Court of Human Right (let alone the African Court of Justice) was really necessary. Those who criticized the move to establish an African Court on Human Rights argued that the African system should engage more in promotional rather than adjudicative role. They reasoned that, since the biggest problem in the African region is “lack of awareness by the general populace of its rights and the processes for vindicating those rights”,<sup>301</sup> formulization and institutionalization of effective educational and promotional machineries aimed at informing people of their rights should be prioritize as the key fundamental strategies.

Accordingly, it is obvious from the foregoing that Protection machineries such as the African Court on Human Rights have been portrayed as being less relevant in as far as protection of human rights in Africa is concerned. In fact, some critics advocate for the

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<sup>299</sup> Dinah Sheldon, *REGIONAL PROTECTION OF HUMAN RIGHT*, Oxford University Press, 2008 at 109-110

<sup>300</sup> Nsongurua J. Udombana, *An African Human Rights Court And An African Union Court: A Needful Duality Or A Needless Duplication?*, *Journal of International Law*, Brooklyn Law School, at 12-13

<sup>301</sup> Supra note 300

strengthening of the African Commission instead of using scarce resource to create additional institution.<sup>302</sup> For example, Mutua Makau argues that:

(...) human rights Court will only be useful if it genuinely seeks to correct the shortcomings of the African human rights system and provides victims of human rights violations with a real and accessible forum in which to vindicate their basic rights. What the OAU and the African regional system do not need is yet another remote and opaque bureaucracy that promises little and delivers nothing. If the Court is to be such a bureaucracy, then it would make more sense to expend additional resources and energy to address the problems of the African Commission and defer the establishment of a Court for another day.<sup>303</sup>

When such persuasive criticism are put forward, one cannot help but question whether the African system really needs the numerous adjudicatory institutions it current has. This question will be answered better by analyzing the current proposed merger of the African Court of Justice and the African Court on Human and Peoples' rights.

In July 2004, the AU Assembly contemptibly and amid myriad criticism and reservations made a decision to integrate the African Court of Human and peoples' Rights and the Africa Court of Justice of the African Union<sup>304</sup>. Accordingly, a Protocol<sup>305</sup> merging the two Courts was adopted on 1<sup>st</sup> of July 2008 and it is currently awaiting ratifications by the member states.<sup>306</sup>

Of relevance to this paper is the provision of Article 2 of the Protocol which provides that:

The African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, are hereby merged into a single Court and established as The African Court of Justice and Human Rights.<sup>307</sup>

<sup>302</sup> Makau Mutua, *African Human Rights Court-A two- legged stool*, Human Rights Quarterly 21.2 (1999) 342-363, The Johns Hopkins University Press 1999

<sup>303</sup> Supra note 302

<sup>304</sup> Which was established by a Protocol adopted in Maputo, Mozambique on 11 July 2003

<sup>305</sup> Protocol on the Statute of the African Court of Justice and Human Rights; The Protocol envisions

<sup>306</sup> According to the provisions of Article 9(1) of the Protocol on the Statute of the African Court Of Justice And Human Rights, "the Protocol and the Statute annexed to it shall, enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States".

<sup>307</sup> Article 2 of the Protocol on The Statute of The African Court of Justice and Human Rights

As highlighted above, the move to merge the two Courts has been criticized for among other things; its potential to undermine the operations and functions of the already existing African Court on Human and People's Rights. This criticism mostly stems from the fact that the African Court of Human Rights was set-up with the express purpose of promoting, protecting and implementing Human Rights in the African region. As such, since the proposed African Court of Justice and Human Rights does not have an expressed mandate to specifically protect human rights like the African Court of Human Rights currently does, there are possibilities that the merger will deny Human rights issues the attention they deserve.<sup>308</sup>

My feeling is that, if the African system so badly needs a Court of Justice; although to me the need for such Court is still elusive, the system can comfortably copy the European system to the extent that it has a well established Court of Justice which is under the Shepherd of the European Union and exists as a separate independent entity from the European Court of Human Rights which is under the Council of Europe. Like the European system, the African system can then mandate the two Courts with different responsibilities. As such the African Court of Justice can be delegated with the responsibility of regulating Protocol and relations within the African Union or the African region at large. This may include dealing with elements such as Union's treaties, "acts, decisions, regulations and directives of the organs of the union". On the other hand, the African Court of Human Rights should continue dealing with matters that are purely human rights in nature.<sup>309</sup>

Accordingly, even though (as we have seen above) the establishment of a Court of Justice was highly critiqued, I still think that if the African system really needs a Court of Justice, then it is more prudent for such Court to exist as a separate body as opposed to its

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<sup>308</sup> Konstantinos D. Magliveras and Gino J. Naldi, *THE AFRICAN COURT OF JUSTICE*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2006, at 191

<sup>309</sup> Konstantinos D. Magliveras and Gino J. Naldi, *The African Court of Justice*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2006, at 191-192

projected merger with the African Court on Human Rights. The proposed merger has a real potential of overshadowing the budding face of human rights in Africa.

### **3.5 Individual access to the Court: legal aid programs**

It is imperative that every person should be able to access the Court with the view of getting a remedy for a violation occasioned to him. However, this might be complicated in the situations where individual applicants cannot afford the cost of representation. Sadly, the African system fails to address the question of indigence and their access to Court. It is rather Irsome that the Protocol establishing the African Court of Human Rights outlines rather superficially under Article 10(2) that:

Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.<sup>310</sup>

However, as contested in Chapter two<sup>311</sup>, the Protocol does not articulate who exactly may benefit from free legal representation neither does it establish funds to be utilize for this purpose. Therefore, it is of paramount importance for the African system to establish a legal aid scheme like the European and Inter-American systems have done in order to aid the most deserving applicant.<sup>312</sup> Secondly, bearing in mind that the African system might not be able to fund every indigent applicant, the system through the assembly should encourage Member States to establish legal aids programmes in their respective countries in order to enable effective exhaustion of local remedies by individual. This is because, in addition to the Court's technical procedures, other factors such as feeble economy and meagre income of most Africans affect their ability to access and or exhaust the local remedies. Subsequently,

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<sup>310</sup> See Article 10(2) of the Protocol Establishing the African Court on Human Rights

<sup>311</sup> See generally pp 36-37

<sup>312</sup> See Chapter 2 at pp 36, 49-51. See also K. Mathews, *The OAU and Political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples' Rights*, 1981, Africa Today, Vol. 34, No. 1/2, Human Rights: The African Context (1st Qtr. - 2ndQtr., 1987), pp. 85-103, Indiana University Press @ 101. The writer warns that "problems emanating from the economic and social evils in African constitute the major impediment to the realization of human right". These sentiments enforce the need for establishment of a legal aid scheme in African system.

without accessing and exhausting the local remedies, it becomes hard for them to forward their claims to the African system.<sup>313</sup> On the same note, it is equally important to evaluate the need to oblige states to petition on behalf of their citizens.

### **3.6 States' obligation to petition on behalf of their citizens**

Considering not only the economic situation of most African countries but also the fact that most Individuals and NGOs do not have direct access to the Court due to various restrictions that are placed by the Charter as well as the Protocol establishing the Court, the African Court on Human and Peoples' Rights should elaborate on whether states have a duty to bring complaints before the Court on behalf of its citizens; especially those who cannot afford to cater for their legal representation.<sup>314</sup>

My contention is that, if the states have discretionary power to decide whether to allow the African Court to exercise its jurisdiction over individual applications under Article 34(6), then it is only logical that in the event that the state does not extend such jurisdiction to the Court, then the state through a selected agency should be mandated to file human rights claims on behalf of its citizens whose rights are violated by the state itself or third party states.

Notably, representation of individual victims of human rights violations by their state is not an alien concept in the regional human rights systems. In fact, the concept has in the past been taken-up by both the Inter-American and the European system. Sadly, It is not clear from the precedents of the African system, the provisions of the African Charter or the Protocol establishing the African Court on Human and Peoples' Rights whether states are under an obligation to protect their citizens' rights in the events that certain violations occurs abroad; and especially if individuals in question are not in a position to access the Court

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<sup>313</sup> Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, Yale Human Rights and Development L.J. [Vol. 3:45, at 109]

<sup>314</sup> Dan Juma, *Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper*, Essex Human Rights Review Vol. 4 No. 2 September 2007, at 13

either for financial reasons or because the perpetrating states has not acknowledged the Court's jurisdiction.<sup>315</sup>

On the other hand, although neither the American nor the European Conventions have addressed the issue of Intervention by the states on behalf of their citizens, both the European and the Inter-American Courts have; through their precedents, addressed the issue. In the Inter-American system for example, in the case of *Victor Saldaño v. Argentina*,<sup>316</sup> the applicant filed a complaint against Argentina alleging that Argentina had breached its "diplomatic protection" by failing to protect Victor Saldaño (the petitioner son) who had been sentenced to death in the United State of America. The applicant alleged that his Son's sentencing had resulted to violations of the American Declaration of Human Rights hence obligating the state of Argentina to protect him against such violations. The Inter-American Commission however ruled that Argentina was not under any obligation to protect its nationals against violations that were perpetrated abroad.<sup>317</sup>

Conversely, many countries in the European systems have on several occasions successfully assisted their citizens to seek redress for human rights violations that are perpetrated abroad. For example, in the case of *Cyprus v Turkey*,<sup>318</sup> Cyprus filed a petition on behalf of Greek-Cypriot missing persons and their relatives and alleged that Turkey had violated various rights as guaranteed by the European Convention. Accordingly, the European Court held unanimously that Cyprus had *locus standi* to file the petition on behalf of its citizens.<sup>319</sup> Additionally, the Court went further and declared that Turkey had violated various provisions of the European Convention including; Articles 2, 3, 5, 8 and 13.

<sup>315</sup> Dan Juma, *Access to the African Court on Human and Peoples' Rights: A Casa of Poacher Turned Gamekeeper*, Essex Human Rights Review Vol. 4 No. 2 September 2007, at 13

<sup>316</sup> *Victor Saldaño v. Argentina*, No.38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. en 289 (1998).

<sup>317</sup> *Victor Saldaño v. Argentina*, No.38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. en 289 (1998).

<sup>318</sup> Application no. 25781/94

<sup>319</sup> *Cyprus v Turkey* (Application no. 25781/94), at Para 62

Accordingly, there is need for the African system to consider issuing an advisory opinion on whether African states have an obligation to petition on behalf of their citizens.

### **3.7 Inefficiency of two tiered system**

Since individual applicants in the African system more often than not have to go through the Commission rather than accessing the African Court directly, one can confidently conclude that the African system has a two tier system. Thus, most of the cases that reach the African Court have to go through the African Commission first before they are forwarded to the Court.<sup>320</sup> This arrangement raises several loopholes that are worth of some consideration. Firstly, while the jurisdiction of the Court extends to the African Charter and “any other relevant human rights instrument ratified by the states concerned”<sup>321</sup> The jurisdiction of the Commission is only limited to applications alleging a violation of the African Charter.<sup>322</sup> Resultantly, an individual alleging a violation of rights other than that guaranteed under the Charter may not access the Court through the Commission because of this jurisdictional limitation. Secondly, even though the Court has a wider jurisdiction, it is hard for individuals to access it if the state concerned has not made an Article 34(6) declaration.

Additionally, the Protocol establishing the African Court does not make it clear whether the Court is supposed to reexamine the questions of admissibility after a case has been referred to it by the Commission regardless of whether the Commission has already declared the case admissible. In the event that the Court is supposed to re-examine the question of admissibility, then it is not out of context to speculate a resultant waste of time and duplication of efforts between the Court and the Commission.

These speculations are derived from the observable trends in regards to the effects that the double tier system has had in the context of the Inter-American system. In fact,

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<sup>320</sup> Dan Juma, *Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher Turned Gamekeeper*, Essex Human Rights Review Vol. 4 No. 2 September 2007, at 7

<sup>321</sup> See Article 3(1) of the Protocol establishing the African Court on Human and peoples’ Rights

<sup>322</sup> See Articles 45(2) and 56(2) of the African Charter

writers such as Jo M. Pasqualucci who criticize the double tier system have argued that the procedures before both Inter-American bodies (the Court and the Commission) are often time-consuming therefore not protecting victims of Human Rights adequately. For example this was the issue in the case of *Velasquez Rodriguez*, where a Honduran student was detained by members of the Honduran security forces and subsequently disappeared. Four years lapsed between the period when the case was first reported to the Commission and the time when the Commission referred the case to the American Court on Human Rights<sup>323</sup>

Although those opposed to double tier systems recommends that the African System should consider copying the European system thereby disbanding the Commission,<sup>324</sup> I personally find the idea of disbanding the African Commission just as elusive as it is premature. This is because, firstly, the level of human right protection in Africa has not developed to a level where the African Court would be able to deal with all judicial and non – judicial issues single handedly. Secondly, it is a fact that most Africans (as elaborated before) are totally unaware of their rights and they therefore still needs educational and promotional services that are offered by the Commission. Consequently, disbanding the Commission and opting to remain with the African Court will leave a big gap that the African Court might not be able to fill without running the risks of being overwhelmed. Instead, there is urgent need to restructure the relationship between the Court and the Commission in order to ensure their effective co-existence. Thus, one thing would be to consider reviewing the Mandates of the two organs so as the Commission mandates are narrowed down to strictly promotional and educational while the Court retains the adjudicatory role.

### ***3.8 Need for creativity in addition to enactment of Court rules***

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<sup>323</sup> Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, The University of Miami Inter-American Law Review, Vol. 26, No. 2 , University of Miami Inter-American Law Review at 309

<sup>324</sup> Frans Viljoen , *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004



Although, as discussed in the previous chapter the African Commission has been commended for its generous and malleable interpretation of the African Charter with the view of accommodating individual's applicants, there is still a lot to be done if the African system is to acquire the standards of human rights protection that the European and the Inter-American systems have been able to achieve. Thus, considering that the success of the European and the American systems is to some extent backboneed on their Rules and Procedures, the African Court should utilize the power bestowed upon it under Article 33 of its Protocol to come up with innovative rules guaranteeing the rights of individual's applicants.<sup>325</sup>

Additionally, although the African system has a lot to learn from the European and the Inter-American systems, my contention is that the African system will need to develop its own jurisprudence on certain areas. My argument is based on the fact that since the "political and institutional environment of one regional system" may have significant difference from the other, there are some elements that cannot be replicated from one system to another because<sup>326</sup> For example, while most of the European countries are developed both economically and democratically, this might not be entirely the case in the African region. As a matter of fact, there are countries in African region where individuals, NGOs and advocates of human rights still faces problems such as lack of judicial independence, prolonged domestic proceedings, indigence and even fear for their lives. Illustratively Abdelsalam points out that:

(There are some countries in Africa where) Judges and lawyers, who are meant to be the guardians of the rule of law, justice, and human rights, have often been subjected to intimidation and persecution for carrying out their professional duties. This harassment ranges from violent attacks, such as

<sup>325</sup> Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, Journal of African Law, Vol. 43, No. 2 (1999), pp. 201-213, Cambridge University Press , At 212-213

<sup>326</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law , Accessed on 30/01/2011 at 784

killings and disappearances, to more subtle measures, such as dismissals and the denial of judicial discretion.<sup>327</sup>

As such in order for African system to succeed, it needs to pay specific attentions to relevant elements that are characteristics of the region. In the words of James L. Cavallaro and Stephanie Erin Brewer, these elements may include:

the type of rights violations prevalent in a region, the political climate on the ground, states' general willingness to comply with the Court's orders, and the (...) efforts of local actors and groups working on underlying human rights issues.<sup>328</sup>

Additionally, the African system need to scrutinize the political willingness of the state parties in regards to protection of human rights. The Court should therefore take judicial notice of some of the specific elements that are recurrent in different African states. It is only after scrutinizing and understanding some of these relatable problems that the African system will be able to develop its own model of dealing with human rights violations in the region.<sup>329</sup>

There is also the need for the African system to set a firm jurisprudence in regards to its accessibility by individuals. For example, while it is obvious that the provisions of Article 5(3) of the Protocol may restrict Court's access by NGOs, the Court need to be more creative and flexible in its interpretation of the phrase 'relevant NGOs so as to "avoid injustices based on formalisms and technicalities in the textual language of the Protocol".<sup>330</sup> Thus, the Court should adjudicate on cases before it more keenly while noting to pay specific attentions to the particular elements in each and every case.

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<sup>327</sup> Supra note 325

<sup>328</sup> James L. Cavallaro and Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law, Accessed on 30/01/2011 at 784

<sup>329</sup> Supra note 328

<sup>330</sup> Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, Yale Human Rights and Development L.J. [Vol. 3:45, at 102

The African system can learn a few lessons from its two counter parts; the European and Inter-American Courts. For example, the two systems have tried to avoid fixated procedures and instead have occasionally opened-up to circumstances of the case in question. Illustratively, while dealing with a case, the European system often considers among other things; the European consensus which basically entails an analysis of the current developments in the members states. Additionally, it is not uncommon in the practice of the European Court on Human Rights to make reference to external sources with the view of seeking more clarity on contentious issues. This was clearly evident in the case of *Selmouni*<sup>331</sup> where the Court consulted the UN Convention against torture with the view of shedding more lights on the provisions of Article 3 of the European Convention.<sup>332</sup> Similarly, in the Inter-American system of Human Rights, Judge Sonia Picado Sotela has particularly insisted on the need for the Court to avoid strict formalism while dealing with certain cases. He argues that:

[A] Court of human rights should be much more flexible than a regular Court . . . The international law of human rights is broader [than international law], and it should have more possibilities to really apply the principles of human rights. If we are going to believe in the enforcement of human rights, we have to take an attitude that is not very positivistic or legalistic, but instead [is in] the spirit of the law in the defence of human beings. In this sense, the judge should believe that a Court of human rights is obligated to create jurisprudence (. . .) I believe that the Court has the obligation to look for openings, because in reality these are new cases and different situations. We should bind ourselves, for example, neither to the civil procedure nor the criminal procedure of any state, but instead should look for openings.<sup>333</sup>

Paying attention to Judge Sonia advice would be particularly important in accommodating a wide range of victims of human rights violations as well as potential

<sup>331</sup> Selmouni Para 97, 29 EHRR(2000)

<sup>332</sup> Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, European Journal of International Law (2003) 14(3): 529-568 doi:10.1093/ejil/14.3.529 at p 554. See also Selmouni Para 97, 29 EHRR(2000)

<sup>333</sup> See, Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never* Yale Human Rights and Development L.J. [Vol. 3:45, at 106 quoting Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 185 (1992).

victims. For example, through a flexible interpretation of the Convention, the European system has been able to accommodate applicants who are in danger of suffering human rights violations in future. Illustratively, in the case of *In Klass v. Germany*, the application before the Court concerned a complaint against a German domestic law on secret surveillance, the European Court of Human Rights found a violation of the applicants' rights and declared them a potential victim even though it could not be proved that they had been under surveillance themselves.<sup>334</sup> Similarly, the African system can also borrow lead from such ingenuity and accommodate deserving cases if there is a cause to believe that the complainant might be a potential victim. This way, potential human rights violations will be addressed before the applicants in question suffers significant harm.<sup>335</sup> It is also important to note that, just as there is a need for the African Court to be flexible and creative, the African Commission similarly needs to be proactive while exercising its mandates.

### **3.9 Jurisdiction of the Commission: the need to be proactive**

Although the African Charter has mandated the Commission with a protector role, the Charter does not clearly articulate what this role entails. The Charter provides rather ambiguously that the Commission is supposed to “ensure the protection of human and peoples' rights under conditions laid down” therein.<sup>336</sup> Therefore one cannot help but guess that it is as a result of this ambiguity that the African Commission most often than not prefers itself as a mediator rather than a protector of human rights. Indeed, the Commission made this clear in its Ninth annual report while considering applications filed before it by *Free*

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<sup>334</sup> See *Klass v. Germany*

<sup>335</sup> Kevin Boyle and Hurst Hannum, *Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: the Donnelly Case*, the American Journal of International Law, Vol. 68, No. 3 (Jul., 1974), pp. 440-453 at 442. See also, Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, American Journal of International Law, The American Society of International Law, 2003 at 11

<sup>336</sup> See Article 45(2) of the African Charter

*Legal Assistance Group v. Zaire*<sup>337</sup>, *Lawyers Committee for Human Rights v. Zaire*<sup>338</sup> and *Union Interafricaine des Droits de l'Homme vs. Zaire*<sup>339</sup>. The Commission clearly articulated that:

The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the State concerned, which remedies the prejudice complained of. A pre-requisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their wiliness to participate in a dialogue.<sup>340</sup>

Hence, although this paper calls for a restructuring of the African Commission's mandate so that the Commission deals with promotional and educational aspects only, it also acknowledges that the Commission can still protect human rights without necessarily trampling on the African Court's jurisdiction. Therefore, although settling potential cases through dialogue is a positive aspect, the African Commission need to be more proactive in utilizing the provisions of the Charter that allows it to protect human rights on a wider realm. Demonstratively, the provisions of Articles 60 and 61 give the Commission a platform to indulge in such flexibility. For example, Article 60 provides that:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.<sup>341</sup>

While article 61 emphasizes that:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international

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<sup>337</sup> communications no. 25/89

<sup>338</sup> communications no47/90

<sup>339</sup> communications no 56/91

<sup>340</sup> See, the Ninth Annual Activity Report of the African Commission on Human and Peoples' Right-1995/96, AHG/207(XXXII).Para 39

<sup>341</sup> Article 60 of the African Charter on Human and Peoples' Rights

Conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Accordingly, noting that initiation of reforms in the African system primarily depends on the willingness of the Court and the Commission to set precedent through “interpretive and jurisprudential mechanisms”<sup>342</sup>, the African Commission should therefore capitalized on the above provisions and consult International law and other International norms whenever it forms an opinion that the provisions of the Charter are inadequate or lacking.<sup>343</sup> In this regard, I particularly find Simon Weldehaimanot argument in regards to setting precedent through interpretive jurisprudence fairly convincing. He argues that:

(since amending the African Charter and other African human rights document with the view of providing more rights to individual complainant might not be easy), creativity and wisdom of those who run the system remain absolutely crucial. Even though those who run the system should not be called to embark on radical reforms that could anger states to the extent of eradicating or crippling the system further, they should progressively tune the system towards better protection and promotional apparatus.<sup>344</sup>

Additionally, although my contention is that the African Commission needs to be more proactive in its role, I am not blind to some of the positive trends it has being illuminating in the past. For example, the Commission creativity was evident in the case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*<sup>345</sup>. In the case, the applicant alleged a violation of numerous rights by the Government of Nigeria following its oil production activities in the disputed area. Commendably, the Commission malleable interpretation of the African Charter was evident when the Commission pronounced that the Government of Nigeria had violated its Charter

<sup>342</sup> Morris K. Mbondenyi, *The African System on Human and Peoples, Rights: Some Strategies for Reforming its Economic, Social and Cultural Rights Norms*, From the Selected Works of Morris K Mbondenyi, 2009, At 20

<sup>343</sup> Morris K. Mbondenyi, *The African System on Human and Peoples, Rights: Some Strategies for Reforming its Economic, Social and Cultural Rights Norms*, From the Selected Works of Morris K Mbondenyi, 2009, At 21

<sup>344</sup> Simon M. Weldehaimanot, *Towards Speedy Trials: Reforming the Practice of Adjudicating Cases in the African Human Rights System*, The University for Peace Law Review, Vol. 1:14, at 38

<sup>345</sup> Communication (2001) AHRLR 60 (ACHPR 2001)

obligations by breaching the rights to housing. It is worth noting that although the Charter does not provide for housing rights, the Commission found a breach of this right by creatively interweaving the rights to health and property and concluded that the breach of the two rights was tantamount to a breach of then right to housing. The Commission had this to say:

Although the right to housing or shelter is not expressly provided for under the African Charter, the corollary of the combination of the provisions protecting the rights to enjoy the best attainable state of mental and physical health cited under Article 16(-), the rights to property and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of Article 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.<sup>346</sup>

It should however be noted that, although creative interpretation of various African human rights documents by the Court and the Commission is important, it is not enough by itself. Thus, there is a need to carry out normative as well as intuitional reforms in the African system with the view of ensuring comprehensive access of justice by individual of human rights violations.

### ***3.10 Individual access to the African system: the need for normative and institutional review***

#### **3.10.1 Normative reviews**

Although, as discussed before, the African Charter is rich in its provisions of human rights,<sup>347</sup> it is also apparent that there is a need to review some of the Charter's provisions that have been or have the potential of hindering effective protection of individual rights.

<sup>346</sup> See The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication (2001) AHRLR 60 (ACHPR 2001)

<sup>347</sup> Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 Va. J. Int' I. L. 339 (1995).

### 3.10.1.1 Restrictions by Article 34(6) of the Protocol Establishing the African Court

Since this thesis is founded on the need for stable access to the African system by individual, it is paramount to look at the specific loopholes that need to be amended in order to bring individual access to Court into full fruition. One of the alarming aspects in as far as the current status in the African system is concerned is the fact that the primacy of individual right to access the Court is preconditioned on states acceptance of the Court jurisdiction. This aspect undermines the concept of human rights which develops with the view of protecting individuals from inimical conducts of the states.<sup>348</sup>

Secondly, the requirement set under Article 34(6) in regards to acceptances of Court's jurisdiction by the states goes against the whole essence of establishing a regional system. This is so because, regional systems are logically supposed to deal with issues that national mechanism are not able or are unwilling to deal with. It therefore follows that, regional systems are supposed to have broader mandates than the states under them. As such, preconditioning the acceptance of a regional system's jurisdiction to the discretion of the states defeats the whole essence of establishing a regional system.<sup>349</sup> In fact most of the changes that have been effected by the Inter-American and the European systems with the view of making the systems more flexible can be attributed to the discovery that the system needs to be more accessible.<sup>350</sup>

It is worth to note that states are normally antagonistic and combative of structures that are likely to expose them to the International as well as public scrutiny, thus giving the

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<sup>348</sup> See Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, EJIL (2003), Vol. 14 No. 3, 529-568, at 532. who argues that, "the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of states, but the protection of the human rights of all individual human rights"

<sup>349</sup> Dan Juma, *Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper*, Essex Human Rights Review Vol. 4 No. 2 September 2007

<sup>350</sup> See chapter two at pp 33-36.(discussing the metamorphosis that has taken place in the two systems especially with the adoption of Protocol 11 the European system).



states discretionary powers to accept the Court jurisdiction to deal with individual applicants under Article 34(6) offers the states a good chance to avoid public scrutiny by their non acceptance of the Court's jurisdiction.

Thirdly, even though member state to the African Charter are "bound by the principle of *pacta sunt servanda* to give effect to their international legal obligation, neither the African Charter nor the Protocol establishing the African Court mandates the member states to guarantee that they will not hinder individual applicant from accessing the Court."<sup>351</sup>

Worse still, the plight of individual applicant is exacerbated by the fact that despite the restriction placed by Article 34(6), the Court has an optional jurisdiction to deal with claims submitted by individuals and NGOs while it has a mandatory jurisdiction to deal with claims submitted before it by the states, the Commissions and African Intergovernmental Organizations.<sup>352</sup> Allowing the Court to have an optional jurisdiction in regards to individual applicants ignores the fact that individuals, as opposed to states, are supposed to be the primary consumer of human rights.<sup>353</sup>

Therefore, it is perceptible that since the provisions of Article 34(6) are likely to slow down the protection of human rights rather than advance it, the Article needs to be amended in order to bring individual access to Court into full fruition. As of now, great "possibility exists that States may tend to use the power granted there under to stifle, rather than encourage, the direct institution of actions by NGOs and individuals".<sup>354</sup> This is more so because, unlike the European system where Protocol 11 obligate state parties not to "hinder

<sup>351</sup> Dan Juma, *Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper*, Essex Human Rights Review Vol. 4 No. 2 September 2007, at 5

<sup>352</sup> See Article 5(3) of the Protocol Establishing the Africa Court on Human and Peoples' rights

<sup>353</sup> Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, EJIL (2003), Vol. 14 No. 3, 529-568, @ 532

<sup>354</sup> Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, Journal of African Law, Vol. 43, No. 2 (1999), pp. 201-213, Cambridge University Press, at 203

in any way the effective exercise”<sup>355</sup> of the rights as provided under the Convention, the Protocol establishing the African Court does not make such a provisions.

Alternatively, the African system should consider finding a way of obligating African states to make a declaration acknowledging the Court’s jurisdiction under Article 34(6) as a matter of rule as opposed to a matter of option. This may be done through inserting a replica of Protocol 11 of the European Convention either in the African Courts rules and Procedures, in the Protocol establishing the Court or in the African Charter. Accordingly, if a requirement to the effect that states are not to stifle the effective enforcement of rights as provided under the Charter is codified, it will follow that failure by the State parties to acknowledge the Court jurisdiction to deal with individual’s applications will be interpreted as hindering effective exercise of the rights as provided under the Protocol.<sup>356</sup>

### **3.10.2 Institutional Reforms**

As Mutua Makau opine “regional human rights system worth its name need strong institutions to anchor its norms”.<sup>357</sup> This in return calls for institutional reforms, which, in the case of the African systems includes reviewing the tenure of office by judges and Commission as well as the stages the petitions goes through before a decision is reached.

#### **3.10.2.1 Tenure of office by Judges and Commission**

Additionally, apart from normative reviews, there are institutional reviews that need to be considered. For example, there is a need to re-evaluate the tenure of judges from temporarily tenure to more concrete or permanent tenure in place of the existing arrangement where they are contracted on a part-time basis. In this case, the European system offers a

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<sup>355</sup> Article 34 of the European Convention

<sup>356</sup> Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, Journal of African Law, Vol. 43, No. 2 (1999), pp. 201-213, Cambridge University Press , at 203

<sup>357</sup> Makau Mutua, *The African Human Rights System: A Critical Evaluation* at p 31.

good example where the judges are elected for a term of nine years but they are supposed to serve on a full time basis.<sup>358</sup> I am of the view that a more concrete tenure will ensure a fulltime accessibility of the system by individual complainants.

There is also a need to set clear division of labour between the African Court and the Commission. As Makau Mutua opine, such division of labour will avoid burdening the Court with the “severe image problems and the anaemia associated with its older sibling (the Commission)”.<sup>359</sup> As of now, the division of labour between the two organs is a bit hazy. For instance, the African Commission is shouldering both promotional and protective roles hence making it have a quasi –Judicial character while the Court is also mandated with a protective role.<sup>360</sup> As suggested earlier, the African system should narrow down the mandate of the Commission to purely promotional and educational role and leave the protection role to the Court.<sup>361</sup> Although the European system did away with its Commission, it has clear cut role between the existing organs. For instance, the roles of the chamber, the grand chamber and the committee of ministers are well articulated throughout the Convention.<sup>362</sup>

### **3.10.2.2 Sessions by the Commission**

Another disturbing aspect that needs to be considered is the fact that the Commission holds only two sessions per year. This means that there are possibilities that the Commission might be out of session at a particularly time and therefore unable to respond to endemic human rights violation that might requires immediate action. This also means that a long time may pass before an application that has been filed before the Commission is finally

<sup>358</sup> See Article 23 of the European Convention on Human Rights

<sup>359</sup> Supra note 357

<sup>360</sup> Makau Mutua, *African Human Rights Court-A two- legged stool*, Human Rights Quarterly 21.2 (1999) 342-363, The Johns Hopkins University Press 1999

<sup>361</sup> Makau Mutua, *African Human Rights Court-A two- legged stool*, Human Rights Quarterly 21.2 (1999) 342-363, The Johns Hopkins University Press 1999

<sup>362</sup> See generally the European Convention on Human Rights Articles 27, 29, 31, 42, 43, 54 etc

processed. This delay affects cases and claims that be categorized as urgent. As such, there is a need for the Commission to work on a permanent basis or at least meet more regularly.<sup>363</sup>

### 3.10.2.3 Stages of petitions before the Commission

The procedure before the Commission starting from the time the case is received to the time the claim is processed is also waiting. This is because all the applications that are filed before the Commission must under-go three stages: seizure, admissibility and merit. At seizure stage, the Commission examines whether the application alleges a violation of any of the rights in the African Charter as provided under Article 56(2). At this stage, the Commission does not concern itself with other requirements that the application must meet under Article 56. The Commission cannot for example examine whether the applicant has used disparaging language and advice him accordingly.<sup>364</sup> Subsequently, the Complainant gets informed about the errors in his application way too late; probably six months after the Commission next seating.

Observably, a lot of time is wasted between the time the application is sent to the Commission and the time the merit of the complaint is decided. This can well be illustrated in the application filed by *Free Legal Assistance Group and others v Zaire*.<sup>365</sup> The communication was sent to the Commission on 17<sup>th</sup> march 1989, it was received by the Commission in June 1989, it was seizure in October 1989 and the state of Zaire was notified about the complaint on 14<sup>th</sup> June 1990. The Communication was finally declared admissible on April 1994. From the foregoing, it is clear that it took closely over five years from the time the Communication was sent to the Commission to the time a decision on its admissibility was issued. The same applied to a communications sent by *Lawyers' Committee for Human*

<sup>363</sup> Dan Juma, Access to the African Court on Human and Peoples' Rights: A CASE OF THE poacher turned Gamekeeper, Essex Human Rights Review Vol. 4 No. 2 September 2007, at 9

<sup>364</sup> Simon M. Weldehaimanot, Towards Speedy Trials: Reforming the Practice of Adjudicating Cases in the African Human Rights System, The University for Peace Law Review, Vol. 1:14, at 23

<sup>365</sup> Communication 25/89

*Rights v Zaire*<sup>366</sup> which was received on October 1990 and declared admissible two year later in October 1992.<sup>367</sup>

To solve this problem, there are several measures that need to be undertaken. Firstly, since the Secretariat's mandate under Article 55(1) entails making a list of the communications other than those of States parties to the Charter and transmitting them to the members of the Commission, who then indicates which communications should be considered by the Commission, the mandate of the Secretariat should be extended so as to enable it to deal with non-substantive parts of Communication like deciding the admissibility of cases while the Commission deals with the merit of the case. This is important because, common sense dictates that, a Commission which seats only twice a year should not utilize the two annual sessions to deal with procedural issues such as admissibility and seizure.<sup>368</sup>

Alternatively, the Commission can do away with the current three separate stages and instead deal with seizure and admissibility stages in one seating. This could be possible if the Commission was to adopt a purposive interpretation of rule 93 of the its Rule of Procedure which mandate the Secretary to consider whether a communication meets the requirement set under Article 56 of the Charter before transmitting the Communication to the Commission which should make a decision on seizure. As such, the Commission can save time by avoiding to deal with aspects that the Secretariat can not only handle but it is mandated to handle by the Rules of Procedure.<sup>369</sup>

Importantly, considering that the African Commission jurisprudence is similar to that of Inter-American Commission in the sense that both the Inter-American and African

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<sup>366</sup> Communication 47/90

<sup>367</sup> See, the Ninth Annual Activity Report of the African Commission on Human and Peoples' Right-1995/96, AHG/207(XXXII).

<sup>368</sup> Simon M. Weldehaimanot, *Towards Speedy Trials: Reforming the Practice of Adjudicating Cases in the African Human Rights System*, The University for Peace Law Review, Vol. 1:14, at 25

<sup>369</sup> See, Rules of Procedure of the African Commission on Human and Peoples' Rights. Approved by the Commission on Human and Peoples' Rights during its 47<sup>th</sup> Ordinary Session held in Banjul (Gambia) from May 12 to 26, 2010

Commissions 1) considers application from any applicant and 2) function as a link between individual applicant and the Courts, the African Commission can enumerate a few things from the Inter-American system. For instance, the Inter-American Commission does not have seizure and formal admissibility stages in its jurisprudence.<sup>370</sup> Secondly, the Secretariat of the Inter-American Commission is allowed by the Commission's Rules of Procedure to determine whether an application meets the admissibility criteria.<sup>371</sup>

In the light of the foregoing, one can confidently conclude that, if the African system is to be able to advance human rights advocacy on the same level as its two counter-part, normative and institutional reforms are going to be inescapable especially because: firstly, setting precedent through interpretive jurisprudence as indicated above might not be enough, as Mbondenyi observes, jurisprudence developed through interpretation might not be taken seriously as the provision of the Charter would be taken. Additionally, It is also easy to consult the Charter than to go through a "lengthy precedent perhaps shrouded in legalese".<sup>372</sup>

Secondly, Article 68 of the Charter allows amendment to be carried out on the Charter following an approval by a single majority of the state parties. As such, there is no excuse as to why reforms cannot be made if chances exists that such reforms are going to facilitate faster access of justice by individuals of human rights violation.<sup>373</sup>

### **3.11 *The seat of the Court and the Commission***

The Protocol establishing the African Court is not very specific when it comes to specifying the seat of the Court. Further, this problem is compounded by the apprehension occasioned by the proposed merger of the African Court of Human Rights with the African Court of Justice. Currently, the seat of the Commission is in Banjul while the Court is

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<sup>370</sup> Supra note 368, at 36

<sup>371</sup> See Article 26 of the Rules of procedure of the Inter-American Commission

<sup>372</sup> Morris K. Mbondenyi, *The African System on Human and Peoples, Rights: Some Strategies for Reforming its Economic, Social and Cultural Rights Norms*, From the Selected Works of Morris K Mbondenyi, 2009, At 22

<sup>373</sup> Supra note 372

temporarily situated in Tanzania. As such, the distance between the Gambia and Tanzania presents a challenge in the sense that the African system might encounter Communication breakdown between the two organs especially considering the most obvious inconveniences such as technological, telecommunication and infrastructural difficulties in the African continent.<sup>374</sup>

Thus, while contemplating on the permanent seat of the Court, the African system has a lot to learn from the Inter-American system in the sense that the distance between the seat of the Inter-American Court and the Inter-American Commission in San Jose, Costa Rica, and Washington D.C respectively has been attributed for the “initial lack of cooperation” between the two organs.<sup>375</sup>

Therefore, Although decentralization of the two African organs: the Court and the Commission is an important aspect in terms of proportional and effective distribution of justice, it is important to ensure that the distance between them does not cause hitches in the running of the system. Notably, since the Court and the Commission need to cooperate with each other in terms of case referral, advisory opinions and dairy running of the system, factors such as infrastructure (roads, communications, technical etc ) in the proposed host state must therefore be of paramount consideration.

From the above discussion, it is obvious that beneath layers of shortcomings, financial constraints, and a myriad of challenges, there is endurance and a will to survive by the African system. With the slightest efforts, the African system has the potential to deliver and even reach the standards that has been reached by its regional counterpart-the Inter-American and the European.

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<sup>374</sup> Frans Viljoen , *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004

<sup>375</sup>Frans Viljoen , *A Human Rights Court for Africa, and Africans*, Brooklyn Journal of International Law, Brooklyn Law School 2004

## CONCLUSION

This paper has established that, although the three regional systems have a few differences in terms of their composition, jurisdictions and functions, the systems also have various similarities in terms of their overall objectives. In this regard, this paper has illustrated that, although the European and Inter-American systems emphasize, as does the African system, on the protection of human rights as their main goal,<sup>376</sup> the three systems employ different approaches when it comes to implementing and meeting their objectives.

It has also been the contention of this paper that restriction of individual's access to regional systems is retrogressive and they no longer have a place in the modern regional justice systems. Therefore, this paper has recommended among other things; the need for judges and the Commission to employ more flexible approaches especially in regards to participation by individuals and human rights Organizations. This paper also established that, so far, the European and Inter-American systems offer a good example in as far as this malleability is concerned. The two systems have put efforts with the view of doing away with 'gatekeepers', such as states, who might inhibit direct access of the systems by individuals.<sup>377</sup>

This paper has also articulated that the political commitments of the states parties play a bigger role in shaping-up the human rights' landscape of the regional systems. An analysis of the European system, and especially an analysis of the Western European countries, has indicated that Political unity, harmonized ideologies and commitment to human rights are some of the elements that are fundamental in structuring an effective institutional

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<sup>376</sup> Obinna Okere *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159, The Johns Hopkins University Press, at pp 153-158

<sup>377</sup> Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, Journal of African Law, Vol. 43, No. 2 (1999), pp. 201-213, Cambridge University Press, at 212. (arguing that (...) "the principal lesson that the African Court should learn is that malleable and innovative employment of rules, especially in the area of international human rights' promotion and protection, yields far better results than should otherwise have been the case if a rigid approach were adopted").



arrangement that is capable of protecting individuals' human rights.<sup>378</sup> As such, this paper has recommended some action plans which the stakeholders in the African system needs to consider in order to enhance human rights situation in the region. Illustratively, this paper has recommended among other things; the extension of the powers and the mandate of the African Commission to include issuance and enforcement of provisional measures, establishment of a distinct enforcement machinery within the African system, structuring apparatus that are capable of enhancing the promulgation of the work of different organs in the Africa systems, the need to incorporate a legal aid programme in the African system as well as encouraging member states to institute legal aid programmes at the national level. In general, the above action plans call for both normative and institutional reforms within the African system.

This paper has also acknowledged that, despite having established that the African system has been able to achieve a lot using very little from the time of its adoption, it is obvious that something more need to be done; a hard choice has to be made: "(...) a choice between dignity and servitude, between fairness and injustice, between commitment and indifference, a choice between right and wrong."<sup>379</sup> Thus, the African system could choice between been enslaved or encumbered by procedural technicalities, just as it could choice to dismiss such encumbrances in favour of dignity and respect for individuals' human rights. The African system could choice to peg direct access of the system by individual on approval by their respective states, just as it could choice to be more fairer to individual applicants through amendment of the instruments that have being restricting individuals' direct access to the system. In essence, the African system could choice to be committed to the modification

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<sup>378</sup> K, Mathews, *The OAU and political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples' Rights; 1981*, Africa Today, Vol 34, No.1/2, Humana Rights: The African Context (1<sup>st</sup> Qtr-2ndQtr,1997)pp.85-103, at 100

<sup>379</sup> Barack Obama, *Dreams From My Father: A Story of Race and Inheritance*, Canongate Books, (1995), at 106

of norms and institutional rules that show prejudice to Individual complainants, just as it could choose to be ‘selectively blind’ and indifferent to such precincts.

Whichever the case, my contestation is that, considering the vastness of the African region and the minimal amount of individual’s complaints that are filed before the system, the stakeholders in the African system need to feel ‘guilty’: it is only with a bit of self-blame that the African system will be able to enumerate the other regional systems; which, as it has been discussed above, are doing favourably well. After all “a healthy dose of guilt never hurt anybody”.

## **BIBLIOGRAPHY**

### **STATUTES**

1. The African Charter on Human and Peoples' Rights
2. European Convention for the Protection of Human Rights and Fundamental freedoms
3. The American Convention on Human Rights
4. Protocol on the Statute of the African Court of Justice and Human Rights
5. The American Declaration of Rights and Duties of Man and the American Convention of Human Rights
6. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
7. African Commission's Rules of Procedure
8. The constitutive Act of the African Union

### **CASES**

1. Michelot Yogogombaye v. Republic of Senegal, APP. No. 001/2008
2. Ireland v UK 58 ILR(1980) 188, AT 291
3. Klass v. Germany, 28 Eur. Ct. H.R. (ser. A), at 29, Para. 64 (1978)
4. Constitutional Rights project, Civil Liberties Organization and Media Rights Agenda v Nigeria, Communications 140/94, 141/94
5. Anuak Justice Council v Ethiopia (2006) AHRLR 97 (ACHPR 2006)
6. Jawara v The Gambia, Communications 147/95, 149/96, [(2000) AHRLR 107
7. Rencontre Africaine Pour la Défense des Droits de l'Homme v Gambia, Communication 71/92
8. John K. Modise v Botswana, Communication 97/93
9. Amnesty International and Others v Sudan, Communications 48/90, 50/91, 52/91, 89/93 [(2000) AHRLR 297 (ACHPR 1999)]

10. Malawi African Association and Others v Mauritania, [(2000) AHRLR 149 (ACHPR 2000)]
11. Mamatkulov and Abdurasulovic v. Turkey, Application 46827/99, 46951/99
12. Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989).
13. De Jong, Baget and Van Den Brink v Netherlands
14. Johnston v Ireland, Application no. 9697/82
15. X. v Iceland, APPLICATION/REQUETE N° 8941 /80
16. Free Legal Assistance Group v Zaire, communications no. 25/89
17. Lawyers Committee for Human Rights v. Zaire communications no47/90
18. Union Interafricaine des Droits de l'Homme vs. Zaire, Communication 56/91
19. Rencontre Africaine Pour la Défense de Droits de l'Homme v Zambia
20. Selmouni, 29 EHRR (2000)
21. Media Rights Agenda v Nigeria, Communications 140/94, 141/94
22. Bissangou v Republic of Congo (2006) AHRLR 80 (ACHPR 2006)
23. Chahal v. The United Kingdom, 70/1995/576/66
24. John D. Ouko v Kenya , Communication 232/99,
25. Organisation Mondiale Contre la Torture and Others v Rwanda 27/89, 49/91, 99/ 93  
[(2000) AHRLR 282 (ACHPR 1996)].
26. Case of Rodić and 3 others v. Bosnia and Herzegovina (application no. 22893/05)
27. Holub v. the Czech Republic (application no. 24880/05 )
28. Bratři Zátkové, a.s. v. the Czech Republic (application no. 20862/06)
29. Ligue Camerounaise Des Droits de l'Homme v Cameroon (2000) ACHRLR 61  
(ACHPR 1997)
30. Int'l Pen v. Nigeria, Communications 137/94, 139/94, 154/96, 161/97
31. Victor Saldaño v. Argentina, No.38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7  
rev. en 289 (1998)

32. Soering v. United Kingdom Eur. Ct. H.R Ser. A 161 (1989)
33. Lozidou v. Turkey Eur. Ct H. R. No 8007/77, 13 DR 85 (1978)
34. The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication (2001) AHRLR 60 (ACHPR 2001)

## **REFERENCES**

1. Abdelsalam A. Mohamed, Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights, *Journal of African Law*, Vol. 43, No. 2 (1999), pp. 201-213, Cambridge University Press
2. ACHPR /Res.33(XXV)99: Resolution on the Criteria for Granting and Enjoying Observer Status to Non- Governmental Organizations Working in the field of Human and Peoples' Rights (1999)
3. Alexander Orakhelashvili, Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights, *European Journal of International Law* (2003) 14(3): 529-568 doi:10.1093/ejil/14.3.529 at p 554. See also Selmouni Para 97, 29 EHRR(2000)
4. Claude E. Welch, Jr., The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment, 14 HUM. RTS. Q.43, 49 (1992).
5. Christof Heyns and Magnus Killlander, The African Regional Human Rights System in INTERNATIONAL HUMAN RIGHTS IN CONTEXT:LAW, POLITICS, MORALS,3 ed. Cecilia Medina, The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture, *Human Rights Quarterly*, Vol. 12, No. 4 (Nov., 1990), pp. 439-464, The Johns Hopkins University Press

6. Dan Juma, Access to the African Court on Human and Peoples' Rights: A CASE OF THE poacher turned Gamekeeper, Essex Human Rights Review Vol. 4 No. 2 September 2007
7. David J. Bederman & Charles Chernor Jalloh, Michelot Yogogombaye V. Republic of Senegal, The American Journal of International Law, Vol. 104, No. 4 (October 2010), American Society of International Law pp. 620-628
8. David Harris, REGIONAL PROTECTION OF HUMAN RIGHTS: INTER-AMERICAN ACHIEVEMENT. "THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS", Ed. David J. Harris and Stephen Livingstone, Oxford Press,( 2004).
9. Dinah Shelton. The Jurisprudence of the Inter American Court Of Human Rights, The American University Journal of International Law & Policy, Washington College of Law, The American University(1994)
10. Dinah Shelton, Regional Protection of Human Right, Oxford University Press, 2008 (who arguing that even way before the initiation of the formulation of the Charter , the UN had , for a long time been advocating for the "establishment of a regional Human Right Institution in Africa"
11. Dinah Sheldon, Regional Protection of Human Right, Oxford University Press, 2008
12. Denys P. Myers, The European Commission on Human Rights: The American Journal of International Law, Vol. 50, No. 4 (Oct., 1956): American Society of International Law,
13. Evarist Baimu, The African Union: Hope for Better Protection of Human Rights in Africa? 1 AFR. HUM. RTS. L.J 299 (2001) see also, Frans Viljoen , A Human Rights Court for Africa, and Africans, Brooklyn Journal of International Law, Brooklyn Law School 2004

14. Erika de Wet, The Protection Mechanism under the African Charter and the Protocol on the African Court of Human and Peoples ' Rights, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, et al, Martinus Nijhoff, 679-707, (2001),
15. European Court of Human Rights Annual report 2003, Registry of the European Court of Human Rights Strasbourg, 2004, available
16. Frans Viljoen , A Human Rights Court for Africa, and Africans, Brooklyn Journal of International Law, Brooklyn Law School 2004
17. F Ouguerouz, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA, Martinus Nijhoff , 2003
18. Gay J. McDougall, Executive Director, Global Rights, Using the Inter-American System for Human Rights: A Practical Guide for NGOs. See Article 52 of the American Convention on Human Rights
19. Germain Baricako, The African Charter and African Commission on Human and peoples' Rights 1-20 in THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS: THE SYSTEM IN PRACTICE, ed, Malcolm Evans and Rachael Murray, (2nd ed 2008). Cambridge University Press
20. George Mukundi Wachira, African Court on Human And Peoples' Rights: Ten Year so on and Still No Justice, (2008), available at <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf> (lamenting the Court's failure to hear a single case a decade after its formal creation)
21. Henry J. Steiner et al, Oxford University Press, 2008

22. H.J. Steiner et al, International human rights in context, 3<sup>rd</sup> edition, Oxford University, 2008
23. Inter-American Court of Human Rights, Gangaram panday case, Preliminary Objections, Judgment of 4 December 1991, (Sec,C) No. 12(1994)
24. Inter-American Court of Human Rights Advisory Opinion Oc-2/82 of September 24, 1982; THE EFFECT OF RESERVATIONS ON THE ENTRY INTO FORCE OF THE AMERICAN CONVENTION ON HUMAN RIGHTS (ARTS. 74 AND 75)
25. Inter-American Court of Human Rights, Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of 10 August 1990 requested by the Inter-American Commission on Human Rights
26. Inter-American Court on Human Rights, Baeno Ricardo et al. case (270 Workers v panama), judgment on competence, 28 November 2003
27. Jack Donnelly, International human rights: a regime analysis, Massachusetts Institute of Technology and the World Peace Foundation, 1986
28. James L. Cavallaro and Stephanie Erin Brewer, Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court, The American Journal of International Law, Vol. 102, No. 4 (Oct., 2008), pp. 768-827, American Society of International Law , Accessed on 30/01/2011
29. Jo M. Pasqualucci, The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law, The University of Miami Inter-American Law Review, Vol. 26, No. 2 , University of Miami Inter-American Law Review
30. Jo Pasqualucci, The Americas in INTERNATIONAL HUMAN RIGHTS LAW, Moeckli Daniel et al, Oxford University press, (2010)



31. J.G Merrills, The Development of international LAW BY THE European Court of Human Rights, 2<sup>nd</sup> ed, Manchester University Press, 1993,
32. K. Mathews, The OAU and political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples' Rights; 1981, Africa Today, Vol 34, No.1/2, Humana Rights: The African Context (1<sup>st</sup> Qtr-2ndQtr, 1997)
33. Kevin Boyle and Hurst Hannum, Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: the Donnelly Case, The American Journal of International Law, Vol. 68, No. 3 (Jul., 1974)
34. Konstantinos D. Magliveras and Gino J. Naldi, The African Court of Justice, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2006
35. Lemmens Paul & Vandenhoe Wouter, PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS, Antwerpen-Oxford, 2005
36. Magdalene Sepulveda et al, HUMAN RIGHTS REFERENCE HANDBOOK, (2000), University for peace
37. Mark W. Janis, Richard S. Kay and Anthony W. Bradley, European Human Rights law: Text and Material, 3<sup>rd</sup> ed. Oxford University press, 2008
38. Makau wa Mutua, The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, 35 Va. J. Int' L. 339 (1995)
39. Makau wa Mutua, The African Human Rights System in a Comparative Perspective, 3 Rev. Afr. Comm. Hum. & Peoples' Rts. (1993)
40. Makau Mutua, The African Human Rights Court: A Two-Legged Stool, Human Rights Quarterly 21.2 (1999) 342-363, The Johns Hopkins University Press
41. Makau mutual, The African Human Rights System: A Critical Evaluation

42. Michelo Hansungule, “Protection of Human Rights under the Inter-American System: An Outsider’s Reflection” in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, et al, Martinus Nijhoff, 679-707, (2001)
43. Morris K. Mbondenyi, The African System on Human and Peoples, Rights: Some Strategies for Reforming its Economic, Social and Cultural Rights Norms, From the Selected Works of Morris K Mbondenyi, 2009
44. Murungu, Chacha Bhoke, Judgment in the First Case before the African Court on Human and Peoples' Rights: A Missed Opportunity or Mockery of International Law in Africa? (December 21, 2009)
45. Murray, Rachel, Dr. & Wheatley, Steven, Groups and the African Charter on Human and Peoples’ Rights, Human Rights Quarterly, Volume 25, Number 1, February 2003, pp. 213-236, The Johns Hopkins University Press
46. Nsongurua J. Udombana ,So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights, American Journal of International Law, The American Society of International Law, 2003
47. Nsongurua J. Udombana, An African Human Rights Court And An African Union Court: A Needful Duality Or A Needless Duplication?, Journal of International Law, Brooklyn Law School
48. Nsongurua J. Udombana, Toward the African Court on Human And Peoples’ Rights: Better Late than Never, Yale Human Rights & Development L.J, Vol 3.45
49. Obinna Okere The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141-159, The Johns Hopkins University Press

50. Oji Umozurike, The Complaint Procedure of the African Commission on Human and Peoples Rights, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MOLLER, Alfredsson Gudmundur, et al, Martinus Nijhoff, 679-707, (2001),
51. Olivier De Schutter, International Human RIGHTS law, Cambridge University Press, 2010
52. Philip leach, Access to the European Court of Human Rights: From A legal Entitlement to a lottery? In INTERNATIONAL HUAMN RIGHTS IN CONTEXT:LAW POLITICS MORALS,3 ed. Henry J. Steiner et al, Oxford University Press, 2008
53. Press Release issued by the Registrar of the European Court of Human Rights on 23/02/2011
54. Simon M. Weldehaimanot, Towards Speedy Trials: Reforming the Practice of Adjudicating Cases in the African Human Rights System, The University for Peace Law Review, Vol. 1:14
55. Steve Greer, Europe in, INTERNATIONAL HUMAN RIGHTS LAW, Moeckli Daniel et al Oxford University press 2010
56. Thomas Buergenthal, The Evolving International Human Rights System, The American Journal of International Law, Vol. 100, No. 4 (Oct., 2006), pp. 783-807, American Society of International Law
57. Thomas Buergenthal, The Advisory Practice of the Inter-American Human Rights Court, American Journal of International Law, The American Society of International Law, January, 1985, 79 A.J.I.L. 1
58. Tenth Annual Report of the Commission-1996/1997
59. The 12th Ann. Activity Report, concerning Ken Saro-Wiwa and other Ogoni leaders

60. The Ninth Annual Activity Report of the African Commission on Human and Peoples' Right-1995/96, AHG/207(XXXII)
61. The Danish Institute for Human Rights, African Human Rights Complaints Handling Mechanisms: A Descriptive Analysis, African Report, February 2008
62. Udeme Essien, The African Commission on Human and Peoples' Rights: Eleven Years After, Buffalo Human Rights Law Review 93, State University of New York at Buffalo School of Law,(200)
63. U. O. Umozurike, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ,The Hague: Kluwer law International, (1997)