



**A CRITIQUE OF ACCESSIBILITY TO THE AFRICAN COURT FOR HUMAN AND
PEOPLE'S RIGHTS BY INDIVIDUALS AND NGO'S; DRAWING EXPERIENCES
FROM THE INTER AMERICAN AND EUROPEAN SYSTEMS.**

BY

LYDIA WINYI KEMBABAZI

LLM HUMAN RIGHTS THESIS

SUPERVISOR: ESZTER POLGARI

CENTRAL EUROPEAN UNIVERSITY

1051 BUDAPEST, NADOR UTCS 9

HUNGARY

ABSTRACT

“...there can be little prospect of an effective complaint procedure in view of many built in loopholes that can be invoked to halt proceedings...”¹

This saying resonates what is the situation in the African human rights protection system. Litigating human rights at the African Court for Human and People’s Rights (herein after called the African Court) is increasingly becoming elusive for the individuals and NGO’s² since their States have to sign a declaration accepting the African Court jurisdiction to have direct access before the African Court.

This thesis will argue that direct access to the Court by individuals and NGO’s is a key element to the effective promotion and protection of human rights on the African continent. The study will also confirm that limited accessibility by individuals and NGO’s hampers effectiveness of the Court since the pre-condition for a declaration impedes the African Court from fully exerting its stamp and fulfilling its mandate to protect and promote human rights in Africa thus crippling its effectiveness. Particular focus and reference will be given to article 34(6) of the Protocol establishing the African Court. The African, European and Inter American regional systems will be laws will be analyzed comparatively to critique the effectiveness of the African Court with regard to its accessibility criteria of the individuals and NGO’s and offer recommendations for consolidation of the African Court.

¹ Walter Kalin and Jorg Kunzli. “ The Law of International Human Rights Protection” Oxford University Press (2009) pg 234

² Femi Falana vs. African Union Application N° 001/2011 , Michelot Yegogombaye vs Senegal Application No. 001/2008

DECLARATION

I, **LYDIA WINYI KEMBABAZI** do hereby declare that this Thesis is my individual work and has not to the best of my knowledge been submitted partially or in whole to any other Institution of learning. All primary and secondary sources have been fully acknowledged. It is hereby presented as a partial fulfillment of the requirement of the requirements for the Degree of LLM Human Rights at Central European University, Budapest Hungary.

Signed.....

LYDIA WINYI KEMBABAZI

Date.....

DEDICATION

This study is dedicated to my dearest mother, **Norah Kabajuma**. God could not have placed me in better arms. Thank you for always being my support. I need not look behind, I know you are always there cheering me on. Thank you for the love, encouragement and for believing in the ‘girl child.’

ACKNOWLEDGEMENT

I would like first and foremost to acknowledge my Lord and King for having blessed me with this opportunity! Great is thy faithfulness! Ebenezer, thus far you have brought me. Secondly, to Central European University and Open Society Justice Initiative for having considered me and offered me the opportunity to pursue my Masters programme. Thirdly, my Supervisor Ms. Eszter Polgari for her time, immense advice, supervision and professional guidance to thesis finalization, thank you.

My family; Mum, Ms. Norah Kabajuma, my dearest sister and only sibling Lina Winyi, Daddy, Abi, Aarona and Luke my nieces and nephew. Thank you for the support, the many phone calls and the love throughout my time in “boarding school.”

Finally, my friends in Uganda and at CEU thank you for the prayers, support and encouragement. God richly bless you all.

ASANTENI!

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AU	African Union
ECHR	European Convention on Human Rights
NGO	Non Governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity
UN	United Nations

INTRODUCTION

The African human rights protection mechanisms offer great hope to a situation that was once desolate. The African Charter on Human and Peoples' Rights (herein after called the African Charter) assumed its place in history in 1981. Prior to the adoption of the Constitutive Act of the African Union³ human rights were not recognized formally as an objective of the African Union (AU).⁴ The African Charter together with its Protocol establishing the African Court on Human and Peoples' Rights (African Court) is a significant contribution to the human rights domain and no doubt that there is demand for respect for promotion and protection of human rights on the continent. However, with the realization of the fact that there is need for a strong mechanism for protection and promotion of human rights unlike the African Commission for Human and People's Rights (African Commission) whose recommendations were never binding, the African heads of State signed the Protocol to establish the African Court.⁵

In the human rights domain today, individual complaint procedures are the most successful ways of enforcement of human rights.⁶ On the African continent, the coming into force of the African Court was a plausible milestone on the continent where human rights violations are rife. The African Court accordingly opened its doors to complainants of human rights violations.⁷

³ Article 3(h) of the Constitutive Act of the African Union

⁴ Constitutive Act of the African Union, Article 3 entered into force on 26 May 2001.

⁵ George Mukundi Wachira, African Court on Human and Peoples' Rights: Ten years on and still no justice. <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf> last accessed on 13/11/11

⁶ Walter Kalin and Jorg Kunzli. "The Law of International Human Rights Protection" Oxford University Press (2009) pg 233

⁷ Article 5 Protocol establishing the African Court for Human and People's Rights

However, individuals and NGO's can only have standing before the African Court if their countries have signed a declaration accepting the African Court's competence and jurisdiction to handle such cases.⁸ This restricted accessibility to the African Court impedes the effectiveness of the Court in fully protecting rights since the ones it is meant to protect has no direct access to it. Lack of direct access by the individuals and NGO's to the African Court can be impetus to the human rights violations on the African Continent for the simple fact that it could discourage litigants, give perpetrators legitimacy to violate rights and burden complainants especially of preventive actions. This paper will analyze the impact of restricted accessibility on the effectiveness of the African Court especially on its human rights protection mandate.

The growing literature and various studies on the African protection mechanism support the fact that the need for promotion and protection of human rights on the continent is imperative.

Scholars like Nsongurua note that with concern that article 34(6)⁹ is restrictive but also adds that it was specifically done as a compromise to facilitate the adoption of the protocol¹⁰ and quoted Ambassador Badawi a former chair and member of the African Commission who mentioned that:

⁸ Article 34(6) of the Protocol to the African Charter on Human and People's Rights establishing the African Court on Human and People's Rights

⁹ Protocol to the African Court on Human and People's Rights establishing the African Court on Human and People's Rights

¹⁰ Udombana Nsongurua J. "Human rights and contemporary issues in Africa" Malthouse Press Limited (2003) pg 140

“...the question of allowing NGOs and individuals to submit cases to the Court was one of the most complicated issue during the consideration of the draft Protocol.”¹¹

Therefore there appears to be reluctance by the African leaders to submit to a higher judicial authority and only 26 out of 53 member states have ratified the protocol and only 5 countries have granted individuals and organizations to have direct access to the African Court.¹² Individuals or NGO's that fail to find recourse in their states' courts therefore cannot have redress before the African Court since their states have not entered a declaration in conformity with article 34(6) of the Protocol which states 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.”

Likewise Ouguerouz, takes note of the challenge that is ratifying as well as signing declaration in compliance with article 34(6) of the Protocol.¹³ However, his comparison with the European Court, also precedes the establishment of the African Court and therefore though good for comparative analysis does not highlight the current status of the Court.

This restriction is likely to dim the light on the effectiveness of the African Court especially that individuals and NGO's are restricted to access it since Courts need not only be accessible but

¹¹ Ibrahim Ali Badawi El Sheikh. “ Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights: Introductory Note” 9 African Journal of International and Comparative Law 943, 944 (1997)

¹² <http://www.au.int/en/> last accessed on 13/11/11

¹³ Fatsah Ouguerouz, The African Charter on Human and Peoples' Rights; A comprehensive agenda for human dignity and sustainable democracy in Africa Martinus Nijhoff: The Hague (2003)

also have an approach that would make them more relevant.¹⁴ Adding to the debate of individual complaint mechanisms, Kalin and Kunzli comparing the Inter-American and European systems to the African system note that:

“If human rights guarantees are to amount to more than lofty declarations of intent, their realization and implementation at the domestic level must not be left to the discretion of the states.”¹⁵

Comparison to the Inter- American system and European system is due to the fact that the African system for example has been termed as the weakest in the regional mechanisms.¹⁶ To the contrast the European Court has for example been called “...the crown jewel of the world’s most advanced international system for protecting civil and political liberties.”¹⁷ The Inter American as well was in existence way before the African Court ever was established.¹⁸ This study will address and evaluate the performance of the highest judicial body on the continent in comparison to the counterpart in Europe and in the Inter-American system particularly on accessibility criteria of the African Court. This study will contribute to the appraisal of the African human rights system as an avenue for protection of human rights by pointing out challenges, suggesting solutions and making recommendations that can be translated into workable elucidations to the African Court tasked with handling promotion and protections of human rights.

¹⁴ Lynda E. Frost. “The Evolution of the Inter American Court of Human Rights: Reflections of present and Former Judges” 14 Human rights Quarterly 171, 185 (1992)

¹⁵Walter Kalin and Jorg Kunzli. “ The Law of International Human Rights Protection” Oxford University Press (2009) pg 183

¹⁶ David J. Bederman& Charles Chernor Jalloh , Michelot Yogogombaye vs. Senegal, The American Journal of International Law, Vol. 104, No. 4(October, 2010), American Society Of International Law pg 620 – 228 at 623

¹⁷Laurence R. Helfer: “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime” The European Journal of International Law Vol. 19 no. 1 2008; pg 125

¹⁸ First case of Inter American Court was in 1986 while the African Court was 2009.

Accordingly, Chapter one will give an overview of the African human rights mechanisms and norms, Chapter two will analyze the criteria for accessibility comparatively for best practices and lessons in order to make recommendations for the African Court. Chapter three will handle challenges identified and identify lessons, examples as well as make recommendations that can be adopted by the African Court to bring to realization its mandate. Finally, Chapter Four will make conclusions.

CHAPTER ONE

GENERAL OVERVIEW OF THE AFRICAN HUMAN RIGHTS SYSTEM

1.1 Introduction

This chapter seeks to give an overview of the African Human Rights System in the global human rights arena. It will look at the evolution of Organisation of African Union (OAU) to African Union (AU), the African Charter and its key elements in protection of human rights in Africa and the challenges hindering full realisation of the rights guaranteed under the African Charter. Furthermore, the chapter will introduce the protection mechanisms and organs in the African system that is the African Commission for Human and People's Rights, the African Court for Human and People's Rights highlighting their mandate, strengths and challenges and as well as briefly introduce the European and Inter-American regional protection mechanisms in with the aim of comparatively illustrating their purpose within the research study framework.

1.2 Background

Upon the drafting and adoption of the Universal Declaration of Human Rights (UDHR), nations joined together to make enabling legislation to be applied regionally to address any grievances as well as seek redress for violations suffered by them.¹⁹ In Africa, however, the human rights agenda was not a priority but only to the extent of self-determination as most states were going through anti-colonial movements and revolutions and thus sought not the human rights agenda

¹⁹ European Convention on Human Rights (1950), The American Convention on Human rights (1969)

then.²⁰ In 1963, African states seeking to rise beyond colonialism, apartheid and seeking a greater economic, and political integration of African States, gave birth to the Organisation of the African Unity.²¹ The OAU sought to look out for African interests particularly the independence of the still colonised states. This OAU's main concern was economic integration, political, and self-determination and unifying of African nations reeling from the aftermaths of colonialism, and fighting apartheid.²² It was therefore, laudable that upon adoption and coming into force of African Charter on Human and People's Rights, human rights issues were brought to the forefront. This leap of action has been argued to have been caused by the fact that the OAU was coming under attack and criticism over human rights issues in its member states, conflicts that were taking place and the dictatorial regimes going on.²³ Further, the OAU was crippled with national agendas that took the front seat rather than a common objective seeking for lasting solutions to the problems being faced on the continent.²⁴ With the realisation that the pan-African, anti-colonialist agenda was not being effective, the OAU went back to the drawing board seeking to bring lasting and effective changes and solutions to the Africans.

²⁰ Juma, Dan, Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper? (September 1, 2007). Available at SSRN: <http://ssrn.com/abstract=1391482> or <http://dx.doi.org/10.2139/ssrn.1391482> pg 1

²¹ VilJoen, International n rights Law in Africa

²² Max Du Plessis 'A Court Not Found? The African Court on Human and Peoples' Rights' (with Lee Stone) African Journal of Human Rights, Vol 7, No 2 2007 pg 523

²³ Idi Amin dictatorial regime in Uganda 1971 - 1979

²⁴ Max Du Plessis 'A Court Not Found? The African Court on Human and Peoples' Rights' (with Lee Stone) African Journal of Human Rights, Vol 7, No 2 2007 pg 524

1.3 The Transition from OAU to AU and the Constitutive Act

Learning from the lessons of the OAU, the AU has adopted a much more interventionist stance through its legal frameworks and institution. Adopting the Constitutive Act at the 36th ordinary session for Heads of Government and Heads of State in July, 2000 Lome Togo, the African Union was established. As discussed above, the OAU was formed with intention to move on beyond colonialism for political and economic prosperity of African States.²⁵ OAU transitioned to AU mentioning that since most states had gained independence, the anti-colonialism agenda of the OAU could no longer hold as well as the fact the OAU was powerless and not effective in curbing the totalitarianism that now engulfed some states like Central African Republic.²⁶ The OAU seemed to be all talk but no action and this was worsened by the underfunding by the member states²⁷ and the need by the African leaders to start a new page and thus created the African Union. They did not only seek economic empowerment of the African States but also sought to protect and promote human rights in their objectives.²⁸ The African Union therefore sought to deal with the human rights violations carried out against Africans by Africans²⁹ unlike its parent Union that only sought human rights as discussed above that is only to the extent of self-determination. With the new Constitutive Act, member states could intervene in affairs of

²⁵ CA Parker & Donald Rukare, "The New African Union and its Constitutive Act" (2002) 96 American Journal of International Law 365 -369

²⁶ As above pg 366 - 367

²⁷ Y El – Ayouty, "An OAU For the Future: An assessment" in Y El – Ayouty (ed) The Organisation of African Unity after thirty years (1994) 180

²⁸ Articles 3(h) and 4(m) of the Constitutive Act of the African Union

²⁹ Vincent O. Nmehielle, "The African Union and African Renaissance," 7 Sing. Journal International and Comparative Law 412, 419 (2003)

another state unlike the OAU Charter that forbade in article 2(2) any interference therein. The new Constitutive Act in article 4(h) made provision for that interference and stated that:

“... the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity...”

The Constitutive Act went ahead to provide for the African Commission for Human and People’s Rights as one of its organs.³⁰ It is clear that the Act and the new African Union sought not only to remedy the failures of its parent Union and look beyond economic issues, but also tackle and involve human rights on its agenda.

1.4 The African Charter on Human and People’s Rights

The African Charter is the central tenet of the African Human Rights System. In 1981, the African Charter on Human and People’s Rights was adopted but came into force on the 21st of October, 1986. The Charter marked a significant milestone in the history of the continent particularly as the human rights agenda.³¹ Its provisions have been both unique and contentious but its mark on the human rights page cannot be down played particularly in a continent where violations of human rights were rampant.³² The Charter guarantees many rights to include civil and political rights, socio-economic and cultural rights, and peoples’ rights. The Charter has been hailed as:

³⁰ Article 5(e)

³¹ Dan Juma. Access to the African Court on Human and peoples’ rights: A case of poacher turned gamekeeper Essex human rights review Vol. 4 No. 2 September, 2007 pg 1

³² Uganda for example under Idi Amin and Central African Republic’s J. Bedel Bokassa

“one of the finest gems, designed by Africa with a view to endowing itself with proper self-awareness, creating a new image in the chain of peoples of the world, giving itself a place of choice in the concert of nations, and playing, henceforward, a significant role in the management and conduct of the world’s affairs.”³³

However, the African Charter did not establish a strong institution to protect and enforce the rights it guaranteed, unlike the European Convention on Human Rights and the Inter-American Convention on Human Rights who had both a Commission and a Court to ensure protection and promotion of human rights as guaranteed in their instruments albeit established separately for the case of the Inter-American system³⁴. It established, instead, an African Commission on Human and Peoples Rights with a sweeping mandate, *inter alia*, “to promote human and peoples’ rights and ensure their protection in Africa.”³⁵

1.5 The Civil and Political Rights Provisions under the Charter

The African Charter does provide for civil and political rights similar to what can be found in other international treaties.³⁶ Part I of the Charter for example recognises the right to life in Article 4, Article 7 on fair trial, and prohibition of torture under Article 5 and elimination of any

³³ Isaac Nguema, “Africa, Human Rights and Development”, 7 Rev. African Commission Human. & Peoples’ Rights. 91 (1998); cf. Makau Mutua, who presents a very pessimistic assessment of the Charter, describing it as “a façade, a yoke African leaders have put around our necks”, and calling on like-minded peoples and interests to “cast it off and reconstruct a system that we [Africans] can profoundly proclaim as ours”, Makau Mutua, “The African Human Rights System in a Comparative Perspective”, 3 Rev. African Commission on Human & Peoples’ Rights. 5, 11 (1993).

³⁴ The Inter-American system was equipped with a Commission in 1959 but upon the adoption of the American Convention on Human Rights, the Court was established and heard its first hearing in 1979. The European system had a two tier system with the Commission and Court which was later abolished to create one European Court of Human Rights under Protocol 11.

³⁵ African Charter, *supra* note 2, Art. 30; the Commission performs three primary functions: it promote and Protect human and peoples’ rights and to interpret the provisions of the African Charter; see *ibid.* Art. 45.

³⁶ For example the International Covenant on Civil and Political Rights (ICCPR)

forms of discrimination under Article 19. Most of these rights are present in both the Inter-American and European instruments too though for the African part, some rights like privacy were not given provision as compared to other treaties like the ECHR which under Article 8 provides for respect of life, family, and their home and prohibits any interference by public authorities except “in accordance with the law,” “national security,” “economic well being of a country,” “protection of health” and “morals and the rights and freedoms of others.”³⁷

1.6 Economic, Social and Cultural Rights under the Charter

The inclusion of the social economic and cultural rights in the Charter is relevant for the fact that it emphasizes the indivisibility of human rights. The Charter provides for right to education under Article 17, right to work under equitable and satisfactory conditions under Article 15 with Article 16 providing for right to health. Notably missing though relevant is the right to housing, water, and food. However the case of *SERAC vs. Nigeria*,³⁸ tried to cater for the missing provisions where the Commission held that the right to housing and shelter as well as the right to food can be impliedly read from the right to health and right to dignity respectively.³⁹ The Commission should not be seen as to be turning its back on the need for the existence of express provisions which contribute to the development of human rights jurisprudence, and existence of a better link between the provisions and prospective human rights complaints. The Charter however, did not also subject these provisions (for example right to health or work) to the qualifiers for application of such rights that is that these rights can be ensured through

³⁷ Article 8 European Convention on Human rights

³⁸ 2001 AHRLR 60 (ACHPR 2001)

³⁹ Paragraphs 60, 65

progressive realization compared to the Inter-American system⁴⁰ for example especially that resources and funds are a major challenge to the African system. The Commission should not be seen as to be turning its back on the need for the existence of express provisions which contribute to the development of Human rights jurisprudence, and existence of a better link between the provisions and prospective human rights complaints.

1.7 The People's Rights

Just like the economic, social and cultural rights, the African Charter brought with it a unique provision for protection of “peoples’ rights”. The “peoples’ rights” in the Charter include: right to a satisfactory environment,⁴¹ self-determination,⁴² peoples’ right to be equal,⁴³ right to economic, social and cultural development,⁴⁴ peace and security,⁴⁵ and to freely dispose of their wealth.⁴⁶ The African Commission on Human and People’s Rights charged with ensuring the protection and promotion of Human and People’s Rights throughout the African Continent has used the concept of “peoples” but have not given it a working definition as was in the case of

⁴⁰ Article 26 of the American Convention on Human Rights provides for progressive realization of the economic social cultural rights as provided for.

⁴¹ Art 24

⁴² Art 20

⁴³ Art 19

⁴⁴ Art22

⁴⁵ Art 23

⁴⁶ Art 21

*Democratic republic of Congo vs., Burundi, Rwanda and Uganda*⁴⁷ the African Commission held that;

“The conduct of the Respondent States also constitutes a flagrant violation of the right to the unquestionable and inalienable right of the peoples of the Democratic Republic of Congo to self-determination provided for by Article 20 of the African Charter, especially clause 1 of this provision.”⁴⁸

Further, the Commission went on to hold that a right to a satisfactory environment for the people extended to reasonable measures for promotion of conservation, prevention of pollution, for sustainable development and use of natural resources.⁴⁹ The fact that “peoples” is mentioned but not defined is still a setback for the Charter. Michelo also questions why the Charter sought to use the term peoples but never gave it a definition.⁵⁰ It can be argued that this emphasis on the rights of people down plays the need to protect the individual noting that most African states are vast and vary one from the other, thus minorities might not be accorded equal protection under the charter.⁵¹ The provisions on people’s rights cannot be downplayed since it recognises the very gist of African culture, and recognises the social cultural identity of African people but this

⁴⁷ **Democratic Republic of Congo vs Burundi, Rwanda, Uganda Case No. 227/99**

<http://caselaw.ihrrda.org/doc/227.99 paragraph 68>.

⁴⁸ Article 20(1) states that “1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self- determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

⁴⁹ Social and Economic Rights Action Centre (SERAC) and another vs Nigeria (2001) AHRLR 60 (ACHPR 2001) para 52

⁵⁰ Michelo Hasungule, Towards a more effective African system of Human Rights: “Entebbe proposals” Unpublished paper at the First international conference on the application of the death penalty in common wealth Africa organised by the british institute of international and comparative law held on 10th – 11th may, 2004 at Entebbe Uganda. Pg 4

⁵¹ Michelo Haunsgule. The African charter on human and people’s rights: A critical review (2001) African yearbook of international law 8 pg 265-331.

emphasis on people's rights could work to the disadvantage of uniting Africans for example the many ethnic conflicts all seeking self determination, political, social and economic domination⁵² which could all work against the essence behind the provisions.

1.8 Women's rights under the African Charter

The African Charter though applauded for its integration of social and cultural rights, it has been criticised for not having specific provisions relating to women. Compared to its Inter-American and European counterparts, the historical and traditional background where women were discriminated against would have been expected to play a great role in specifically protecting those groups of vulnerable people in this case women. The provision in the Charter was hurdled with children's rights in Article 8 (3) providing that:

“The State shall ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”

This bundling up of the women and children's rights leaves an opening for violations of women's rights since it inadequately protects the rights of the women. Women and children are a vulnerable group of people whose protection needs to be specific for effective protection. Separate articles clearly providing for their rights should have been drafted into the Charter. Therefore bundling up these rights could work to the detriment of either group. The Charter is therefore frowned upon for encouraging discriminatory tendencies against women⁵³ on the basis of gender all which are residual practices of the set up and order of the African society. This

⁵² Rwanda case of Hutu and Tutsi, Eastern Democratic Republic of Congo conflicts

⁵³ E. Welch Jr. 'Human rights and African women: A comparison of protection under two major treaties' 15 Human Rights Quarterly 548 1993

could have been as a result of the various African traditions that influenced the existing legislation and thus the women took the back bench when it came to provision for their rights. The African Protocol on Women's Rights (The Maputo Protocol)⁵⁴ has been able to conceal the loopholes of the African Charter regarding women. With the inadequate protection of women rights in the Charter, the Protocol reinforces rights specific to women to include elimination of harmful practices like female genital mutilation (Article 5), elimination of any form of discrimination against women (Article 2), political participation (Article 9), protecting widows rights (Article 20), protecting the elderly women (Article 22), women in armed conflict (Article 11) plus health and reproductive rights.⁵⁵ The protocol is enshrined with 24 fundamental articles that spell out in a detailed manner the rights of women that the Charter so obviously neglected to address. The Maputo Protocol bearing in mind the historical injustices suffered by and against women around the world but particularly having in mind the African experience and history was a step ahead for the African system as contrasted to the American and European counterparts for specifically addressing these wrongs and formulating ways to implement the norms guaranteed under national, regional and international standards. It has been almost 7 years since the adoption of the Protocol and its success is still a contentious issue.⁵⁶ The Maputo Protocol though in place, has still not effectively addressed the discrimination, harmful and inequality tendencies that still

⁵⁴ Adopted in July, 2003 in Maputo Mozambique <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>

⁵⁵ Art 14.

⁵⁶ **Reviewing the Protocol on the Rights of Women in Africa**

http://www.newsfromafrica.org/newsfromafrica/articles/art_10688.html

affect women on the African Continent⁵⁷ may be due to poor implementation and enforcement mechanisms.

1.9 Duties under the African Charter for Human and People's Rights

Chapter II of the Charter provides for duties. From Article 27–29, the Charter provides for duties aimed at the individual. Article 27(2) of the Chapter provides as follows:

“The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

This provision reiterates the fear of negating of individual rights.⁵⁸ The chapter clearly has held on to ancient African standards and values which might not applicable in modern day Africa and inevitably stall the advocacy and respect for individual rights.⁵⁹ Further, Article 29 (1) provides that the individual shall have the duty

“To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;”

This has been criticised as ambiguous and has no effect if carried out or not.⁶⁰ Hasungule therefore recommends that Africa should not be hesitant to shift away from the important values

⁵⁷ WHO Facts Sheets: Violence Against Women <http://www.who.int/mediacentre/factsheets/fs239/en/> last accessed on 10th November, 2012, 92 Million girls in Africa have undergone FGM. WHO Fact Sheets: Female Genital Mutilation <http://www.who.int/mediacentre/factsheets/fs241/en/index.html> last accessed 10th November, 2012.

⁵⁸ Michelo Haungule. The African charter on human and people's rights: a critical review (2001) African yearbook of international law 8 pg 265 -331.

⁵⁹ Michelo Haungule, Towards a more effective african system of human rights: Entebbe proposals http://www.biicl.org/files/2309_hansungule_towards_more_effective.pdf pg 4

⁶⁰ Ibid pg 4

and traditions that might hinder the essence of protecting human dignity.⁶¹ The Commission has gone ahead to state that Article 27 (2) is the only provision with limitations on the rights and freedoms in the Charter. This it mentioned in the case of *Media Rights Agenda and others vs. Nigeria*.⁶²

However, Christof and Killander argue that the provision should not be misunderstood to mean that “rights should be earned” but rather “... it implies that the exercise of human rights which people have simply because they are human beings maybe limited by the duties which they also have.”⁶³ They continue to argue that recognising duties is another form of rights limitation.⁶⁴ Vincent Nmeihelle also adds to the debate to state that the notion of duties was used to complement the notion of human rights and be read to entrench pre-colonial African values which existed in Africa.⁶⁵ The provisions in the articles also were geared to the fact that one’s enjoyment and fulfilment of rights might affect the rights of other individuals or community.⁶⁶ In the same vein that the State expects the individual not to compromise the security of the States, to enhance social and economic solidarity, one would expect the duties laid upon the state to protect the individual from any form of human rights violations therefore to be at the forefront by

⁶¹ Ibid pg 4

⁶² Para 68 2000 AHRLR 200(ACHPR 1998)

⁶³ Heyns, Christof and Killander, Magnus, The African Regional Human Rights System (November 10, 2006). INTERNATIONAL PROTECTION OF HUMAN RIGHTS: ACHIEVEMENTS AND CHALLENGES, Felipe Gomez Isa & Koen de Feyer, eds., Bilbao: University of Deusto, 2006. Available at SSRN: <http://ssrn.com/abstract=1356505>

⁶⁴ Ibid

⁶⁵ Vincent O. Orlu Nmeihelle, The African Human Rights System: Its Laws, Practice and Institutions (International Studies in Human Rights) Martinus Nijhoff Publishers 2001 pg 163

⁶⁶ Ibid pg 163

putting up measures giving effect to rights and duties in the African Charter. However, these duties could be seen to reinforce harmful tendencies in society for example deny women rights to property (in cases where women are regarded as perpetual minors)⁶⁷, participate in female genital mutilation and other practices that violate rights all in the name of carrying out his/her duties to the society for the good of “common interest.” Women are seen to be under the custody of the parents, then husband and finally sons and always in perpetual minor form. Thus cannot inherit land or make decisions as they are taken to be minors.⁶⁸

1.10. Derogation provisions under the African Charter

In general human rights jurisprudence, notably under the International Covenant on Civil and Political Rights, derogation from fulfilling certain duties by States during times of public emergencies where the life of a nation is threatened is allowed except for specific rights that are listed in the Covenant. The African Commission for Human and People’s Rights has however emphasized that:

“Contrary to other human rights instruments, the African Charter does not allow for derogation from obligations due to emergency situations.”⁶⁹

⁶⁷ Francis K Makoa; Gender and Politics: A Note on Gender Inequality in Lesotho. *Journal of Social Development in Africa* (1997), 12, 1,5-14

<http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/social%20development/vol12no1/jsda012001002.pdf>
last accessed on 10th November, 2012.

⁶⁸ Ibid pg 7

⁶⁹ *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000). Available at <http://www1.umn.edu/humanrts/africa/comcases/54-91.html> and *commission nationale des droits de l’homme et des libertes vs. chad* para 21 (2000) AHRLR 66 (achpr1995) Accessed on 25th March, 2012

The African Charter's exclusion of a possibility to derogate seems to suggest that states must promote, respect and fulfil all rights at all times with no exception. Despite the fact that there is no derogation under the African Charter, there are limitations to some rights under the Charter for example freedom of religion and conscience is limited by interest of law and order. However, questions arise in relation to such provisions. Does this mean that the justification for derogation from rights is illegitimate for Africa? Are there other means of ensuring that the state is not unreasonably stretched during times of public emergencies by the seemingly stringent requirement not to derogate that the Charter imposes? The case of non-derogation reinforces the fact that human rights are core in the African system and if states are willing not to give exceptions to derogations from the provisions of the Charter, then one can assume that even in protecting the rights and granting remedies for violations of the same should be met with the same standards. There should therefore be no impediments to access to courts for protection of the rights guaranteed under the Charter.

1.11 Claw back clauses in the African Charter

Vincent Nmeihelle has defined claw back clauses in the African Charter to mean;

“...those provisions of the African Charter that tend to limit some of the rights guaranteed under the Charter. They do not as outright derogation clauses that are found in other international human rights instruments. They rather qualify the enjoyment of the right as contingent upon other notions of state prescription.”⁷⁰

The Charter has been criticised for having included these clauses in some articles for example right to property, freedom of movement, freedom of religion, conscience are all subject to the

⁷⁰ ⁷⁰ Vincent O. Orlu Nmeihelle, *The African Human Rights System: Its Laws, Practice and Institutions* (International Studies in Human Rights) Martinus Nijhoff Publishers 2001 pg 165

law and or provisions of the law. Since states are known to be the notorious violators of the law, these claw back clauses all impede on the full enjoyment of rights since they are increasing vulnerable to being abused and or validate acts of violations as the States so wish. The claw back clauses in the African Charter water down its effectiveness and uniform application of the rights by member states as each State might interpret the provision differently according to their circumstances and law.⁷¹

Makau suggests that the Charter should delete the claw back clauses it inserted in its provisions and replace them with derogation clauses.⁷² Since derogation clauses are only temporary and act for specific rights and during specific times unlike the claw back clauses which can be manipulated by States to perpetuate human rights violations and or restrict enjoyment of rights, one can only agree with Mutua that these claw back clauses may work to hinder effectiveness of the African Charter in protecting human rights. The African Commission ruled in the case of *Media Rights Agenda and Others vs. Nigeria*⁷³ that:

“...to allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International Human Rights must always prevail over contradicting national law.”

These clauses leave the domestic legislation only answerable to itself which makes it meaningless if it cannot be put on the international yard stick in this case the African Charter. The African Commission’s role in interpreting the provisions of the African Charter to be

⁷¹ Ibid pg 166

⁷² Makau Mutua, *The African Human Rights System; A critical Evaluation*
<http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> pg 8. Accessed on 23rd March, 2012

⁷³ (2000) AHRLR 200(ACHPR 1998) Para 66

compliant with international principles can be commended though the fact that the Charter did not expressly provide for these limitations will only leave it to try and do damage control whenever States manipulate their domestic laws to violate human rights. Much as it would be difficult to oversee rights that cannot be limited and seeking to justify these clauses, the African Charter should have put into consideration the fact that most African States' domestic laws were remnants of colonial law and thus oppressive and therefore subjecting the Charter to domestic law was bound to have adverse effects.⁷⁴

1.12 Organs for protection of human rights in Africa

1.12.1 African Commission on Human and People's Rights

In 1987, a year after the adoption of the African Charter, the African Commission for Human and People's Rights (herein after referred to as the African Commission) was established. The African Commission was established by the African Charter under Article 30 which states that:

“An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.”

However, Christof clarifies that it was created by a different treaty and therefore not formally be called an organ of the African Union much as it operates within the African Union.⁷⁵ This has been a cause of concern that the fact that the Commission is not entrenched in the structures of

⁷⁴ Makau Mutua, The African Human Rights System; A critical Evaluation
<http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> pg 6. Accessed on 10th November, 2012

⁷⁵ Heyns, Christof And Killander, Magnus, The African Regional Human Rights System (November 10, 2006). INTERNATIONAL PROTECTION OF HUMAN RIGHTS: ACHIEVEMENTS AND CHALLENGES, Felipe Gomez Isa & Koen De Feyter, Eds., Bilbao: University Of Deusto, 2006. Available At SSRN: <http://ssrn.com/abstract=1356505> Pg 16

the African Union as it is not provided for in the Constitutive Act might be a setback in its operations.⁷⁶ Unlike in Europe and in the Americas who at the time had both a Commission and a Court, the African system sought to have only a Commission.⁷⁷ The European Convention on Human Rights originally had provision for a Commission and a Court until the acceptance of the Protocol 11 that saw creation of a lone body in form of a permanent Court.

1.12.1 Mandate of the African Commission

The African Charter acts as a source of law for use by the African Commission on Human and People's Rights. It derives its establishment, mandate, procedures for admissibility, and all general provisions from the Charter. Article 45 in its entirety provides for the Commission mandate and states as follows; the functions of the Commission shall be:

“1.To promote Human and Peoples' Rights..., 2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter, 3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU, 4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.”

Within the framework of its role of interpreting the African Charter, the Commission is charged with interpreting all provisions of the present Charter at the request of a state party, an institution

⁷⁶Michelo Hasungule African Courts And The African Commission On Human And Peoples' Rights http://Www.Kas.De/Upload/Auslandshomepages/Namibia/Human_Rights_In_Africa/8_Hansungule.Pdf Pg 249.

⁷⁷ Heyns, Christof and Killander, Magnus, The African Regional Human Rights System (November 10, 2006). INTERNATIONAL PROTECTION OF HUMAN RIGHTS: ACHIEVEMENTS AND CHALLENGES, Felipe Gomez Isa & Koen de Feyere, eds., Bilbao: University of Deusto, 2006. Available at SSRN: <http://ssrn.com/abstract=1356505> pg 16

of the AU or an African organisation recognised by the AU.⁷⁸ Both individuals and states can bring complaints to the African commission. Articles 47–54 provide for such procedure on inter-state proceedings under the African Charter. Articles 47 and 49 specifically provide for states to either bring the matter to the attention of the respondent state, the Commission, OAU but may also choose to directly refer the matter to the African Commission upon reasons to believe that there have been violations of the Charter provisions. Individual complaints under the African Charter have been noted to be ambiguous and in particular the “other communications” reference to them. Individuals can always submit their complaints if any violation of one or more rights under the Charter has been violated. This will be discussed further in the next Chapter.

The Commission has a duty to protect the fundamental rights and freedoms as provided for in the Charter and therefore has opened its doors to individuals and NGOs to bring communications before it.⁷⁹ For any complaints alleging the violation of human rights as guaranteed by the Charter, individual complainants can submit their complaints to the Commission. State parties also can also bring complaints against member states.⁸⁰ Hasungule gives some reasons as to why the mechanism has not been successful and credits it to the fact that some states for fear of being reprimanded once precedents have been set, keep away from being the first ones to take the step as well as the fact that most states are not “coming to equity with clean hands” and thus in fear of opening up loopholes in their own countries’ human rights violations, choose to keep away from

⁷⁸ Starmer & Christou; Human Rights Manual and Sourcebook for Africa

⁷⁹ Article 55

⁸⁰ Article 48 -49

employing the mechanism of the Charter to bring any perpetrators to book.⁸¹ The Commission however, not having an enforcement mechanism and wielding no power in its mere non-binding recommendations cripples its own effectiveness in protecting human rights as well as curtailing any human rights' abuses. Further there has not been major reciprocal support and cooperation between the two bodies and thus so far there is no evidence that the Commission has brought a case before the Court and there was any exchange of experience and procedures between the two bodies.⁸²

1.12.2 African Court for Human and People's Rights

The African Court for Human and People's Rights (hereinafter referred to as the African Court) was a momentous milestone in the human rights field in Africa. Following the adoption of the African Charter which only provided for the establishment of the African Commission,⁸³ establishment of the African Court was a welcome step in advancement of human rights protection on the Continent. In 1998, the Protocol to the establishment of the African Court for Human and People's Rights was adopted. The Protocol then entered into force in 2004 but the court did not commence work till 2006. Article 1 establishes the Court and provides as follows:

“There shall be established an African Court of Human and Peoples' Rights ("Court") whose jurisdiction and functioning of which shall be governed by the present Protocol.”

⁸¹ Michelo Hasungule, “African Courts and The African Commission on Human and Peoples' Rights” in Dr. Dr. Anton Bösl, Dr. Joseph Diescho(eds) Human Rights In Africa; Legal Perspectives on their Protection and Promotion, 2009
http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf 260

⁸² Id.

⁸³ Article 30

Makau reasons that the creation of the African Court might have been due to the fact that “norms prescribing state conduct are not meaningful unless they are anchored in functioning and effective institutions.”⁸⁴ Juma agrees that the court was a great move to concretise human rights issues on the continent prevalent with many human rights violations.⁸⁵ The Court therefore created hope in the protection of human rights particularly since it was going to reinforce the non-enforceability of the African Commission’s recommendations as the Courts decisions and findings were going to be binding on the States who had ratified it. The Protocol in Article 27(1) provides that if “court finds that there has been a violation of human or people’s rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

Article 2 of the Protocol stipulates that the Court was established to “complement the protective mandate of the African Commission on Human and Peoples' Rights.” The complementary relation of the African Court and the African Commission has been brought into question by some critics.⁸⁶ Despite having supported the establishment of the Court, many states are still not party to the Protocol but even when Party, have not acknowledged the Court’s jurisdiction

⁸⁴ Makau Mutua, The African Human Rights System; A critical Evaluation
<http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf>. pg 22 Accessed on 10th November, 2012

⁸⁵ Juma, Dan, Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher Turned Gamekeeper? (September 1, 2007). Available at SSRN: <http://ssrn.com/abstract=1391482> or <http://dx.doi.org/10.2139/ssrn.1391482> pg 2

⁸⁶ Weldehaimot, Simon M, Towards Speedy Trials: Reforming The Practice of Adjudicating Cases in The African Human Rights System(April 10, 2010) The University For Peace Law Review, Vol.1, No. 14, 2010 pg 29

granting individuals and NGOs direct access to the Court.⁸⁷This paradox will be discussed further in Chapter two.

1.13. Conclusion

Evidently, it follows that the human rights agenda has taken root in almost all the African human rights protection mechanisms albeit challenges and slow progress. The transformation from OAU to AU, the enactment of the Charter of Human and People's Rights all point to the fact there was, there is and will be a desire for promotion and protection of human rights on the Continent.

The African regional human rights protection mechanism as discussed above has plausible endeavours in protecting human rights and has through its Charter and creation of organs to enforce observance and respect for the rights guaranteed under the Charter goes to show substantial efforts in protecting the rights guaranteed under the African Charter. However, these efforts faced with various challenges and loopholes have done less to salvage the situation of impunity with which human rights are abused. One can rightly argue that the effectiveness of the human rights system has been hindered through the mediocre commitment to ensuring full protection and promotion of human rights.

The establishment of protection mechanisms, streamlining of human rights provisions into treaties, the interpretation of some case law to include human rights protection all illustrate the significance conferred to human rights in Africa. However, the challenge of accessing all the

⁸⁷ George Mukundi Wachira, African Court on Human and People's rights: Ten years on and still no Justice(2008), available at <http://www.unchr.org/refworld/pdfid/48e4763c2.pdf> last accessed on 20th October.

protection mechanisms particularly the Court by individuals and NGOs will be the focus of discussion in the next chapter.

CHAPTER TWO

CRITIQUE OF THE RESTRICTED ACCESS TO THE AFRICAN COURT BY INDIVIDUALS AND NGO'S

2.1 Introduction

This chapter following the introduction to the Human Rights protection system in Africa, briefly introduces the admissibility and accessibility criteria under the African Human Rights System to assess the effectiveness of the African Court and specifically analyses the impact of article 34(6) of the Protocol to the establishment of the African Court for Human and People's Rights and its impact within the human rights protection context. The chapter also refers relevant practices from the Inter-American and European practice comparatively to assess the effectiveness of the African Court for Human and People's Rights. The analysis of the three regional human rights systems is not for one to point out the role model that could be followed given the different historical, political and or financial history but rather seek out the justifications for such practice in promotion of human rights.

2.2 The relationship of the African Commission and African Court

The preamble of the Protocol establishing the African Court provides that:

“...the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.”

Article 6 of the Protocol for the establishment of the African Court on Human and People's Rights provides for admissibility to the court. The rules of the Court also do not provide for a clearer stipulation on admissibility of the cases before the Court mainly because the assumption

is that the cases referred to the African Court by the African Commission met the admissibility criteria particularly in reference to Article 6(1) of the Protocol establishing the African Court dealing with cases of NGOs and Individuals. Article 6(1) of the Protocol makes provision for the Court to seek opinion of the Commission on admissibility of cases by NGOS and individuals. With the defunct two tier system of the European system, as was the case, the European Commission dealt with the admissibility criteria to the European Court. However, with Protocol 11, the European Court also deals with the admissibility criteria. The Inter-American system still holds the two tier system with the Commission acting as the gate keeper to the Inter American Court particularly in line with Article 57 of the American Convention of Human Rights.⁸⁸ However, what is unsure is whether the African Court under Article 6(3) of the Protocol establishing the African Court with the African Court referring cases to the Commission or consider them might not cause uncertainty. The fact that the Court seems to have discretion to determine admissibility of cases before it, creates uncertainty on the relationship between the African Court and African Commission⁸⁹ The fact that the African Court might actually consider cases and or refer them to the African Commission creates ambiguity on the complementary relation of the two organs since it seems to have no effect as the Commission will have considered their admissibility.

This relationship though not clearly stipulated remains ambiguous though it is meant to be correlative as the African Court and African Commission share some roles and powers which could also work against their relationship as it may create conflict on the roles of the two

⁸⁸ Article 57 provides that: "The Commission shall appear in all Cases before the Court."

⁸⁹ Solomon Ebobrah, Admissibility Before the African Court on Human and Peoples Rights: Who Should do what? (2009) Malawi Law Journal Vol 3, Issue 1 pg 101

organs.⁹⁰ The African Court has powers to examine a case before it or refer the matter to the African Commission though both of them can seek to have friendly settlements. However, much as the African Commission can refer cases to the African Court, it is under no obligation to do. This can act as a hindrance to effective protection since the African Commission may or may not refer cases to the African Court for consideration especially that the African Court has binding powers. The two tier system in the Inter-American system especially that the Inter-American Commission acts as the adjudicator at the commencement of proceedings but later takes on a role of a complainant before the Inter-American Court creates a sense of impartiality in the function of the American Commission before the American Court.⁹¹

The pre-Protocol 11 European approach seems to be the better practice. The European Commission dealt with cases particularly by examining their admissibility and called for friendly settlements as well upon failure of which the matter was referred to the African Court. The African System is yet to map out its rules of procedure on the practice and work between the African Court and the African Commission. This would greatly improve the cooperation between the two organs for example the African Commission could determine admissibility of matters before they are submitted to the Court as well carry out investigations so that the African Court could deal with merits of the case only.

⁹⁰ Ibid

⁹¹ Ariel E Dulitzky; The Relationship between the African Commission and the African Court; Lessons from the Inter - American System <http://www.utexas.edu/law/faculty/adulitzky/15-Relation-African-Commission-and-Court.pdf> last accessed 10th November, 2012

2.3 Admissibility under the African Human Rights System

Under the African Charter, communications to be declared admissible must not be written in an abusive language, based on media news and the author not anonymous.⁹² However, it should be noted that all these matters have to be in compliance with the fact that the local remedies must have been exhausted. Article 56 of the African Charter provides for reasonable time within which the complaint has to be lodged. The European Court in the case *Adrian Mihai Ionescu v. Romania*⁹³ can declare a case inadmissible if;

- 1) "the applicant has not suffered a significant disadvantage", (2) unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits" and (3) "provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."⁹⁴

Further, though the African Charter provides for reasonable time, the European and Inter-American systems are specific with six months time limits as provided in article 35 (1) of the ECHR and Article 46 (1) (b) of the ACHR respectively. With admissibility criteria it can be concluded therefore that the frequently demand dealt with is the requirement for exhaustion of local remedies.⁹⁵

2.4 Access to the Court or Standing before Court

⁹² Article 56 of the African Charter on Human and People's Rights

⁹³ Application no. 36659/04

⁹⁴ Ibid

⁹⁵ See Prot. to African Charter, *supra* note 4, Art. 56(5) & 50; cf. ECHR, *supra* note 7, Art. 35(1) ("The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law...").

Under the Protocol that establishes the African Court for Human and People's Rights, Article 5 provides for access to Court also known as standing. Under the Article, the Commission, a state party that lodges a complaint and the state party who has a complaint lodged against it, NGOs with observer status and individuals whose respondent state will have signed a declaration acknowledging the competence of the Court are entitled to institute cases before the Court.⁹⁶

Before dealing with the question of access to the Court, it is imperative that it is defined and a brief given on the different practice of accessibility to Court in Europe and in the Americas. In Europe also known as standing is provided for under Article 34.

Manuel Vargas, defined access as

“...the individual's ability to have Court considers his or her case, the term is not limited to the individual's legal qualification to actually appear or argue before the Court.”⁹⁷

This criterion of standing or accessibility is different from the admissibility criteria and is neither interested in the merits of the case. Depending on the adjudicating bodies therefore, accessibility can be interpreted to mean whether the complainant has the competence to bring a case before the Courts not financially, physically but because of having a stake in the matter before the Court.⁹⁸

However, important to note is that some writers have stated that “an ideal standing doctrine will ensure that all parties...actual or threatened damage will have access to

⁹⁶ Article 5(1) and 5(3) of the Protocol

⁹⁷ Vargas, Manuel D, Individual Access to the Inter American court of Human Rights. 16 N.Y.U J. Int'l L& Pol 601 (1983 -1984) pg 601

⁹⁸

the Courts for resolution of the dispute.”⁹⁹ In reference to actual or threatened damage the European Court has gone ahead to interpret their case-law to include actual or direct victims and potential victims.¹⁰⁰ In this context the direct victim must have been directly affected by the violation while the potential victim is at risk of being affected by the measure or omission even if not made directly at the person. In its case-law, the European Court has defined a direct victim is: “...the person directly affected by the act or omission in issue,”¹⁰¹ and in *Dudgeon vs. United Kingdom*¹⁰² where a law that sought to prohibit homosexuality acts between consenting adults was challenged, the European Court holding that the complainant was a potential victim due to the proposed law, and that the law would in fact be a violation of his right to privacy if enacted. In the case of *Open Door & Dublin Well Woman vs. Ireland*, the European Court noted that a potential victim must be likely to suffer if the Government took certain measures or made some omissions.¹⁰³

The European Court went on to clarify in the case of *Gorraiz Lizarraga and others vs. Spain*¹⁰⁴ that:

⁹⁹ Jensen, Meckling, Holderness, The Case for Restricting Access to Courts <http://papers.ssrn.com/abstract=618765> last accessed on 12th October, 2012. pg 20

¹⁰⁰ See; *Chahal Vs UK* (1997) 23 EHRR 413, *Soering vs UK* (1989) 11 EHRR 439, *Buckley vs UK* (1997) 23 EHRR 101.

¹⁰¹ *Amuur vs France* Application No. 19776/92 para 36

¹⁰² Application No. 7525/76

¹⁰³ (1993) 15 EHRR 244

¹⁰⁴ Application no. 62543/00 27 April, 2004

“the concept of “victim” must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act...any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory.”¹⁰⁵

The European Convention therefore appears to be stricter in applying the victim requirement despite having a wide variety as to who can have standing before the European Court. To the contrary, the Inter- American system does not apply the same strict rules on victim requirement. In fact, in the case of *Baena Ricaedo et al (270 Workers) vs. Panama*, the American Court noted that victim status is not necessary for one to have standing before the Court¹⁰⁶ and recognizes action popularis as well.¹⁰⁷

The African Commission under Article 5(2) of the Protocol establishing the African Court for Human and People’s Rights and Rule 119 (4) of the Interim Rules of the African Commission provide for bringing a case by the Commission to the Court if there has been serious and massive violation of human rights. However, this provision could have perilous effects for it seems to suggest that should cases be of unserious and not massive nature of violation, then it cannot be referred to the Court. This also in away has an effect on the process of determining how serious a given case it. Considering that the members of the Commission have varying opinion, and the fact that the circumstances surrounding the different cases may present different human rights issues to be discussed. It would also mean that the seriousness of all cases is not subjected to the same test so as to determine whether or not there is a serious or massive violation of human

¹⁰⁵ Paragraph 35 and 38

¹⁰⁶ (Merits) IACHR (2nd February, 2001) Ser. C No. 72 Para 6

¹⁰⁷ *Aguirre Roca, Rey Terry and rovenedo Marsano vs. Peru (Competence)* IACHR (24th September, 1999) Ser.C No. 55

rights. Two questions are then raised: will violations that have not been considered before be simply ignored because they are not serious and massive? How will this then affect the development of human rights generally?

Article 5(1)(e) makes mention of access to the Court by African Intergovernmental Organisations. These are according to the criteria for granting observer status under the AU are Organisations not recognised as regional economic communities.¹⁰⁸ Finally, the State can access the Court if it is the complainant, a respondent State or alleging violation of the rights of its citizen or citizens.¹⁰⁹ Similarly the above provisions apply to the Inter-American system though only the American Commission has standing before the American Court. To the contrary the European system allows for States under Article 33 of the ECHR to bring a matter though States can still be respondents under Article 34.

2.5 Individuals access to Court

For any civil society to thrive, a well functioning judiciary system has to play a big role. Despite most African countries having constitutions that protect, promote and forbid any human rights violations, the increasing violations carried out with impunity have left human rights protection all but elusive. The restricted access by the court for individuals and NGOs is a paradox. Granting States access and denying direct access to the Court by NGOS and individuals implies that states should implicate themselves in any event of human rights violations. Clearly this is

¹⁰⁸ Criteria For Granting Observer Status And For A System Of Accreditation Within the AU, Executive Council Seventh Ordinary Session 01 – 02 July 2005 Sirte, LIBYA <http://www.africa-union.org/summit/july%202005/Observer%20Status%20Criteria%20as%20adopted%20-%20July%202005.pdf> last accessed 10th November, 2012

¹⁰⁹ Article 5 (1) (b) (c) (d) of the Protocol establishing the African Court

wishful thinking on the part of the court for putting so much faith in the States for no State would ever bring proceedings against itself for violation of any human rights.

Human rights are primarily for the main part built on the foundation of protecting the individual against the state¹¹⁰ and thus trusting a State to bring complaints against itself as opposed to individuals and or NGOs is dumbfounding. Even though to some extent it was the ineffectiveness of the Commission in protecting human rights in Africa that led to the creation of the Court, closer look at the background, function, and structure of the Court suggests that it was destined to be weak from the beginning which could be explained by the underlying broader legal and political contexts surrounding its formation in particular, the reluctance of the African states to accept a strong Court that could challenge their “state sovereignty” already threatened by the flexibility and openness of the Commission.¹¹¹

Having had an African Commission that did not have any binding powers over its recommendations on States, the establishment of the African Court was very vital. One would rightly expect therefore that the Court would rise to fill the gaps that the already weakened commission posed.

The Court has through its restrictive access of individuals proved to be a hitch in the protection of human rights. The individuals can have access to the Court through two means; through the Commission which can forward their case to the Court or directly bring their case to the Court only if their parent State has signed a declaration recognising the Court’s jurisdiction. For the

¹¹⁰ Dan Juma; “ Access to the African Court For Human and People’s Rights: A case of the poacher turned Gamekeeper” Essex Human Rights Review Vol. 4 No.2 September, 2007 pg 3

¹¹¹ Rebecca Wright, Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights, Berkely Journal of International Law, Vol 24, no. 2, 2006, p. 473

purpose of the discussion focus will be put on the direct restricted access to Court by NGOs and individuals.

Article 5(3) provides for Individuals and NGO's access to the Court so long as the respondent State has made a declaration recognising the competence of the Court in line with Article 34(6) of the Protocol. Article 34(6) goes on to provide as follows;

“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.”

The European counterparts who initially had the individual and NGOs submit their cases to the European Commission for submission to the Court, had under Protocol 9 enable NGOs and individuals to submit their cases to the Court although they had already submitted their cases to the Commission. However, important to note is the fact that NGO's cannot bring cases as a matter of action popularis but only when there has been a violation of their own rights. In *Lindsey & others vs. UK*, the European Court emphatically stated that it would not tend to matters that did not rise from actual but hypothetical violations of the ECHR and thus cannot entertain matters of action popularis.¹¹² This riddance of the restricted access of the individual to Court was a great achievement that can be drawn from by the African counterparts in seeking to have significant contribution on the human rights domain. Emphasising the need to effectively protect human rights in the case of *Klass vs. Germany*, Court held that “...the Convention and its

¹¹²(1997) 23 EHRR CD 199

institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.”¹¹³

The Court in this case noted that the effectiveness and machinery of the Convention would be watered down should the accessibility be inhibited by restrictions. Pursuant to Article 44 of the Inter-American Convention, individuals, NGOs and their representatives have standing before the Commission. The Commission is the gate keeper to the American Court especially that States have to accept the contentious jurisdiction of the Court upon ratifying. This could be interpreted to mean that individuals have restricted access but although the individuals did not have direct access to the American Court,¹¹⁴ the Court has in fact introduced the victim role to involvement in litigation of the case together with the American Commission.¹¹⁵ The victim is allowed in the mitigation of costs and reparation, cross examination of witnesses in the Inter-American system.¹¹⁶ It would be very vital for the African Court to relax and or revise its rules to match the practices of its counterparts in according victims of human rights violations a front seat in participation of litigation of their cases. However, with the restricted access this might all but be an empty gesture particularly if the intention of the drafters was to safeguard State interests as against individuals. In sum, it can be argued that the founding instruments of the African Court staunchly protect state sovereignty, restricting the institution's power to act.¹¹⁷ The Court's basic

¹¹³ ECHR(6 September, 1978) Ser A 23 para 34

¹¹⁴ Article 57 of the American convention States that “The Commission shall appear in all cases before the Court”

¹¹⁵ Article 23 of the 2000 Rules of Court of the Inter American Court of Human Rights
<http://www1.umn.edu/humanrts/iachr/rule12-03.html> last accessed n 2nd October, 2012

¹¹⁶ David Padilla; An African Human Rights Court: Reflections from the perspective of the Inter American System. Vol. 2 African Human Rights Law Journal (2002) pg 192

¹¹⁷ Rebecca Wright, Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights, Berkely Journal of International Law, Vol 24, no. 2, 2006, p. 463

genetic structure so limits the institution that it is, from the outset, destined to fall short in its efforts to protect and promote human rights.¹¹⁸

Moreover, denial of individual's direct access to the Court led to Article 6 in which individual access became conditional upon each State making an optional declaration accepting the competence of the Court to receive petitions from individuals.¹¹⁹ This has the effect of subordinating human rights to state good will. Thus, not surprisingly, only a handful of states have currently made a declaration allowing individuals to access the Court, confirming that the fear is warranted.¹²⁰

Further, the Inter-American Court in an advisory opinion noted the importance of treaties by stating that:

“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 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.”¹²¹

To the contrast the provision in the Protocol to the African Court creates wariness on the reason as to why the States are empowered to impede any individual or NGO who might bring a case against them. Currently only 5 countries have signed the declaration and include Ghana,

¹¹⁸ Ibid., p. 464

¹¹⁹ Ibid., p. 476

¹²⁰ Ibid, p. 478

¹²¹ Inter American Court of Human Rights Advisory Opinion September 24, 1982; The effect of Reservations on the entry into force of the American Convention on Human Rights. Page 1 paragraph 43.

Tanzania, Burkina Faso, Mali and Malawi.¹²² The fact that the States are given priority over individuals in human rights protection defeats the purpose of international human rights law today.¹²³ This is for the simple reason that in this case, a State will not bring a complaint against itself one can then rightfully conclude that this clause was an impediment to human rights protection for there was no will from the onset to grant individual access against State parties.

Therefore the restricted access by Individuals and NGO's is an irony as they seek to protect themselves from their States. In the exception, though with suspicious motives¹²⁴ Costa Rica filed a case¹²⁵ against itself in the Inter American Court of Human Rights asking to "investigate alleged violation of human rights by Costa Rican Authorities."¹²⁶ Since individuals and NGO's would be the most complainants to the Court, it is dubious that the protocol worked on the assumption that states will sign a declaration to grant them access to implicate States in human rights violation matters. This limitation has since been questioned¹²⁷ for defeating the purpose of international human rights law that is to protect the individual.¹²⁸ When the main concern of the

¹²² African Court on Human and People's Rights Website <http://www.african-court.org/en/> last accessed on March 25th, 2012

¹²³ H.J. Steiner, "International protection of Human Rights," in M.D Evans (ed), International Law (Oxford: Oxford University Press, 2003) pg 760

¹²⁴ C. Medina, "The Inter American Commission on Human and People's Rights and the Inter American Court on Human Rights: Reflections on a joint venture," (1990) 12 Human rights Quarterly 439 at 450,451.

¹²⁵ In the matter of Viviana Gallardo et al, No. G 101/81. Series A (1984) and Series B (1986)

¹²⁶ Part 1, In the matter of Viviana Gallardo et al, No. G 101/81. Series A (1984) and Series B (1986) available at http://www.wfrrt.org/humanrts/iachr/b_11_11a.htm last accessed on 25th March, 2012

¹²⁷ Femi Falana vs. The African Union Application No. 001/2011, Michelot Yegogombaye vs. Senegal Application No. 001/2008

¹²⁸ Dan Juma, Access to the African Court on Human and People's Rights : A case of the Poacher turned Gamekeeper. Essex Human Rights Review Vol. 4 No. 2 September, 2007. Pg 3

Court is to prioritise the State as against the individual with the hope that the States will grant individuals access to bring complaints against them is dumbfounding.

The African Court has to date only had 5 states who have signed the declaration out of the 53 member States. Maybe the African Court can learn from their European counterpart whose jurisdiction is compulsory upon having the member state ratify the protocol 9. Much as States cannot be forced to sign and be party to treaties but only by consent for the simple reason of respecting State sovereignty, the optional consent enabling the individuals in the Member States to lodge complaints against their States could have emulated the European Court practice of having compulsory jurisdiction upon ratification. The European Court's huge docket inadvertently establishes rich jurisprudence than paltry cases decided not on merits mainly but dismissed for lack of having their States sign a declaration.¹²⁹ The gist of establishing these mechanisms is usually to protect, promote, as well as have an efficient and effective mechanism to enforce these rights.¹³⁰

With no revision to Article 34(6) or having more than 5 States sign declarations, this will remain a dream on the African Continent. I am of the opinion that individuals be granted access putting in mind that most developing countries are the most perpetrators of human rights violations and denying this access will leave the African populace vulnerable to human rights abuses. This provision left as it is, makes States avoid commitment to human rights protection and not be fully subject to the African Court's jurisdiction since they will hide under the veil of having not

¹²⁹ Femi Falani and Michelot cases. See Supra note 44

¹³⁰ P.HP.H.M.C Van Kempen; Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR. Electronic Journal Of Comparative Law Vol. 14.3 pg 11 (December 2010) [http:// www.ejcl.org](http://www.ejcl.org) last accessed on 10th October, 2012

signed a declaration and invoke it should a case be brought against them making human rights protection lose relevancy.

Any regional human rights protection mechanism is expected to “exercise authority broader than the sovereign state”¹³¹ and therefore denying individuals and NGO’s direct access to the Court and as against in this case leaving the State with power to grant the access by depositing a declaration defeats the whole purpose of the Court’s mandate. The ECHR in its proviso in Article 34 notes that the contracting high parties are not to hinder the effective exercise of the individual applications to have their matters heard before the European Court. It states clearly that:

“The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

Further, the respondent State can be found in violation of Article 34 if they do not take any measures as would have been indicated by the Court as was held in the case of *Mamatkulov and Askarov vs Turkey*.¹³²

The African Court taking a leaf from its Inter-American and European counterparts should be able to enforce human rights protection and short of this fails and undermines the whole essence of human rights protection. Article 34(6) of the Protocol therefore has impact on protection human rights for the denial of the individual and or NGO bringing their case directly to the court. Therefore the obstacle in accessing the Court inadvertently prevent litigants from pursuing any cases for the simple fact that one will not bring a case to the Court till their State has signed a

¹³¹ C Tucker, “Regional Human Rights Models in Europe and Africa: A comparison” (1983) 10 Syracuse Journal of International Law and Commerce 135 at 139

¹³² Application numbers 46827/99, 46951/99 Para 99 - 129

declaration but also for the fact that even with the declaration court still can deny them access for it welds the power to have discretion on whom to grant access and who not to. This bizarre provision will not only leave the human rights protection elusive but also unobtainable and their enforcement a dream. The African Court being the highest appellate Court but having its doors “half open” to individuals and NGO’s leaves one wondering whether the drafters had any will to protect and promote the provisions of the Charter. It can rightly be concluded that the Court has then become idle on issues of individual human rights protection despite the rampant impunity on the Continent.

The case of *Femi Falana vs. The African Union*¹³³ was challenging article 34(6) of the Protocol and seeking an order to have it annulled for allegedly being in contravention with provisions of the African Charter. The Applicant had failed to get his State of Nigeria to deposit a declaration and had inadvertently denied him access to the Court in seeking justice. He argued that the criterion for having a declaration before he can have access to the court was a setback for his clients whom he could not represent since his Country had not filed the declaration.¹³⁴ Further, he pleaded that the clause was in violation of and inconsistent with Articles 1, 2, 7, 13, 26, and 66 of the African Charter and thus should be annulled.¹³⁵ Despite, the African Court holding that it had no jurisdiction to handle the case; the clause evidently is a stumbling block that most human rights activists will agree needs to be revised. Further, Judge Fatsah Ouguergouz in his separate opinion agrees that the Court should grant individuals and NGOs automatic access to the

¹³³ Application N° 001/2011 paragraph 3

¹³⁴ Ibid Paragraph 31

¹³⁵ Ibid Paragraph 40

Court.¹³⁶ This circumvention by the African Court to grant open access inevitably threatens justice and is a disincentive to potential litigants seeking promotion and protection of human rights on the continent like Femi Falana above. Judicial institutions should avoid making procedural complexities that deny either party the right to access to justice in this case the complainants.

The African Court reluctant to hold that the contested article 34(6) was in fact a violation of the Charter in the Falana case due to the simple fact that protocols are subservient to their Charters as a matter of trite law, side stepped the issues created by article 34(6) which will continue to haunt the operation, practice and mandate of the African Court.¹³⁷

One writer opines that from the onset, the absence of political will by African States has thus crippled the effectiveness of the Court and in turn affecting the African human rights protection system particularly to ensure that state parties

“...promote and protect human and people’s rights in accordance with the African Charter on Human and Peoples rights and other relevant human rights instruments.”

With cases like Femi Falani and Michelot highlighting the hitch that is created by article 34(6) of the protocol there is further worry created by the fact that the African Court can actually transfer a case submitted to it back to the Commission.¹³⁸ Noting that the Commission does not make binding recommendation but a Court that has the power can have discretion to transfer a case might pose a problem for the simple fact that violations of human rights might go unchecked if

¹³⁶ Paragraph 37 http://caselaw.ihrda.org/doc/001.11_so_fo/view/ last accessed on 12th September, 2012

¹³⁷ Kayode Oladele, African Court Restricting Access to Justice. <http://www.punchng.com/feature/the-law-you/african-court-restricting-access-to-justice/> last accessed on 12th October, 2012

¹³⁸ Article 6(3)

what are used to tackle them are mere non binding recommendations. It is my opinion therefore that the Court would then be failing to realize its mandate especially that it was created to enhance the efficiency of the Commission.¹³⁹

Further, the fact that these NGOs if they are to have standing would require to have observer status is tedious. The criteria for granting observer Status includes among others, filing financial records, sources of finance, been in operation for not less than three years, resources derived from its members¹⁴⁰ which all might not be possible for some organizations that might be very proactive in promoting and protecting human rights and thus discouraged from seeking the same. Few NGOs can afford the intricacies of obtaining observer status and meet all requirements that are needed to be granted observer status.¹⁴¹ By contrast the Inter-American System grants NGO's standing to the Inter-American Court so long as they a registered and legally recognized organisation which policy in turn can encourage litigation through *actio popularis* which would inevitably create positive impact on human rights protection.¹⁴² The European Court does not expressly mention the criteria for the NGO's but they are provided for as amongst those who have standing before the Court and can only have the access if they are victims.¹⁴³ However, the Committee of Ministers in Resolution (2003)8 and (2003)9 set down rules for participatory

¹³⁹ Paragraph 6 of the preamble of the Protocol to the African Court on Human and People's rights.

¹⁴⁰ Criteria For Granting Observer Status And For A System Of Accreditation Within the AU, Executive Council Seventh Ordinary Session 01 – 02 July 2005 Sirte, LIBYA <http://www.africa-union.org/summit/july%202005/Observer%20Status%20Criteria%20as%20adopted%20-%20July%202005.pdf> last accessed 10th November, 2012

¹⁴¹ Nsongurua J. Udombana, Toward the African Court on Human and People's Rights: Better Late Than Never Yale Human Rights And Development L.J Vol 3:45, pg 99 – 100

¹⁴² Ibid pg 100

¹⁴³ Article 34

status by NGO's in the Council of Europe. In the case of the Inter – American system under Article 44, it is implied that one need not be a victim but prove that there has been a violation of rights guaranteed under the American Convention on Human Rights.¹⁴⁴

2.6 Conclusion

Article 34(6) undermines the whole gist of the establishment of the court that is to ensure justice for human rights violations through protection of the individual against the State. The case of *Michelot Yogogombaye vs Senegal*¹⁴⁵ which was the first case the court handled was dismissed on the grounds that direct access to the Court by an individual is subject to the individual's State depositing a declaration authorizing such cases to be brought by the individuals before the Court.¹⁴⁶ The Preamble of the Protocol mentions the need for Court to “enhance the efficiency of the African Commission” but all this efficiency and effectiveness of the Court is lacking for the mere fact that it is failing in practice if the Court cannot guarantee prosecution of human rights violations thus creating a culture of impunity. With no justice accorded to the victims of human rights violations, there cannot be expectations of the rule of law. This is of the essence particularly that for justice to have resonance, there have to be strong accessible institutions to promote and protect it. Therefore having analyzed the impact of Article 34(6) on human rights

¹⁴⁴Diego Rodríguez Pinzón; The “Victim” Requirement, The Fourth Instance Formula And The Notion Of “Person” In The Individual Complaintprocedure Of The Inter-American Humanrights System . ILSA Journal of Int'l & Comparative Law [Vol. 7:1 pg 4 <http://www.wcl.american.edu/humright/hracademy/documents/ILSA-draft-Apr-24-2001.pdf> last accessed on 10th November, 2012

¹⁴⁵ Application No. 001/2008 <http://caselaw.ihrda.org/doc/001.08/view/> last accessed on 12th September, 2012.

¹⁴⁶ Ibid paragraph 34

promotion and protection, the next chapter will offer recommendations which could be adopted to curb the impediments that Article 34(6) creates.

CHAPTER THREE

CHALLENGES, PROSPECTS AND RECOMMENDATIONS FOR THE AFRICAN COURT

3.1 Introduction

The previous chapters have introduced the African human rights system and the development of the organs with the mandate of protecting and human rights on a continent plagued with human rights violations but also spelt out how a significant procedural limitation is a severe shortcoming to the effectiveness of the African Court in curbing human rights violations and with the Court not tending to individual and NGO complaints. As discussed previously in Chapter two, this effectiveness relates to the “producing an intended result” or to “accomplish a purpose.”¹⁴⁷ Its effectiveness will remain uncertain as some scholars have noted that “good initiatives do not implement themselves.”¹⁴⁸ Yerima notes that mere passing of laws and creation of organs to condemn States that violate human rights is not the issue and more is needed to have an effective human rights mechanism.¹⁴⁹ Notably most African countries might have constitutions that promote and protect human rights but all seems to be on paper as impunity of human rights violations increases.¹⁵⁰ To the contrast the Inter-American and European systems seem to work better since their institutional framework systems are more progressive and efficient. In this

¹⁴⁷ <http://www.elook.org/dictionary/effective.html> last accessed on 20th November, 2012.

¹⁴⁸ Vincent O. Nmehielle, *The African Union and African Renaissance*, 7 SING. J. INT’L & COMP. L 412 at 414 (2003)

¹⁴⁹ Dr. Timothy Fwa Yerima; *Comparative Evaluation of the Challenges of African Regional Human Rights Courts* Journal of Politics and Law Vol. 4, No. 2; September 2011 pg 1

¹⁵⁰ For example Zimbabwe, Central African Republic

chapter therefore, a summary of the conclusions from the study are present, other factors other than the restrictive access that affect the effectiveness of the African Court are discussed and recommendations to consolidate the African human rights protection system are offered.

3.2 Summary of the study and concluding remarks

Just like the African Court, the Inter-American Court also was seen to have started on a weak note having had its first case after six years of existence.¹⁵¹ It also has a two tier system just like the African system though for the Inter-American only a State party and the Commission have standing before the American Court yet the African system has more options where a state party, the African Commission, intergovernmental organizations as well as individuals and NGOs with observer status and whose States have signed a declaration accepting the African Court's competence can also have standing before the African Court. However, the Inter-American Court amended its rules of procedure¹⁵² and now has individuals involved in the litigation process alongside the Inter-American Commission.¹⁵³ The Inter-American Court further in the case of *Castillo Petruzzi et al vs. Peru* noted that to effectively tackle human rights violations, it is imperative that "certain formalities are excused, provided that there is a suitable balance between justice and legal certainty."¹⁵⁴ This move to involve individuals in the litigation process alongside the Inter-American Commission as well put human rights before any formalities makes

¹⁵¹ Velasquez Rodriguez vs. Honduras IACHR (18 April 1986) Ser L/V/II 68, Doc 8 Rev 1 was presented in 1986 while the Court had been established in 1980.

¹⁵² Rules of Procedure of the Inter-American Court of Human Rights, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.9 (2003).
<http://www1.umn.edu/humanrts/iachr/rule12-03.html> last accessed on 20th November, 2012

¹⁵³ Ibid Article 23

¹⁵⁴ (Preliminary Objections) IACHR (4th September, 1998) Ser. C No.41 Para 78

the Inter- American system better and could be a leaf that the African System could borrow to effectively promote and protect human rights. The African system could choose to have individuals from States that have not signed a declaration to become more involved with the African Commission during the Court proceedings especially that their only avenue would be the African Commission.

Before Protocol 11 that established a sole European Court of Human Rights, the European counterpart originally had a two tier system with the European Commission and the European Court. The European Commission was seen to be shielding the European Court from being “inundated with frivolous litigation and its facilities exploited for political ends”.¹⁵⁵

For the African Court, having been established almost ten years ago but still have a paltry of cases resolved does not advance the jurisprudence creation of the Court. This lack of pronouncement on issues and merits of cases will not reinforce the already non binding recommendations of the African Commission. The African Commission on the other hand has had great initiatives despite challenges and not having binding powers. With special rapporteurs or working groups that report to the African Commission, the African Commission has worked to ensure fulfillment of the protection and promotional mandate. The African Commission has under its competence decided on committees (for example the Committee for Prevention of Torture in Africa), working groups(for example working group on death penalty), and rapporteurs (for example the Special Rapporteur on Prisons and conditions of detention in

¹⁵⁵ Explanatory Report to Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby Strasbourg, 11 V 1994 (European Treaty Series No. 155) Para 7

Africa) as special mechanisms that all work to fulfill its mandate.¹⁵⁶ The African Commission has been commended for having interpreted the provisions of the African Charter for understanding and learning about the rights and obligations in the African Charter.¹⁵⁷ The African Commission has for example ruled that the right to life involved protecting nationalities against militants in the case of *Commission Nationale des Droit de l'Homme et des Liberties vs. Chad*.¹⁵⁸

3.3 Other Challenges affecting the effectiveness of the African Court

The African human rights system has shown to have rather promising mandates despite the challenges enunciated in the previous Chapters. The African Court has been criticized due to its restrictive approach that has hindered its effectiveness in protecting human rights.¹⁵⁹ However, not only is the restrictive access a challenge but the African Court is met with several other challenges that will be discussed briefly below and recommendations made.

3.4 Awareness and exposure of the African Court

The African Court has been criticized for having not promoted advocacy and awareness on its processes and its availability. There have been calls and processes of improving the visibility of

¹⁵⁶ African Commission on Human and People's Rights. Special Mechanisms <http://www.achpr.org/mechanisms/> last accessed 20th November, 2012

¹⁵⁷ Max Du Plessis 'A Court Not Found? The African Court on Human and Peoples' Rights' (with Lee Stone) *African Journal of Human Rights*, vol 7, No 2 2007 pg 529

¹⁵⁸ 2000 AHRLR 66 ACHPR 1995

¹⁵⁹ Dan Juma, Access to the African Court on Human and People's Rights: A case of the poacher turned Gamekeeper. *Essex Human Rights Review* Vol. 4 No. 2 September, 2007

the African Court.¹⁶⁰ Fewer people in Member States barely know of its existence and or mandate and thus fewer cases have been brought to it inadvertently not being able to develop jurisprudence for human rights protection. There have been reform processes targeting raising awareness about the Inter-American system particularly under their Reform Process 2012 which targets raising awareness on the American Convention but also about the American Court and Commission.¹⁶¹ Further, compared to the European counter parts, the Commissioner for Human Rights in the Council of Europe, though has detailed mandate under Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, has a full mandate of “to promote the awareness of and respect for human rights in 47 Council of Europe member states”¹⁶² which is specifically lacking in the African system despite a few awareness raising activities that have not sold the mandate of the African human rights system. The AU therefore could decide on a committee or working group that can work to create awareness about the African Court.

3.5 Lack of Political Will by Member States

With only 25 States having signed and ratified the protocol¹⁶³, only a mere 5 have signed the declaration granting the individuals access to the African Court. All this points to unenthusiastic

¹⁶⁰ African court needs more visibility <http://www.ipsnews.net/2011/10/african-court-needs-more-visibility/> last accessed 12th November, 2012

¹⁶¹ Reform Process 2012 Inter-American Convention on Human Rights <http://www.oas.org/en/iachr/strengthening/docs/RespCPEn.pdf>

¹⁶² Mandate of the Commissioner for Human Rights http://www.coe.int/t/commissioner/Activities/mandate_en.asp last accessed on 20th November, 2012

¹⁶³ List Of Countries Which Have Signed, Ratified/Acceded To The Protocol To The African Charter On Human And Peoples'rights On The Establishment Of An African Court On Human And Peoples' Rights <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf> last accessed 12th November, 2012.

political will on the part of the States on commitment to fighting human rights violations. African States mostly backed the African Charter provisions but the support given to the enforcement mechanisms is still lacking.

3.6 African Court Judges' part time tenure

With the already financially constrained African Court, the judges do their work on part time basis minus the President of the African Court post which is permanent. With most judges working part time, it would not be surprising that there will be a back log of cases since the time spent on them per sitting might not be enough yet there are more cases that will be getting filed at the African Court. Compared to the European and Inter-American systems whose judges are not part time, the African Court can emulate their practice since availability of judges would likely contribute to the effectiveness of any Court. However, though the African system provides for part time its number of judges seems more feasible than the Inter-American system which provides for only seven judges.¹⁶⁴ Not quick to judge the African and Inter-American systems on the number of judges compared to the European Court, this could be attributed to the fact that the European Court is the sole organ and thus the workload calls for more human resource than the two systems which have a Commission doing some work like admissibility criteria determining which to the contrary is done by the European Court.¹⁶⁵ The African Court can therefore though have fewer judges, make them permanent to cater for its docket as well as have less financial implications.

¹⁶⁴ Article 52 of the Inter-American Convention on Human and People's Rights

¹⁶⁵ Article 27, 28, 29 of the European Convention on Human Rights

3.7 Financial Constraints

The African continent has majority of the poorest countries and thus might not and have not contributed much funds if any to help in facilitating the running of the African Commission and African Court. This could have been the reason why Member States opted for part time judges which can affect its efficiency as well as effectiveness due to unavailability of full time judges. Further, such constraints hinder the day to day running of the African Court. There are employees to pay, bills to pay and other items that need funding on a daily basis. The Office of the United Nations High Commissioner for Human Rights commented and noted with concern this grave constraint on the African System.¹⁶⁶ With the African Commission meeting only twice a year and the African Court sitting only quarterly, this in turn affects the frequency of meetings and sittings and inevitably the effective functioning of the African system which might not yield much to benefit the African populace. Even at these sittings, the time spent is little the average being 2 weeks.¹⁶⁷ These days are not enough for a Court to sit and deliberate all matters before it. This unavailability due to resource constraints will in turn take a toll on the African Court's mandate since it will not have ample time to deliberate and deal with all matters before it but even if it did, would do so irregularly.

¹⁶⁶ UN Doc E/CN.4/1999/93 Para 6

¹⁶⁷ See Calendar of Sessions of the African Court for Human and People's Rights. <http://www.african-court.org/en/index.php/sessions/indicative-table> last accessed on 19th November, 2012.

3.8 Recommendations to the challenges affecting the African court

3.8.1 Reviewing and monitoring the performance of the African Court and African Commission

Introduce regular and comprehensive evaluation process and monitor the performance of the African Court and the African Commission. The Court could do stock taking of its operations, seek opinions of the member states. Further, with the fact it was meant to complement the Commission, the Court could seek to evaluate this relationship especially that the Commission had standing before the Court and seek to see more cases being forwarded by the Commission to it. Criteria to monitor and evaluate would be alongside their mandate. In line with Article 45 of the African Charter therefore the African Commission can be evaluated on its performance vis á vis its mandate to promote, protect human rights, and interpreting the provisions of the African Charter. Since the African Commission has two sessions annually, the African Commission can use some of the time to report on the work they are doing, evaluate their performance and consider way forward on tackling any challenges. This should be engrained in the agendas of all sessions so that the feedback can be used to plan better methodologies of fulfilling its mandate. Likewise, the African Court can through its quarterly sessions seek to do a stock taking of effectiveness particularly as contained in Article 2 of the Protocol establishing the African Court that is to complement the protection mandate of the African Commission.

3.8.2 Awareness on the Court's visibility

There needs to be a special campaign supported by the African Court and Commission to bring awareness on the African Court, and its mandate. Mere awareness seminars that last just one day will barely have over role impact on the African Court visibility. The Court can work hand in

hand with member States to create awareness campaigns by their Ministries for example. The fact that there have been calls and processes of improving the visibility of the African Court goes to show that that is a gap in the effectiveness of the African Court.¹⁶⁸

The African Court has been criticized for having not promoted advocacy and awareness on its processes and its availability.¹⁶⁹ Though there have been initiatives for raising awareness¹⁷⁰, only 5 states have signed the declaration but still despite the fact that they have signed the declaration, there have not been any cases coming to the African Court from the same countries despite the violations that have not been tackled by their Countries.¹⁷¹ Some Countries that have signed the declaration are implicated for not tackling the violations in their Countries but still no cases arise from the same Countries to that effect before the African Court.¹⁷² This could be due to the fact that the local remedies are exhausted but it is because mainly that there is no awareness on the Court's mandate to provide redress for such violations. Countries need to know how to use the

¹⁶⁸ East Africa: Legal Fraternity Commits to Strengthen Rights Court.

<http://allafrica.com/stories/201208280390.html> last accessed on 19th November, 2012

¹⁶⁹ Nine executed in Gambia, says Amnesty International <http://www.bbc.co.uk/news/world-africa-19371622> accessed on 19th November, 2012.

¹⁷⁰ PRESS RELEASE: Regional Sensitization Seminar on the Promotion of the African Court opens in AddisAbbaba http://www.african-court.org/en/images/documents/Press_Docs/Press_Release_Opening_of_the_Regional_Seminar.pdf last accessed on 20th November, 2012

¹⁷¹ Amnesty International Annual Report 2012 <http://www.amnesty.org/en/annual-report/2012/africa> last accessed on 20th November, 2012.

¹⁷² Ibid - Tanzania, Malawi are implicated under the Justice and Impunity category, Burkina Faso and Malawi for political repression.

mechanisms available to them especially in lobbying the Commission to refer their cases to the Court in the instance that their countries have not signed the declaration.

3.8.3 African Union Intervention

The African Union can work with naming and shaming as well as cancelling membership of States that do not respect human rights protection and promotion if they have not signed declarations and still blatantly violate rights of their people. The AU which put human rights to the forefront with the Constitutive Act needs to go back to the drawing table and evaluate why the protection mechanisms are not working well. With the good intentions that established the AU, one would expect that the Member States would definitely support even its enforcement organs in this case the African Court in fulfilling its mandate. The African Union can therefore join efforts with member States to ensure compliance with the rights guaranteed by the African Charter. States still go on to commit violations with the latest being Gambia the seat of the African Commission who went on to execute some prisoners despite warnings from the African Commission and outcry from the Diaspora.¹⁷³ In such instances if member States do not take heed, then sanctions can be imposed upon it and maybe membership could be suspended as a last resort.

¹⁷³ Nine executed in Gambia, says Amnesty International <http://www.bbc.co.uk/news/world-africa-19371622> last accessed on 19th November, 2012.

3.8.4 Legal amendments and or revisions by the AU

3.8.4.1 Procedural Amendments

Laws are not made in stone and can always be amended. Like Aristotle mentioned;

“Even when Laws have been written down, they ought not always to remain unaltered.”

The law can be revised to scrap the declaration and upon ratification of the protocol the individuals and NGOs automatically have standing before the African Court. Just like the European counterpart, the African Court can seek to have automatic access for individuals and NGOs upon the State ratifying the Protocol.

It has been more than ten years since the establishment of the African Court and still the African Court docket is not being filled with complaints on human rights violations due to limiting laws like restriction on direct access by individuals and NGO's to the African Court but still witness the human rights violations on the continent. This raises eye brows as to whether the African Court is doing enough work to protect and promote human rights. If the African Court goes on to dismiss cases on grounds of admissibility but turn a blind eye to the reason for the application that is human rights' violations, then the relevancy of the African Court will have been lost to the rigidity and limiting law.

“A court which is scarcely used cannot make much of a mark. A full docket, on the other hand, though not the only requirement, provides a tribunal with a series of opportunities to display its potential”¹⁷⁴

¹⁷⁴ JG Merrills; The Development of International Law by the European Court of Human Rights (1993) pg 16

3.8.4.2 Procedural revisions

The AU can revise to scrap the discretion of the African Commission to forward the case but instead make it automatic or obligatory should the case involve serious human rights violations that have not obviously been settled or handled at domestic level particularly that the Commission makes non binding recommendations. With the new rules of the Inter-American Court that involve the individual in almost the whole stages of litigation alongside the Commission, the African Court can pick a leaf and have the Commission involve the individuals in the litigation of human rights violations especially when the African Commission has referred a case to the African Court. This would therefore mitigate the challenge that is restrictive access especially if the African Commission constantly refers the cases from Countries that have not signed a declaration accepting the African Court's Jurisdiction.

3.8.4.3 To States

The States should try a grass root approach to promote the visibility, and coverage of the African Court and Commission in their own countries. With the support of the African Commission whose mandate also entails promotion and awareness of human rights enshrined in the Charter, the States and the African Commission can work hand in hand to promote awareness on the African Court as an organ mandated to protect human rights on the African continent. As the old adage goes, "information is power" and that cannot be far from the truth that once the African people are empowered with information on how and when to use and access the African Court, there is likely increase in the cases that will be filed with the African Court seeking to protect human rights. The Member States can start by incorporating the African Human Rights

Protection Mechanisms into all their school curricula for example which would reach different categories of students who upon leaving school would impart the same information or better still be able to use it in cases of human rights violations.

Reward and recognition of States that have ratified as well signed the declaration under Article 34(6) of the Protocol establishing the African Court. It is not promising of a Court to have five States sign the declaration to accept the jurisdiction and competence of the African Court granting individuals and NGO's direct access to the African Court. Gina Bekker notes that most African States just were shielding themselves and protecting their stakes¹⁷⁵ in not signing declarations and thus revealing the lack of political will to have the African Charter provisions enhanced. Therefore, recognizing and acknowledging African States that have signed the declaration should be promoted to encourage support for signing the declaration.

Further, the States can encourage and create a conducive environment for NGOs to carry out advocacy centered on promoting the African Charter and the rights enshrined there in for few people on the continent are aware of their rights and in turn do not know that there are avenues of redress should any violation occur. Also, this will bring more complainants at the gates of the African Court or African Commission since the now sensitized populace is capable of filing suits at the African Court in case of any violations to protect rights enshrined in the Charter.

Moves by civil societies to have countries sign the declaration, and have special recognition of those that have signed could go a long way in bringing change in attitude towards the African Court but specifically in having States commit to political will to have the declaration signed and

¹⁷⁵ Gina Bekker; The African Court on Human and People's Rights: Safeguarding the Interests of African States. *Journal of African Law*, 51 pp 151 - 172

deposited with the Court . Working together with the African Union that has developed “the human rights strategy for Africa¹⁷⁶” civil society can advocate for change in legislation and or revision of the rules governing access to the African Court by the individuals and NGOs as well as human rights awareness.

Since the African Court has discretion to refer cases to the African Commission, it can refer cases that have issues with standing to the African Commission which in turn can refer back the matter upon determining its merits so that the African Commission is now the complainant having been the referral source to the African Court since it already has standing before the African Court.

Both the African Court and Commission do consider admissibility cases that go before the Court, my opinion is that the rules can be revised to have the Commission deal specifically with admissibility issues and standing issues. This will in turn avoid the standing issues since the two can be considered while considering the admissibility criteria.

With the African Commission able to handle individual and NGO complaints and make recommendations, the African Court could in turn have the recommendations that have been determined by the African Commission transferred from the African Commission to the African Court to pass them as binding recommendations on behalf of the individuals or NGO’s.

With the power to make inquiries by the African Court, it can by its own initiative select cases that might come to its attention and still go ahead to litigate on them whether the country has signed a declaration or not to avoid blatant human rights abuses especially by countries that hide

¹⁷⁶ Human Rights Strategy for Africa [http://au.int/en/dp/pa/sites/default/files/HRSA-Final-table%20\(EN\)\[3\].pdf](http://au.int/en/dp/pa/sites/default/files/HRSA-Final-table%20(EN)[3].pdf) last accessed on 20th November, 2012

under the veil of having not accepted the jurisdiction of the court by depositing a declaration particularly relying on Article 1 of the African Charter providing for measure to give effect to the provisions of the Charter.

Having had complainants seeking to have direct access to the African Court so as to litigate on human rights violations dismissed, the African Commission should be able to directly pick up on such cases or better still use their own initiative and refer cases to the African Court particularly that they can through the Special rapporteur system have information as to the cases that need attention in particular States. This can be a great initiative that the African Commission can use for individuals and NGO's whose access to the African Court is restricted. Having discussed and addressed challenges affecting the African Court and recommendations made, the next chapter will give a conclusion of the study.

CHAPTER FOUR

CONCLUDING REMARKS FROM THE STUDY

The study traced the general over view of the African human rights system alongside its European and Inter-American counterparts analyzing its strengths and weaknesses. This study also established comparatively that in all the three regional human rights protection systems, restricted access to the Courts by individually particularly to the African Court affects its effectiveness and no longer has a place in human rights protection today.

The restrictive access can work to discourage litigants in more than one ways than one. The study established that the restrictive defeats the purpose of protecting individuals as against States per international human rights law. The need for this restriction to be revised could not be more imminent due to its adverse effects on human rights protection. In light of the foregoing, individual and NGO involvement and having *locus standi* before the Court cannot be ignored.

Further, the quest for justice by individuals and NGOs might be hindered by the restrictive access which inadvertently affects the performance of the African Court. The dismissal of cases¹⁷⁷ particularly on the fact that the respondent countries had not signed declaration can create grave ramifications. This restrictive access creates impunity and gives legitimacy to acts of violations since there will be no anticipated prosecutions of such acts as States might choose to willfully refuse and or ignore to sign declarations to grant the individual and NGO access to the African Court. Still on impunity, should the action sought be one that is preventative, then

¹⁷⁷ Femi Falana vs. African Union Application N° 001/2011, Michelot Yegogombaye vs Senegal Application No. 001/2008

the potential victims will be burdened and could have adverse consequences to the masses or particular individuals since the action sought to prevent these violations will not be given effect.

Finally, this restrictive access will inadvertently deter any prospective litigants and users of the African Court. This restriction could mean that the human rights violations by victims will endure for they are not in a position to challenge any of these violations.

The effectiveness of the African Court as posed against its restrictive access to individuals and NGO's has confirmed the hypothesis of the study. The restrictive access discourages and prevents litigants from using the African Court, the fact that States most States have not signed the declaration creates impunity since the process of directly bringing complaints against them is restricted, it may also further human rights violations if the action sought is preventive as discussed earlier. However, not only is the restrictive access a challenge but other factors including resource constraints, part time personnel, and lack of awareness on the African Court. The African human rights system needs to deal with all these challenges is crucial to ensure effective and efficient protection and promotion of rights as guaranteed in the African Charter for Human and People's Rights.

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